The
Ontario Weekly Notes

VOL. XIV. TORONTO, MAY 3, 1918. No. 7.

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 23RD, 1918.

*OSHAWA WATER COMMISSIONERS v. ROBSON LEATHER CO. LIMITED.

Reference—Order Directing—Water Unlawfully Taken—Waiver of Tort—Implied Contract to Pay for Water—Ascertainment of Amount and Value—Reference of Whole Action—Judicature Act, sec. 65 (c).

An appeal by the plaintiffs from an order of FALCONBRIDGE, C.J.K.B., referring the action for trial to an Official Referee, under sec. 65 (c) of the Judicature Act.

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

R. T. Harding, for the appellants.

M. H. Ludwig, K.C., for the defendants, respondents.

The judgment of the Court was read by MIDDLETON, J., who said that the plaintiffs complained that the defendants unlawfully and fraudulently connected pipes with the plaintiffs' water system and took large quantities of water therefrom for use in their tannery. The plaintiffs waived the tort, and claimed for the water at 11 cents per hundred cubic feet, or $37,725.42. The defendants said, in effect, that on several occasions, when they found their own water-supply unsuitable for their purposes and when their own waterworks were out of repair, they used water for their tannery from the plaintiffs' service-pipe, but not to the extent claimed, and they submitted to pay what should be found due, raising several

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

contentions as to the basis upon which payment should be made. The defendants also pleaded the Statute of Frauds.

The order of reference was made at the instance of the defendants and against the protest of the plaintiffs.

All the cases shewed that a wide meaning should be given to the words "matters of account" in sec. 65; and the words are wide enough to warrant a reference in this case—the sole matter in issue being the amount of water taken and the price that should be paid.

The course adopted seemed convenient, as there would probably be much evidence of detail before the *amount* of water actually taken would be ascertained. The *value* of the water taken could easily be ascertained, upon well-understood principles applicable where the tort is waived and the wrongdoer is called upon to pay the value of the thing taken upon the implied contract.

The statute, as it now stands, differs from the corresponding provision in the Common Law Procedure Act, and authorises a reference of the whole action when the question in dispute consists wholly or partly of matters of account—the earlier Act permitted the question of account only to be referred.

The appeal should be dismissed; costs to the defendants in the cause.

Appeal dismissed.

FIRST DIVISIONAL COURT. APRIL 23RD, 1918.

*HAYS v. WEILAND.

Libel—Discovery—Examination of Defendant—Disclosure of Name of Person to whom Printed Copies of Libellous Document Given—Destruction of Original—Material Fact—Power to Compel Disclosure.

Appeal by the plaintiff from an order of MEREDITH, C.J.C.P., in Chambers, refusing to compel the defendant to answer certain questions on his examination for discovery in this action.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and KELLY, J.

R. S. Robertson, for the appellant.

W. Lawr, for the defendant, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the action was for libel, based on a pamphlet printed by the respondent, who pleaded only that the document was not capable of having nor intended to have the meaning attributed to it in the statement of claim. The pamphlet referred by name to the appellant, a member of the legal profession, who went to the front; and the innuendo was that he was (in the pamphlet) charged with both cowardice and unprofessional conduct.

Upon his examination, the respondent refused to disclose the name of the person to whom he gave the copies of the pamphlet after he had printed them—but he said that that person gave him the manuscript to print. The respondent admitted that he was told that the manuscript was secret, and that he destroyed it after printing it.

The true point involved in this appeal was, whether the fact or allegation that an answer might disclose the name of a witness was enough to warrant the refusal to answer.

The learned Chief Justice of the Common Pleas exacted an undertaking from the respondent that on the trial he would "admit publication by him of the printed paper containing the words complained of," and considered that, with such an admission, the appellant was not entitled to press for further answers.

Reference to Marriott v. Chamberlain (1886), 17 Q.B.D. 154, for the rule that, "if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to such fact is not displaced by the assertion that such information involves the disclosure of the name of a witness." There are two exceptions to this rule: (1) where it would be oppressive to require an answer; and (2) where the question is put for a purpose outside the action.

There would be nothing oppressive in compelling answers to the questions asked here; and the other exception was really applicable only to newspapers, as appeared from such cases as Gibson v. Evans (1889), 23 Q.B.D. 384.

There was no reason for extending the protection afforded to newspapers to the printer of a fugitive libel, who, after reading it, asks to be assured that it will lead to no trouble, then prints it, and destroys the manuscript.

The name of the person to whom the copies were delivered was a material fact, and should be disclosed: Massey-Harris Co. v. De Laval Separator Co. (1906), 11 O.L.R. 227, 591, 593; McKergow v. Comstock (1906), 11 O.L.R. 637, 643.

