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APPELLATE DIVISION.

NOVEMBER 30TH, 1915.

*RE HARRISON.

Creditors Relief Act—Money Made by Sheriff by Sale under Execution and Entered before Assignment by Execution Debtor for Benefit of Creditors—Executions Lodged after Assignment but within Month of Entry—Right of Creditors to Share in Money Made—R.S.O. 1914 *ch.* 81, *sec.* 6.

Appeal by the McClary Manufacturing Company Limited from an order of the Judge of the County Court of the County of Essex, upon an application made by the appellants under sec. 33 of the Creditors Relief Act, R.S.O. 1914, ch. 81, directing distribution by the sheriff of the proceeds of the sale, under execution, of the property of George N. Harrison, without regard to the claims of the appellants and other creditors of Harrison, whose executions did not come into the sheriff's hands until after he had made his levy, though they came into his hands within one month from the entry thereof: sec. 6 of the Act.

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

G. S. Gibbons, for the appellants.

G. A. Urquhart, for the Tooke Brothers Company Limited, execution creditors, respondents.

V. H. Hattin, for the Metal Shingle and Siding Company Limited, execution creditors, respondents.

RIDDELL, J., delivering the judgment of the Court, said that the Tooke company placed an execution against Harrison in the hands of the sheriff on the 14th November, 1915; the Metal

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

Shingle company did the same on the 13th January, 1915; on the 16th February, 1915, the sheriff sold Harrison's property, and realised a sum of money, of which he made an entry, according to form 1, under sec. 6 of the Act; on the 17th February, 1915, Harrison made an assignment for the benefit of creditors under the Assignments and Preferences Act; and on the 2nd March, 1915, the appellants placed their execution in the sheriff's hands, and there were others also within the month allowed by sec. 6.

The assignment did not cut out the creditors who lodged their executions after it was made.

Roach v. McLachlan (1892), 19 A.R. 496, and Breithaupt v. Marr (1893), 20 A.R. 689, considered and distinguished.

In the latter case, Maclennan, J.A., said: "If the money were realised and the entry made in the sheriff's books before the assignment, it is possible that the fund might be divisible among all creditors coming in within the limited time."

Here the money was in the hands of the sheriff; the assignee had no property in it nor any right except after the sheriff had paid all claims made upon it. What Mr. Justice Maclennan regarded as possible is the law; and the appellants should be included in the distribution.

Appeal allowed with costs here and below.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 29TH, 1915.

WARREN v. CAIRNS.

Mortgage—Default in Payment of Principal—Action for Principal and Interest—Payment by Mortgagor — Claim for Bonus—Amendment—Discretion—Refusal.

Appeal by the defendant from an order of the Master in Chambers allowing the plaintiff to amend the writ of summons in this (mortgage) action by adding a claim for $30, being three months' interest by way of bonus.

F. H. Barlow, for the defendant.
E. E. Wallace, for the plaintiff.

MIDDLETON, J., said that the mortgage contained a clause providing that, in the event of non-payment of the principal moneys at the time stipulated, the mortgagor should not require the mortgagee to accept payment without paying a bonus equal to three months' interest in advance. Default was made, and the mortgagee required the mortgagor to pay, by suing him for the principal and interest. The mortgagor had paid the principal, interest, and costs. The mortgagee, not satisfied, sought the aid of the Court to enable him to exact this bonus, by allowing him to amend the writ, after all he originally sought had been given him; so that, unless the mortgagor yielded to the demand, an action in the Supreme Court of Ontario must be prosecuted to determine the right to this bonus. This amendment the Master had permitted, but the learned Judge was unable to agree with him.

In the first place, it was clear that the mortgagee is entitled to the bonus only when the mortgagor "requires the mortgagee to accept payment" after default. The clause has no application where, as here, the mortgagee himself demands payment, and sues upon the covenant. Secondly, in the exercise of a sound discretion, and even though an amendment is generally granted, as a matter of course, no amendment should be granted which would re-open the whole litigation where the plaintiff's original demand has been acceded to and where the amount in dispute is so small as to make it a monstrous thing that a Supreme Court suit, with all its incidental expense, should be the means of determining liability for what is, after all, a trifling amount, and an amount which is rendered still more trifling by the fact that the Master provided that the costs of the motion should be set off against it.