The appeal should be allowed with costs, including those of the order appealed from and the application for leave to appeal,

to the appellant in any event; and an order for the attendance at his own expense of the respondent, and requiring him to answer these questions, should issue.

Appeal allowed.

FIRST DIVISIONAL COURT. APRIL 23RD, 1918.

*REX v. RODNEY.

Criminal Law—Evidence—Statements of Accused to Detectives—Absence of Warning—Voluntary Statements—Admission in Evidence.

The defendant was, on the 3rd December, 1917, convicted in the County Court Judge's Criminal Court for the County of Wentworth of having unlawfully stolen a number of street railway tickets, and several sums of money, the property of the Hamilton Street Railway Company, his employers.

The trial Judge reserved, and stated a case, which set forth: that the evidence shewed that, on the day of the arrest, the railway superintendent told the defendant he was wanted down the street, and the two went out of the office together, and were met by two detectives, Shirley and Smith, who asked the defendent to get into a taxicab with them, and they took him to the police headquarters, where they searched him, and found some street railway tickets on him; he was then asked by the detectives where he got the tickets, and he voluntarily made the statements given in evidence by the detectives; that no promises were made or threats used by the detectives to the prisoner; that he was not then under arrest; and that he was then detained on the above charge. The County Court Judge said that he believed the detectives' evidence and disbelieved the accused's evidence. No warning was given the accused by the detectives that what he might say would be used against him.

The questions reserved for the consideration of the Court were:—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made to them by Rodney at police headquarters?

"2 Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

The case was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and LATCHFORD and KELLY, JJ.

M. J. O'Reilly, K.C., for the accused.

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

MACLAREN, J.A., read a judgment in which he said that the decisions on the point as to whether the answers of a prisoner to questions put to him by a policeman or other person in authority could be received as evidence, where he was not warned or cautioned that his answers would be given in evidence against him, had not been uniform or consistent either in England or in this country. There was nothing in the law of either country which required that a prisoner in such a case must be warned or cautioned, as is directed by sec. 684 (2) of the Criminal Code, at the close of the preliminary examination before a magistrate in the case of indictable offences.

Reference to Ibrahim v. The King, [1914] A.C. 599, 609; Rex v. Voisin (1918), 34 Times L.R. 263; Rex v. Colpus (1917), 12 Cr. App. R. 193; Rex v. Ryan (1905), 9 O.L.R. 137; Rex v. Steffoff (1909), 20 O.L.R. 103.

The trial Judge certified in the stated case that the accused "voluntarily made the statements given in the evidence by the detectives." It is also stated that "no promises were made or threats used by the detectives," and that "he was not then under arrest," when he made the admissions or confession.

The first and second questions should be answered in the affirmative. It was unnecessary to answer the third question, as the above authorities shewed that, even if the accused was under arrest at the time, the first and second questions should be answered in the affirmative.

If he was not under arrest, then *a fortiori* the same answers should be given.

MAGEE and HODGINS, JJ.A., agreed with MACLAREN, J.A.

LATCHFORD, J., for reasons stated in writing, agreed that the first question should be answered in the affirmative, and thought it was unnecessary to answer either the second question or the third.

KELLY, J., was of opinion that, the statements of the accused having been voluntary, their admission in evidence was not improper.

Conviction affirmed.

FIRST DIVISIONAL COURT. APRIL 23RD, 1918.

*WHEELER v. HISEY.

Principal and Agent—Contract Made by Son in Respect of Father's Farm—Authority to Land Agents to Sell—Exclusive "Listing" for Defined Period—Sale during Period without Intervention of Land Agents—Action by Land Agents for Commission—Failure to Shew Ratification by Father—Right of Land Agents against Son.

Appeal by the defendant Abraham Hisey from the judgment of the Senior Judge of the County Court of Simcoe, after the trial of the action with a jury, upon the findings of the jury, in favour of the plaintiffs, land agents, for the recovery of a sum of money as commission on the price ($9,000) at which the appellant sold his farm; and cross-appeal by the plaintiff against the defendant Norman Hisey.

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

W. A. Boys, K.C., for the appellant.

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

MEREDITH, C.J.O., reading the judgment of the Court, said that the employment of the respondents as agents to sell was by the defendant Norman Hisey, the son of the appellant, and was evidenced by a writing, signed by Norman Hisey, dated the 20th October, 1916, giving "the exclusive sale of my property," describing it, "good for 90 days," to the plaintiffs, "and in case of a sale being made I will pay to them a commission of 2 per cent. on the selling price."