The appeal should be allowed, with costs to be paid by the plaintiff to the defendant, both here and below.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 29TH, 1915.

REX v. COLTON.

Liquor License Act — Magistrates' Conviction for Keeping Intoxicating Liquor for Sale without License—Evidence — Search-warrant—Prior Conviction—Identity of Accused.

Motion to quash the conviction of the defendant by magis-

trates for keeping intoxicating liquor for the purpose of sale without a license, contrary to the Liquor License Act.

H. E. Rose, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., said that he had read the evidence carefully more than once; and, while he was not sure that he should have come to the same conclusion as that arrived at by the magistrates, there was evidence which could not be taken from a jury if the case had been one for a jury trial. There was the evidence of a man named Hazelton, who went to the place to get a drink, got it, and paid for it. He expected to get whisky. He did not know what he got—"It was poor stuff; it would not be a soft drink; would not swear what I got was intoxicating. . . . I went to Colton when Stamper was short of whisky; I would go to Colton's to get it, though I would not call it whisky." Whisky was found upon the premises; and, upon these facts, quite apart from the statutory presumption which may or may not have arisen, the magistrates could find that the whisky which was upon the premises was to meet the demands of a man who, like Hazelton, was seeking a drink of whisky.

The accused, having been given a search-warrant and not producing it, although his counsel had undertaken to file it, could hardly be heard to argue at this stage that the warrant was not shewn to have been a warrant under sec. 131 of the Liquor License Act.

The conviction should not be quashed on the ground that there was not sufficient evidence of identity of the accused with the person against whom the earlier conviction had been recorded. The provincial constable identified the accused, but his evidence was a good deal weakened upon cross-examination, although the cross-examination was directed largely to the recollection by the constable of the particular day of the former conviction. He closed his evidence on cross-examination thus, after producing a memorandum-book: "I am positive this is the same man, from the record made by myself. Don't recollect the day personally. As far as my personal recollection is concerned, I don't remember the day. The defendant is the same man as entered in the record who has been convicted to-day." There was no assertion on the part of the accused that he was not the same person.

Motion dismissed with costs.

MIDDLETON, J. NOVEMBER 29TH, 1915.

*SCHWARTZ v. WILLIAMS.

Mortgage—Short Forms Act—Additional Covenants—Default in Payment of Interest and Taxes—Acceleration Clause—Relief on Payment of Interest and Taxes—Construction of Mortgage-deed—Powers of Court—Interest-bonus — Penalty—Costs.

Motion by the defendant, mortgagee, to dissolve an interim injunction obtained by the plaintiffs, mortgagors, whereby the defendant was restrained from taking further proceedings under the power of sale in the mortgage.

The motion came before MIDDLETON, J., in the Weekly Court, and was turned into a motion for judgment.

L. Davis, for the defendant.

W. J. McLarty, for the plaintiffs.

MIDDLETON, J., said that the mortgage was dated the 20th February, 1915, and was made to secure $4,000 and interest, repayable as to $300 in six half-yearly instalments on the 20th February and 20th August in each year, with interest, and the balance on the 20th February, 1920. The mortgage was in pursuance of the Short Forms of Mortgages Act, but contained many added covenants and provisions. There was a provision that if the mortgagors made default as to any of the covenants the principal should, at the option of the mortgagee, become payable; a covenant that if the principal was not paid at maturity the mortgagors should not be at liberty to pay it except after three months' notice in writing or upon payment of three months' interest; and a covenant that if an action was brought or the lands were sold the mortgagee should be entitled to three months' interest in advance on the principal so paid or recovered, in addition to interest to the date of payment. There was the ordinary covenant for payment of taxes.

The taxes for 1915 became in default, and the interest was also in default. The mortgagors tendered the amount of the interest, and were ready to pay the taxes and the mortgagee's costs of serving notice of intention to exercise the power of sale; but the mortgagee refused to stay her hand, contending: (1) that, default having been made in payment of taxes, the

Court had no power to relieve from the stipulated consequences of default; and (2) that the mortgagee was entitled, as a condition of any relief granted, to three months' interest in addition to the interest earned and to be earned.

The mortgage being subsequent to the 4th August, 1914, the provisions of the Mortgagors and Purchasers Relief Act, 1915, could not be invoked to aid the mortgagors.