The farm was owned by the appellant, and the son had no interest in it, but he owned the stock upon the farm, and had made some improvements on it, and would probably have become the owner of it at his father's death.

There was a conflict of evidence as to what had occurred at the time the document was signed; but it was clear that the son did not assume in entering into the agreement to act for his father. What the son said was that he would see his father, and, if his father was not satisfied, he would let the respondents know. On returning home, the son informed his father that he had "listed" the farm with the respondents, but he did not tell his father that he had given an exclusive authority to sell. The

father was satisfied with the listing having been made; but the proper conclusion from the evidence was, that, if he had been told that an exclusive authority to sell had been given and that the commission would be payable if the farm were sold, as it afterwards was, without the intervention of the respondents and not in consequence of their introducing the purchaser, he would not have acquiesced.

Norman Hisey swore that he went to the office of the respondents in order to ascertain whether the authority he had signed was an exclusive one; but the respondents contradicted this. The son testified that Holbrook told him that no commission would be payable to Wheeler & Holbrook (the respondents) if the farm were sold by his father; the respondent Holbrook denied that he had seen Norman Hisey after the document was signed until he came to the respondents' office in response to a letter from them requesting payment of the commission on the sale, which had then been made. The attention of the jury was not directed to this point, and it had not been passed upon. The proper conclusion was, that the testimony of Norman Hisey should be accepted.

Even if that conclusion was not warranted, there was no ratification of the son's act by the appellant. The most that he intended to ratify and did ratify was the listing of the farm with the respondents—which ordinarily means that the agent is to receive a commission in the event of a sale being effected through his instrumentality.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act, and take the risk, whatever the circumstances may have been; Bowstead on Agency, 5th ed., p. 57, and cases there cited; and of any such intention there was no evidence, nor could the inference properly be drawn that the appellant so intended.

All that the jury found was, that "Norman Hisey, after consulting his father, became his agent, therefore Abraham Hisey becomes responsible for commission." This was not a finding sufficient, in the circumstances, to warrant a verdict for the respondents against the appellant.

The plaintiffs cross-appealed against the defendant Norman Hisey, but no case on that footing was made in the pleadings. The judgment dismissing the action as against that defendant should stand, without prejudice to the respondents, if so advised,

bringing another action against him, based upon a contract by him to pay the commission in the event of a sale being made within 90 days.

The appeal should be allowed, the verdict against the appellant set aside, judgment entered dismissing the action against him with costs here and below; and the cross-appeal should be dismissed, but without costs.

FIRST DIVISIONAL COURT. APRIL 23RD, 1918.

*ARMSTRONG CARTAGE AND WAREHOUSE CO. v. GRAND TRUNK R.W. CO.

Railway—Highway Crossing—Negligence of Gateman—Injury to Vehicle Attempting to Cross Tracks—Evidence—Findings of Jury—Contributory Negligence.

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., on the findings of a jury, at the trial at Hamilton, in favour of the plaintiff company, in an action for damages for injuries caused to a motor-truck of the plaintiff company, and the goods it was carrying, owing, it was alleged, to the negligence of the appellant company.

The motor-truck was injured by being struck by an east-bound train of the defendant company while the truck was being driven across the tracks of the railway lines laid upon Lottridge street, in the city of Hamilton.

The defendant company had, under the authority of the Board of Railway Commissioners for Canada, erected gates on the north and south sides of the lines on Lottridge street; and it was not disputed that it was the duty of the defendant company to keep these gates closed when there was danger to persons crossing the tracks from an approaching train; and it was not open to question that, when the gates are not down, the travelling public is told that the tracks may be safely crossed.

The truck was being driven by one Ince, and was proceeding, heavily laden, southward on Lottridge street.

The relevant questions put to the jury and the answers to them were as follows:—

"(1) Was the injury to the plaintiff's motor-truck caused by any negligence of the defendant? A. Yes.

"(2) If so, wherein did such negligence consist? A. By not having the north gate lowered soon enough.

"(3) Was the plaintiff's driver guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No."

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

S. F. Washington, K.C., for the appellant company.

George Lynch-Staunton, K.C., and G. C. Thomson, for the plaintiff company, respondent.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts, he said that the evidence as to the position of the gates was conflicting. According to the testimony of Ince and of Oscar Smith, who was with Ince in the truck, both the gates were up when the truck reached the railway track. The evidence contradicting this was to the effect that the north gate was coming down when the truck reached it and made a dash to go through before the gate had quite descended, and that the gateman had begun to raise the south gate to let the truck through, when the truck was struck.