In Todd v. Linklater (1901), 1 O.L.R. 103, it was held that where, under clause 16 of the Short Forms of Mortgages Act, the mortgagor is entitled to relief, all the consequences of default are at an end. But the mortgagee contended that this covenant provides solely for acceleration upon default of payment of interest and for relief upon payment of arrears of interest, and that, where the acceleration takes place not by reason of default in payment in interest, but of default in payment of taxes, there is no provision for relief. The learned Judge, however, was of opinion that the addition to the statutory covenant was in effect a qualification of or addition to the covenant; and he felt warranted in reading into the power to relieve the same qualification and addition.

The power of the Court to relieve against oppressive and unfair forfeiture is not as narrow as contended for by counsel for the mortgagee: Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319; Empire Loan and Savings Co. v. McRae (1903), 5 O.L.R. 710.

The learned Judge was also of opinion that the mortgagee was not entitled to a bonus of three months' interest. The stipulation is in effect for a penalty.

In the result, the litigation appeared to have been occasioned by the unfounded claims of the mortgagee, and she must bear the costs.

The learned Judge also suggested legislation which might afford to mortgagors a protection analogous to that afforded to the assured in regard to variations from statutory conditions in insurance policies.

BOYD, C. NOVEMBER 29TH, 1915.

*LATIMER v. HILL.

Parent and Child—Liability of Parent for Maintenance of Forisfamiliated Child — Contract — Implication — Quantum Meruit.

Action to recover the money value of the maintenance of

the defendant's son by the plaintiff for 12 years, or damages for deprivation of the boy's services, the defendant having taken the boy back after he had become useful to the plaintiff.

The action was tried without a jury at Chatham.

R. L. Brackin, for the plaintiff.

J. H. Rodd, for the defendant.

THE CHANCELLOR delivered a considered judgment, in which he said that the defendant in 1902 brought his son, then about two years old, to be taken care of by the plaintiff; the plaintiff was willing to keep the child for a year or so without pay; but, apart from that, the expressed agreement was, that the plaintiff should have the benefit of the work and services of the boy as advancing age enabled him to render such services. The boy stayed with the plaintiff till about the beginning of 1915, when the defendant took him away. The conclusion from the evidence was, that the care and maintenance of the boy for all these years was not intended to be and was not understood to be on a gratuitous basis. The intervention of the defendant disturbed and ended the engagement; and, in the circumstances, there was an implied contract to pay a quantum meruit.

The learned Chancellor referred to and distinguished Farrell v. Wilton (1893), 3 Terr. L.R. 232. He referred also to Hughes v. Rees (1884), 10 P.R. 301; Griffith v. Paterson (1873), 20 Gr. 615, 618; Urmston v. Newcomen (1836), 4 A. & E. 899; 29 Cyc. 1611; Wright v. McCabe (1899), 30 O.R. 390; Halsbury's Laws of England, vol. 17, p. 116; Eversley on Domestic Relations, 3rd ed., p. 539.

The law appears to be in an unsettled state; but the Chancellor favours the view that the plaintiff is entitled to recover.

Judgment for the plaintiff for $500 and costs on the lower scale without set-off.

MEREDITH, C.J.C.P. NOVEMBER 29TH, 1915.

*SHEWFELT v. TOWNSHIP OF KINCARDINE.

Security—Fidelity-bond — Municipal Treasurer — Action for Cancellation of Bond after Resignation of Treasurer, Audit, and Payment—Right of Municipality to Retain Bond—Possibility of Something Remaining Due—Validity of Bond—Rights of Sureties.

Action by a former treasurer of the defendant municipality and his sureties to compel the defendant municipality to cancel

the bond given by the plaintiffs to secure the due performance of the duties of the treasurer.

The action was tried without a jury at Walkerton.

D. Robertson, K.C., for the plaintiffs.

W. Proudfoot, K.C., and P. A. Malcolmson, for the defendants.

MEREDITH, C.J.C.P., said that upwards of two years ago the treasurership came to an end, the treasurer's accounts were duly audited, the audit was adopted by the defendants' council, and payment over was duly made in accordance with the audit by the old to the new treasurer.

The plaintiffs objected to remain as if under the obligation which the bond created; and the defendants did not wish to release the plaintiffs or give up the bond, as long as it was valid, because it might be found that there was something for which the treasurer should have accounted, but had not, as in County of Frontenac v. Breden (1870), 17 Gr. 645; and there was something reasonably to be said on each side of the question.