In view of the evidence, the meaning to be given to the jury's answer to the second question was, that they were unable to find that the south gate was up, but that they found that the north gate was not lowered when the truck reached it, and that this was an intimation to the driver that he might safely cross the tracks; and it could not be said that there was not evidence to support this finding. The jury acquitted Ince of contributory negligence, and must therefore have come to the conclusion that he was not negligent in not noticing the condition of the south gate.

It was impossible to say that, as a matter of law, the condition in which the south gate was, prevented the condition of the north gate from being taken to have been an intimation to the driver that he might safely cross the tracks, or that the driver was negligent in failing to observe that the south gate was down. These were matters for the consideration of the jury; and the Court could not say that their findings as to them were such that a jury might not reasonably have made them.

Reference to North Eastern R.W. Co. v. Wanless (1874), L.R. 7 H.L. 12, and Smith v. South Eastern R.W. Co., [1896] 1 Q.B. 178.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 23RD, 1918.

*GOUGH v. TORONTO AND YORK RADIAL R.W. CO.

Costs—Taxation—Injury to Vehicle Insured by Insurance Company—Negligence of Railway Company—Loss Paid by Insurance Company to Owner of Vehicle—Action by Insurance Company in Name of Owner against Railway Company—Recovery of Judgment for Damages and Costs—Right of Insurance Company to Tax Costs of Action against Railway Company—Indemnity.

Appeal by the defendants from the order of MIDDLETON, J., in Chambers, ante 45.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. H. Moss, K.C., and W. Lawr, for the appellants.

J. M. Ferguson, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. APRIL 23RD, 1918.

*NEWCOMBE v. EVANS.

Will—Testamentary Capacity—Undue Influence—Evidence—Execution of Will—Testimony of Attesting Witnesses—Findings of Trial Judge—Appeal—Costs.

Appeal by the defendant from the judgment of CLUTE, J., 12 O.W.N. 266.

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

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

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

Further evidence was taken, pursuant to an order made by the Divisional Court on the 26th October, 1917: 13 O.W.N. 109.

MEREDITH, C.J.C.P., in a written judgment, said that, in view of the additional evidence adduced by the plaintiff, by leave

of this Court, since the trial of this action, the judgment, pronounced at that trial, establishing the will propounded by the plaintiff, could not well be disturbed; though, but for that additional evidence, the Chief Justice would have been in favour of allowing the appeal and dismissing the action.

There were circumstances connected with the case which made it one of those in which the conscience of the Court should not be satisfied as to the validity of the will until all available evidence, material to the issue between the parties, had been adduced and the plaintiff's claim well-proved.

Having regard to the learned trial Judge's findings, and to the additional evidence, the Chief Justice was not able to find that that had not now been done.

But the case was one in which the defendant should have her costs of the litigation, throughout, out of the estate of the testator, down to and including the trial, because the case was one requiring careful investigation, and one in which strict proof of the validity of the will was needed—proof of which all persons disappointed by it had a right to demand; and her costs of this appeal, because it was well-brought, and the plaintiff retained her judgment largely upon the evidence adduced by her, by the leave of this Court, since the trial, evidence which should have been adduced by her at the trial.

RIDDELL, J., agreed in the disposition of the case as set out in the judgment of the Chief Justice.

LENNOX and ROSE, JJ., also agreed.

Appeal dismissed.

FIRST DIVISIONAL COURT. APRIL 26TH, 1918.

*MACKAY v. CITY OF TORONTO.

Municipal Corporations—City Corporation—Services of Accountant Employed by Mayor—Remuneration—Absence of By-law and Contract under Seal—Municipal Act, secs. 8, 10, 214, 249, 258 (1)—Executed Contract—Benefit of Services—Ratification by Corporation of Act of Mayor—Necessity for By-law—Knowledge—Intention.

An appeal by the plaintiff from the judgment of MIDDLETON, J., 39 O.L.R. 34, 11 O.W.N. 440.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., RIDDELL, J., and FERGUSON, J.A.

A. W. Anglin, K.C., and Glyn Osler, for the appellant.

A. C. McMaster and C.M. Colquhoun, for the defendants, respondents.

MACLAREN, J.A., in a written judgment, said that the broad ground on which the judgment below was based was, that the defendants had never contracted with the plaintiff under seal or as required by the Municipal Act, and that it did not fall within the class of cases in which such a formality might be dispensed with.

The learned Judge of Appeal agreed with the trial Judge as to the general result of the authorities and the effect of the evidence.