Upon principle, the learned Chief Justice said, he could not understand why an action should lie to have a valid instrument, not negotiable, delivered up to be cancelled, unless there was some real danger of its being used for an improper purpose, to the loss, in some way, of those seeking its cancellation: Brooking v. Maudslay Son & Field (1888), 38 Ch.D. 636; Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536.

However that might be in a case in which the instrument had fulfilled all its purposes, it would be different in a case such as this, where there was a possibility that it had not. In such a case there is no known law which gives such a right of action. And the fact that some of the plaintiffs were sureties only did not lessen the defendants' rights in this action in this respect.

Action dismissed with costs.

MASTEN, J. NOVEMBER 30TH, 1915.

*McINDOO v. MUSSON BOOK CO.

Copyright—"Literary Composition"—Title or Name of Book—Infringement by Use of Similar Name — Copyright Act, R.S.C. 1906 ch. 70, sec. 4—"Passing-off"—Reputation — Evidence.

Motion by the plaintiff for judgment on the pleadings and affidavits filed upon a motion for an interim injunction and by consent made evidence upon this motion, by leave of the Court.

The motion was heard in the Weekly Court at Toronto.

E. C. Ironside, for the plaintiff.

George Wilkie, for the defendant company.

MASTEN, J., said that the plaintiff was the publisher of a book with the title of "The New Canadian Bird Book," of which he held the copyright; and the defendant company was the publisher of another book on the same subject—"The Canadian Bird Book" The plaintiff's book was first placed on the Canadian market at or about the date of the copyright, and the defendant company's book was issued and sold to the public in Canada in the spring of 1915—two or three months later than the plaintiff's book.

The plaintiff's claim was based, first, on copyright; the certificate of copyright was produced, and appeared to be in the usual form. The right which the registration conferred was that set out in sec. 4 of the Copyright Act, R.S.C. 1906 ch. 70. The subject-matter to which that right relates and in which it inheres is a *literary composition*. Here there was no complaint that the literary composition forming the body of the work had been infringed. The complaint related solely to the title or name of the book.

There cannot in general be any copyright in the title or name of a book: Dick v. Yates (1881), 18 Ch.D. 76, per James, L.J., at p. 93.

No one could suggest that the title "The New Canadian Bird Book" amounted, in itself, to a literary, scientific, or artistic work or composition.

The plaintiff also alleged that the defendant company was selling its book under the name or title of the plaintiff's work

—a phase of the "passing-off" doctrine. In order to establish that allegation the plaintiff must shew (1) that his book had become known to the public and sought for under the title adopted by him; and (2) that the defendant company was so acting as to pass its book off as that of the plaintiff by using a similar title. See the cases collected in Scrutton's Law of Copyright, 4th ed., pp. 56 to 59. Each case must be determined upon its own facts; and upon the facts of this case the plaintiff must fail.

When the defendant company's book appeared, the plaintiff's book had been on the market so short a time (about three months) that its public reputation had not been established; and it was questionable whether there was adequate evidence of passing-off. Rose v. McLean Publishing Co. (1896-7), 27 O.R. 325, 24 A.R. 240, distinguished.

Action dismissed with costs.

BRITTON, J. DECEMBER 2ND, 1915.

ARMSTRONG v. McINTYRE.

Executors and Administrators—Action by Distributee to Recover Share of Estate from Executors of Deceased Administrator—"Trustee"—Limitations Act, R.S.O. 1914 ch. 75, secs. 47, 48—Breach of Trust—Administration Bond—Remedy by Action against Bondsmen — Commencement of Period for Statutory Bar—Assets in Hands of Executors.

Action against the executors of Alexander McIntyre, deceased, to recover a one-sixth share of the estate of James McIntyre, deceased: Alexander having been the administrator of the estate of James, who died intestate, and the plaintiff being the sister of both James and Alexander and entitled as one of the next of kin of James.

The action was tried without a jury at Woodstock.

Peter McDonald, for the plaintiff.

S. G. McKay, K.C., for the defendants.

BRITTON, J., said that the defendants, as executors of Alexander, received, as the assets of his estate, about $15,217.52. The plaintiff alleged that part of the estate of James was in-

cluded in the amount held by the defendants. James died in November, 1895; Alexander, in March, 1914.

The defendants pleaded plene administrairt, and that the plaintiff's claim was barred by the Statute of Limitations. The plaintiff's contention was, that Alexander McIntyre held the moneys belonging to the estate of James upon an express trust to pay the debts of James, if any, and then to pay the balance to those entitled by law.

There was no pretence that the plaintiff's share was lent to Alexander or that Alexander was authorised to invest it or hold it. That the plaintiff did not demand and get her share during the lifetime of Alexander shewed carelessness on her part, but was no answer to her claim in this action.

The word "trustee" as used in sec. 47 of the Limitations Act, R.S.O. 1914 ch. 75, includes executor and administrator. Having regard to that, sec. 48, sub-sec. 2, does not protect an administrator who has been guilty of a breach of trust.

Apparently there was enough to pay all claims; and there was no reason, as a matter of equity and good conscience, why the plaintiff's claim should not be paid.

The grant of administration to the estate of James was made on the 17th February, 1896; the administrator could not be called upon to distribute until the lapse of a year from that date. The Limitations Act would not begin to run in favour of the bondsmen upon the bond given by Alexander before obtaining the grant, until February, 1897; and the right of action would not be barred until February, 1917. The plaintiff would be entitled to an assignment of the bond, and could bring an action upon it.

The plaintiff was entitled to recover one-sixth of $2,700, or $450 and interest amounting to $434.09 up to the 11th May, 1915. Judgment for $884.09, with interest from that date, and with costs, payable by the defendants out of the assets of the estate of Alexander McIntyre.

CLARY v. MOND NICKEL CO.—MASTER IN CHAMBERS—NOV. 25.

Evidence—Foreign Commission — Relevancy of Proposed Testimony—Admissions—Discretion.]—Motion by the defendant company for an order directing the issue of a commission to take the testimony of witnesses in England and Wales. The plaintiff, the owner of a farm situate in the neighbourhood of the

defendant company's works in the district of Sudbury, brought this action to recover damages for injury alleged to have been done to his crop of vegetables and grain and to trees, metal roofing, etc., on his premises, by reason of sulphur fumes from the defendant company's works. The plaintiff also sought an injunction restraining the defendant company from further allowing the escape of sulphur fumes—alleging a nuisance. The defendant company said that it was necessary that their works should not be interfered with, because they were working 24 hours a day for 7 days in the week with a view to producing nickel for the British army and navy, their whole output being requisitioned therefor; they also said that they had an up-to-date plant and were using the best methods. The defendant company sought to take the evidence of the Secretary for War, the First Lord of the Admiralty, and the Minister of Munitions, or of officials under them, and of officials of the defendant company in England, for the purpose of shewing that it is essential that as much nickel as possible be produced for the army and navy, and to establish that the defendant company's entire output is now being used therefor. On the argument of the motion, counsel for the plaintiff offered to admit the existence of the greatest necessity for the output of as much nickel as possible for the purpose mentioned, and that the output was being used in that way. The Master said that such admissions should be sufficient for the defendant company's purposes; but, apart from that, the matter was of such common knowledge, that it was unnecessary to go to England for evidence.—The second branch of the motion was based on the necessity for obtaining expert evidence for the purpose of shewing the nature of the work carried on by the defendant company and the methods used, and shewing that their plant is modern and their processes scientific. The Master called attention to the fact that the plaintiff did not allege negligence on the part of the defendant company in allowing sulphur fumes to escape, nor did he assert that the defendant company's methods were not the best; and said that the contention of the plaintiff that there was no issue on the pleadings on which the expert evidence referred to would be relevant, and that such evidence would not be an answer to the plaintiff's claim, was entitled to prevail. See Halsbury's Laws of England, vol. 21, pp. 529, 532, 543, 564. In the exercise of a proper discretion, the motion for a commission should be refused—on both grounds; the admissions made by the plaintiff's counsel may be recited in the order; costs in the cause. R. U. McPherson, for the defendant company. H. S. White, for the plaintiff.

BAILEY COBALT MINES LIMITED v. BENSON—MASTER IN CHAMBERS—NOV. 27.