It was strongly urged by counsel for the appellant that Pim v. Municipal Council of Ontario (1885), 9 U.C.C.P. 304, which was not considered or referred to by the trial Judge, was applicable to the present case, and was binding upon this Court as an authority. It was perhaps a sufficient answer to say, that the present statute-law on the subject differs widely from that in force when the Pim case arose, and this Court is bound by the decision of the Supreme Court of Canada in Waterous Engine Works Co. v. Town of Palmerston (1892), 21 S.C.R. 556, determined under a statute practically similar to that in force when the present case arose.

It was also argued that it comes within the class of cases in which it has been held that, where a contract has been entered into by or on behalf of a corporation without being under seal or without the observance of some other required formality, the plaintiff would nevertheless be entitled to recover if it had been fully carried out and the corporation had benefited by it; and a number of cases were cited to establish this proposition. An examination of these cases shewed that where the plaintiff succeeded, the contracts under consideration had been made either with the governing body of the corporation, such as the council or board, or by its duly authorised agent or agents, or had been duly ratified. In the present case it could not be said that the council had any knowledge that any contract such as the plaintiff asserted had been made; and the testimony of the Mayor, of which the trial Judge expressed his "full and unqualified acceptance," shewed that he had no idea that he was entering into any such contract in his dealings and communications with the plaintiff; and, even if he had, it had not been fully carried out, and could by no means be designated an executed contract.

The only report made by the plaintiff was designated by him as

an "interim report," and the final report had not been made even at the time of the trial.

Nor could it be said that the defendants had in any way benefited by it. The only part of the work or material by which the defendants might ultimately have benefited was the information derived from the books of the companies, and that the plaintiff received under a promise of secrecy, and no part of it was communicated to the defendants.

In a number of the cases, the requirement of a seal or some other formality was held dispensed with on account of the subject-matter of the contract being comparatively unimportant, or a matter of routine or of frequent occurrence. There was no evidence in this case that the plaintiff had ever previously been called to advise where the sum of $30,000,000 had been even thought of or mentioned as the possible value of the property in question, or that he had ever previously thought of making a charge of $100,000 in the event of his advice being accepted and the campaign in favour of the purchase recommended resulting favourably; and it was probably equally novel to the city council.

The plaintiff was asked and urged by the Mayor, at the outset, to give an estimate of what his work would cost, and was informed that the city council had first voted $5,000 and afterwards $10,000 for the fees and disbursements of the other experts, Ross and Arnold; and the inference was that the Mayor expected that the plaintiff's remuneration would be somewhat on the same scale; and apparently the plaintiff did nothing to remove this impression.

The plaintiff entirely misconceived his position and what was required of him.

The appeal should be dismissed.

MAGEE, J.A., agreed with MACLAREN, J.A.

RIDDELL, J., read a judgment agreeing in the result.

HODGINS, J.A., agreed with RIDDELL, J.

FERGUSON, J.A., read a judgment agreeing in the result.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 26TH, 1917.

*MURPHY v. CITY OF TORONTO.

Workmen's Compensation Act—Contractor—Assessment—Estimate of Pay-roll—Authority of Officer of Board—Adoption of Assessment by Board—Jurisdiction—4 Geo. V. ch. 25, secs. 60 (1), 78 (3).

Appeal by the plaintiff from the judgment of CLUTE, J., 41 O.L.R. 156, ante 11.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

F. J. Hughes, for the appellant.

Irving S. Fairty, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. APRIL 26TH, 1918.

WHIMBEY v. WHIMBEY.

Costs—Action for Alimony—Appeal—Disbursements.

The judgment of the Court is noted ante 128.

The Court now intimated, in a written memorandum, that the costs of the appeal would be disposed of as follows: "The plaintiff will be entitled to her disbursements on the appeal, to be applied for as usual in alimony actions; and, except as stated, there will be no costs of the appeal to either party.

HIGH COURT DIVISION.

MASTEN, J. APRIL 23RD, 1918.

*JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. W. CO.

Constitutional Law—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140—Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Jurisdiction of Court to Award Personal Judgment where Lien-claim Unenforceable—Sec. 49 of Act—Jurisdiction of Officers to Try Action to Enforce Lien—District Court Judge—Sec. 33 of Act as Enacted by 6 Geo. V. ch. 30, sec. 1.

Pursuant to the order of MIDDLETON, J., 10 O.W.N. 372, the issues of law arising in this action were tried by MASTEN, J., at Toronto.

A. C. McMaster, for the plaintiffs.

W. N. Tilley, K.C., and A. J. Reid, K.C., for the defendants the Canadian Northern Railway Company.

H. S. White, for the defendants Foley Welch & Stewart.

The Attorneys-General for Canada and Ontario were notified of the hearing.

The former did not desire to be heard.