Parties—Addition of Defendant upon its own Motion, after Judgment—Assignee of Original Defendant—Action Brought in Name of Company in Liquidation by Leave Obtained in Winding-up Proceeding—No Leave Obtained to Make Application — Jurisdiction of Master in Chambers.]—Motion by the Profit-Sharing Construction Company for an order adding them as parties defendants in this action. The Master in Ordinary, in the course of a reference for the winding-up of the Bailey Cobalt Mines Limited, a mining company, made an order allowing an action to be brought in the name of the company and the liquidators. That order was affirmed by MIDDLETON, J.: Re Bailey Cobalt Mines Limited (1915), 8 O.W.N. 433. This action was begun, pursuant to the order of the Master so affirmed, on the 29th June, 1915. Upon the application of the plaintiffs, on the 15th September, 1915, the defendants not appearing, a judgment was pronounced by MEREDITH, C.J.C.P., in the Weekly Court, setting aside, for fraud, a certain judgment for $90,788.89 and costs recovered by the defendant Benson against the company, which judgment had been assigned to the Profit-Sharing Construction Company, who now sought to be added as defendants, notwithstanding the judgment against the original defendants. The learned Master in Chambers, dealing with an objection raised on behalf of the plaintiffs, said that the leave of the Master in Ordinary, under sec. 22 of the Winding-up Act, to make this motion, was unnecessary. As soon as the Master in Ordinary had signed the order allowing this action to be brought, his power in regard to this action was exhausted. It was also contended for the plaintiffs that if the applicants had a claim against the company, it could be proved in the winding-up matter. This contention, the learned Master in Chambers said, was untenable in the face of the order authorising the bringing of this action. The present application was pending when the motion for judgment was made to MEREDITH, C.J.C.P.; and although, under strict practice, counsel for the plaintiffs was under no obligation to bring the fact to the attention of the Chief Justice, it was inequitable to deprive the applicants of the opportunity of presenting their case for adjudication by the Court. Order made adding the applicants as defendants; costs of the application to be paid by the applicants, except the costs of the examination of their president, which are reserved

for disposition by the Taxing Officer on final taxation. H. E. Rose, K.C., for the applicants. W. Laidlaw, K.C., for the plaintiffs.

PALANGIO v. AUGUSTINO—BRITTON, J.—NOV. 29.

Fraudulent Conveyance—Action to Set aside—Insolvency of Grantor—Intent to Defraud on Part of Grantor—Failure to Shew Knowledge of Insolvency or Intent to Defraud on Part of Grantee.]—The defendant Dominique Augustino was on the 9th June, 1913, the registered owner of two lots in the town of Cochrane. He was indebted to the plaintiff for money lent and goods sold; and on that day an account was stated between them, and Dominique promised to give the plaintiff a mortgage upon the two lots as security for the debt. Later, Dominique refused to execute a mortgage. On the 5th August, 1913, the plaintiff sued Dominique, and on the 21st November, 1913, recovered judgment for $455.70 debt and $252.10 costs. On the 19th September, 1913, the defendant Rosa Augustino, wife of Dominique, lodged a caution in the Land Titles office claiming ownership of the two lots by virtue of an alleged transfer from her husband dated the 17th July, 1913. On the 31st October, 1913, the defendant Paceicco lodged a caution alleging a transfer by way of mortgage to him from Dominique. The plaintiff, having an unsatisfied execution against the goods and lands of Dominique in the hands of the proper sheriff, brought this action to set aside the transfer to Paceicco, alleging that Dominique was at the time of the transfer in insolvent circumstances and unable to pay his debts in full, and that the transfer was made with intent to defeat, delay, and hinder the plaintiff in the recovery of his debt. The action was tried without a jury. The learned Judge finds, upon the evidence, that the allegations of the plaintiff as to the insolvency and intent of Dominique are proved. He holds, however, that fraudulent intent on the part of Paceicco must be shewn as well. This action was not commenced until several months after the transfer; and, therefore, there was no presumption against the transfer. To set the transfer aside, there must have been knowledge on Paceicco's part of the insolvency of Dominique, and there must have been concurrent intention on the part of Dominique and Paceicco to defeat, delay, or hinder the plaintiff or the creditors generally in the recovery of his or their claims. The evidence was lack-

ing in this respect. The case was full of suspicion; but knowledge by Paceicco of Dominique's insolvency was not shewn, nor was Paceicco's intention to defraud shewn. Action dismissed without costs. Peter White, K.C., for the plaintiff. W. A. Gordon, for the defendant Rosa P. Augustino. A. G. Slaght, for the defendant Paceicco.