The latter submitted a written memorandum.

MASTEN, J., in a written judgment, said that the action was to enforce a mechanic's lien; and the questions to be determined were:—

(a) Can a lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, exist or be enforced against the property of the Canadian Northern Railway Company, in the circumstances alleged in the amended statement of claim?

(b) If not, can the plaintiffs proceed to obtain judgment under sec. 49 of the Act or otherwise in these proceedings?

(c) Are the provisions of the Act conferring jurisdiction on the special officers referred to in sec. 33 intra vires?

The learned Judge, in regard to the first question, said that, notwithstanding the able argument of counsel for the plaintiffs, he was unable to distinguish this case from Crawford v. Tilden (1907), 14 O.L.R. 572; and the answer to the question must be in the negative.

With respect to the second question, he was referred to Kendler v. Bernstock (1915), 33 O.L.R. 351, and had also considered Baines v. Curley (1916), 38 O.L.R. 301; Benson v. Smith & Son (1916), 37 O.L.R. 257; and In re Sear and Woods (1893), 23 O.L. 474. Having regard to these cases, the answer to the second question must be in the affirmative, even though it has the anomalous result of establishing the jurisdiction of the Court to award a personal judgment by the mere assertion of a lien-claim, unfounded not only in fact but in law.

No difficulty arises as to the third question, in this particular case. The land is in the district of Rainy River; and by the amending Act of 1916, 6 Geo. V. ch. 30, sec. 1, substituting a new section for sec. 33, the action is to be tried by the Judge of the District Court of the district in which the land lies—a Judge appointed by Dominion authority. The enactment is within the scope of provincial authority. Question 3 should be answered in the affirmative.

Judgment accordingly; costs in the cause.

SUTHERLAND, J. APRIL 23RD, 1918.

BAKER v. ORDER OF CANADIAN HOME CIRCLES.

Insurance (Life)—Beneficiary Certificate—Constitution and Laws of Benefit Society — Monthly Assessment Unpaid at Death of Member—Reinstatement not Applied for—Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 188 (1)—Custom as to Payment of Assessments — Sum Coming to Assured under Scheme for Distribution of Reserve Fund, but not Payable at Time of Death.

Action to recover $3,000 upon a beneficiary certificate for that amount issued by the defendants to one Rachel A. Baker on the 21st March, 1893, payable, in the event of her death, to Slade Baker, her husband.

Rachel A. Baker died on the 11th October, 1914. On the 22nd December, 1914, Slade Baker assigned all his interest under the certificate to his son Daniel Baker.

This action was begun, in the name of Slade Baker as plaintiff, on the 2nd January, 1915. Slade Baker died on the 15th October, 1915, leaving a will of which he appointed his son Daniel executor; he also appointed another executor, who renounced.

Letters probate were issued to Daniel Baker on the 29th December, 1916. The action was continued in the name of Daniel Baker as plaintiff in his double character of assignee and executor.

The action was tried without a jury at Toronto.
R. G. Agnew and E. C. Ironsides, for the plaintiff.
Norman Sommerville, for the defendants.

SUTHERLAND, J., in a written judgment, said, after stating the facts and referring to the constitution and rules of the defendants, the application made by the deceased Rachel in 1893, and the evidence, that it was clear, upon the evidence, that, the monthly assessment for August not having been paid on the 1st September, or within 30 days thereafter, under rule 19 of the defendants the assured was suspended from the Order and all benefits. A constitutional method of reinstatement was provided by rules 21 and 22, if reinstatement was applied for within a prescribed time and in the manner indicated. She might have been reinstated had she applied in her lifetime, but it was impossible that an application could be made after her death.

Reference to Grainger v. Order of Canadian Home Circles (1914-15), 31 O.L.R. 461, 33 O.L.R. 116; and Re Supreme Legion Select Knights of Canada, Cunningham's case (1898), 29 O.R. 708, 714; the Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 188 (1).

It was clear that fixed monthly sums, at fixed dates, were required to be paid, under the constitution and laws of the defendants, by which the assured was bound; that the amounts and dates of payment were known to the assured and to Daniel Baker; and that, consequently, the statute could not intervene or regulate the procedure.

The evidence did not sustain the plaintiff's contentions that there was a custom or practice of making and accepting payments in a manner different from that laid down in the constitution and laws—even if such a custom could be considered binding.

The assured was entitled to a sum of $51.84, under a scheme for distribution of the defendants' reserve fund (see an Ontario Act respecting the Canadian Order of Home Circles, 7 Geo. V. ch. 99, sec. 1); but it was plain that this sum was not due to her at any time before her death, nor was it available to be applied upon her assessments.

Action dismissed with costs.

MIDDLETON, J., IN CHAMBERS. APRIL 26TH, 1918.

*BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED.

Parties—Addition of Defendants—Rule 67—Improper Joinder—Distinct Contracts between Different Parties—Service on Added Defendants out of the Jurisdiction—Rule 25 (8)—Discretion—Service Set aside.

Appeal by W. Green & Son Limited and Stevens & Sons, Limited from an order of the Master in Chambers refusing to set aside the service of the writ of summons and statement of claim upon them, pursuant to an order made by the Master allowing the plaintiffs to amend the writ of summons and statement of claim by adding the appellants as defendants, making a claim against them, and permitting service upon them out of the jurisdiction—one of the added defendants carrying on business in Scotland and the other in England.

R. H. Parmenter, for the appellants.
Alfred Bicknell, for the plaintiffs.
R. T. Harding, for the original defendants.

MIDDLETON, J., in a written judgment, said that the plaintiffs were agents for the sale in America of a legal work published by the two appellant companies jointly, and made an agreement to take a certain number of sets at a stipulated price per volume. The plaintiffs, as part of their plan for disposing of the work, entered into an agreement with the original defendants to sell them a certain number of sets at a named price. This agreement was made on the faith of the prospectus issued. The original defendants were made "agents" for Canada. The copies intended for Canada were sent direct from the publishers to the original defendants, but these defendants had no contract with the publishers.

The plaintiffs sued the original defendants for the price of certain copies of volumes which had been delivered; these the defendants declined to pay for, alleging that there had been a departure from the prospectus—the number of volumes being increased and the number of pages to a volume decreased. The original defendants asked, by counterclaim, a declaration that they were entitled to the remaining volumes without further payment. As against the added defendants (the publishers) the plaintiffs, by their amended statement of claim, asked that,

if the original defendants should succeed in their contention, the added defendants should be declared liable by reason of their prospectus. The clause of Rule 25 relied upon by the plaintiffs was (*g*). The added defendants were said to be proper parties to the action as brought. The criterion to be applied was Rule 67, relating to the joinder of parties and of causes of action. All parties may be joined as defendants against whom a claim for relief may be made, if the right to relief arises from the same transaction or occurrence. Here the action was upon two distinct contracts, between different parties—perhaps in widely different circumstances—and the claim of the plaintiffs against the original defendants was the opposite of the claim against the added defendants.

The English Rule is not the same as ours; and a late English case which goes further than any other on this subject—Oesterreichische Export A.G. v. British Indemnity Insurance Co. Limited, [1914] 2 K.B. 747—does not justify the joinder here, even bearing in mind the wider provisions of Rule 67.

The right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion. The right is not absolute in any case; and, when it is sought to justify an order under Rule 25 (*g*) and Rule 67, in addition to the general discretion possessed by the Court, there is the express provision of Rule 67 (2), enabling the Court to deal with the case if the joinder is deemed oppressive or unfair.

The plaintiffs are well within their rights in seeking to enforce their contract with an Ontario company in an Ontario Court; but no sound principle can justify the bringing in Ontario of an action by a Massachusetts company against defendants in Scotland and England upon a contract neither made nor to be performed within Ontario.

The appeal should be allowed and the service out of the jurisdiction set aside with costs to be paid by the plaintiffs to the added defendants forthwith and to the original defendants in any event of the action.

SUTHERLAND, J. APRIL 27TH, 1918.

CANADIAN H. W. GOSSARD CO. LIMITED v. DOMINION CORSET CO. LIMITED.

Trade-name — Deception — Use of Similar Name and Label — Sale of Goods—Likelihood of Purchasers being De eived—Evidence—Suspicious Circumstances—Action to Restrain Use of Name and Label—Dismissal—Costs.

Action to restrain the defendants from manufacturing, advertising, selling, offering for sale, dealing in, or disposing of front-laced corsets, not being the plaintiffs', under or bearing the name of "Goddess" or any like name; or any corsets, not being the plaintiffs', without clearly and unmistakably distinguishing them from front-laced corsets manufactured and sold by the plaintiffs; and from manufacturing etc. any front-laced corsets, not being the plaintiffs', under any name and with or in such packages as by colourable imitation or otherwise might be calculated to represent or lead to the belief that such corsets, not being the plaintiffs', are the plaintiffs; and from doing any act or thing whatever calculated to induce the belief that any front-laced corsets, not the plaintiffs', are the plaintiffs'.

The action was tried without a jury at Toronto.

G. M. Clark, for the plaintiffs.

Hammet Hill, for the defendants.

SUTHERLAND, J., in a written judgment, said that the plaintiffs' complaint was, that the defendants, by the use of the word "Goddess" in connection with the sale of corsets and by the form and design of a label placed upon each box containing a corset, bearing the words "Goddess, Laced in Front," were inducing the public to buy their corsets under the belief that they were the plaintiffs' corsets, sold under the name of "Gossard Corsets—they Lace in Front."

The plaintiffs contended, and it was to some substantial extent borne out by the evidence, that the word "Gossard" had become well known in the trade as a name applied to a front-laced corset made by them. They did not prove any actual deception or passing-off.

The learned Judge referred to Payton & Co. Limited v. Snelling Lampard & Co. Limited, [1901] A.C. 308, 311; and said that, giving the best consideration he could to the evidence,

and after a careful inspection and examination of the two boxes, he had come to the conclusion that it was unlikely that an ordinary customer would be so deceived by any similarity as to be misled into purchasing the goods of the defendants, thinking he was purchasing those of the plaintiffs. The matter was left in too much doubt to decide otherwise.

There was some ground for suspicion that the designer of the defendants' label had copied the plaintiffs' label.

The plaintiffs had not made out a case entitling them to succeed; but they should not be ordered to pay costs.

Action dismissed without costs.

MIDDLETON, J. APRIL 27TH, 1918.

*GORDON v. FRASER.

Mortgage—Claim of Mortgagee to Fixtures—Attornment Clause—Creation of Relationship of Landlord and Tenant—Right to Remove Tenant's Fixtures—Right of Mortgagee to Fixtures—Intention—Removal of Fixtures—Injunction—Damages.

Motion by the plaintiff for an interim injunction, turned by consent into a motion for judgment.

The motion was heard in the Weekly Court, Toronto.

Peter White, K.C., for the plaintiff.

J. H. Fraser, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff was a mortgagee of certain lands and premises, and sought to restrain the removal of certain articles which he contended were fixtures and to compel the restoration of certain other articles, also said to be fixtures, or damages.

One Thornton, the owner of the premises, on the 1st December, 1912, mortgaged them to the plaintiff to secure an advance of $5,000. Thornton sold the land to one Williams, and took from him a mortgage to secure part of the purchase-money. This mortgage was subject to the plaintiff's prior charge. Thornton and his brother, who carried on business in partnership, sold their stock of merchandise, fixtures, and chattels to Williams, and executed a bill of sale, dated the 16th December, 1916. On the

4th June, 1917, Williams made a bill of sale of the stock, chattels, and fixtures to one Black. On the 11th October, 1917, Black made a bill of sale of the same property to Lillian Finkelstein. She was added as a party defendant.

The plaintiff's mortgage contained the ordinary clause by which the mortgagor is until default entitled to possession of the lands, and an additional provision by which the mortgagor attorned to the mortgagee and became tenant of the lands at a rent equivalent to and payable at the same time as the interest, and which is to be accepted in satisfaction of the interest.

Subject to the question as to the articles being fixtures in fact, the defendant based upon the attornment clause his main contention, viz., that the effect of the clause was to create the relation of landlord and tenant between the parties, and the mortgagor could remove the fixtures as tenant's fixtures.

This was not, however, the situation. By the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and, if the clause created the relationship of landlord and tenant, the fixtures were the landlord's and could not be removed by the tenant. As tenant, on the expiry of the term, he was bound to surrender them to his lessor. But the true relationship was that of mortgagee and mortgagor.

The mortgagor, by the mortgage of the land, pledges all that can be regarded as fixtures in the widest sense of the term—all things that are actually fixed, and such things as, though not actually fixed to the land, are intended to form part of the inheritance: Monti v. Barnes, [1901] 1 Q.B. 205.

The actual intention of the parties here was clear, for the mortgagor said that the fixtures in question were pointed out as part of the security upon which the loan was made.

Reference to Southport and West Lancashire Banking Co. v. Thompson (1887), 37 Ch.D. 64, at p. 70; Stack v. T. Eaton Co. (1902), 4 O.L.R. 335; Bing Kee v. Yick Chong (1910), 43 S.C.R. 334.

All the articles claimed should be declared to be fixtures and to be the property of the plaintiff as mortgagee; there should be an injunction against their removal; and, unless the articles removed are replaced, there should be a reference to ascertain whether any of the defendants removed them and their value.

The defendants, including Lillian Finkelstein, but excepting Isaac Finkelstein, who was made a defendant by mistake, must pay the costs up to and including this judgment. As to Isaac Finkelstein, no costs. Costs of the reference (if any) may be dealt with by the Master.