WATSON CARRIAGE CO. LIMITED v. AUTO-TRANSPORTATION CO. LIMITED—MULOCK, C.J.Ex.—DEC. 1.

Sale of Goods—Implied Warranty of Fitness for Special Purpose—Goods Supplied not as Contracted for—Refusal to Accept—Promissory Note Given for Part of Price—Action on—Dismissal—Counterclaim—Recovery of Moneys Paid—Damages.]—Action to recover $1,217.50, being the amount of a certain promissory note, dated the 2nd February, 1914, made by the defendant company, and payable one month after date to the order of the plaintiff company. The note was made in part renewal of a note made by the defendant company as part of the consideration for the purchase of a taxicab from the plaintiff company. The defendant company denied liability, and counterclaimed to recover the moneys paid on account of the purchase-price and moneys expended in endeavouring to make the car supplied by the plaintiff company fit for use as a taxicab, and for damages. The action was tried without a jury. The learned Chief Justice finds: (1) that the contract between the parties was entered upon with a distinct understanding that the vehicle purchased was to be used for hire as a taxicab; (2) that the defendant company, to the knowledge of the plaintiff company, relied upon the plaintiff company to supply a car that would be fit for use as a taxicab, and the plaintiff company impliedly warranted that it would be reasonably fit for that purpose; (3) that the car was not, at the time of its shipment by the plaintiff company or thereafter, reasonably fit for that purpose; (4) that the defendant company incurred some expense and loss in endeavouring to make the car efficient, and afforded the plaintiff company every reasonable opportunity to make the car fit for use; (5) and that the defendant company did not accept the car. Having made these findings, the learned Chief Justice expressed the opinion that the defendant company was not bound to accept the car, inasmuch as it did not correspond in quality with the car which was the subject of the contract,

and was entitled to a return of the moneys paid on account, with reasonable damages: Canadian Gas Power and Launches Limited v. Orr Brothers Limited (1911), 23 O.L.R. 616; Alabastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited (1912), 30 O.L.R. 394. Action dismissed with costs, and judgment for the defendant company on its counterclaim for $257.90 with costs. R. G. Code, for the plaintiff company. A. D. Armour, for the defendant company.

DAVIDOVITCH v. SWARTZ—BRITTON, J.—DEC. 2.

Stay of Proceedings—Costs of Appeal in Former Action between same Parties Unpaid—Relief Claimed in both Actions Practically the same.]—Motion by the defendants for an order staying or dismissing the action, on the ground that the costs of a former action between the same parties, payable by the plaintiffs, had not been paid. The learned Judge said that the former action was practically for the same relief. It appeared that the costs of an appeal in the former action had not been paid by the plaintiffs, although they were liable for and had been ordered to pay them. An order should be made staying proceedings in this action until payment of the unpaid costs. If there was any dispute about the amount of the unpaid costs, that should be settled by the Senior Taxing Officer. No costs of the present order. H. H. Shaver, for the defendants. J. S. Duggan, for the plaintiffs.

LABROSSE v. MCLEOD—BRITTON, J., IN CHAMBERS—DEC. 2.

Security for Costs—One of two Plaintiffs out of the Jurisdiction—Solvent Plaintiff in Jurisdiction—Joint Claim of two Plaintiffs.]—Appeal by the defendants from an order of the Local Judge at L'Orignal refusing to require the plaintiffs to furnish security for the defendants' costs of the action. The plaintiff Labrosse resided in Ontario, and his co-plaintiff in Quebec. The learned Judge said that the sole point was, whether the plaintiff K. D. McLeod, one of two joint plaintiffs, should be ordered to give security for costs. The defendants had the security of the plaintiff Labrosse. With one solvent plaintiff, and in the circumstances of this case, the defendants were not entitled to an order for security for costs from the plaintiff K. D. McLeod. The claim sued upon was a joint claim—it was not

even a joint and several claim. See Holmested's Judicature Act, 4th ed., p. 878. Appeal dismissed with costs in the cause to the plaintiffs in any event. J. A. McEvoy, for the defendants. W. Lawr, for the plaintiffs.

NEELY'S LIMITED v. DREDGE — DREDGE v. NEELY'S LIMITED — BRITTON, J., IN CHAMBERS—DEC. 2.

Jury Notice—Motion to Strike out — Powers of Judge in Chambers—Discretion—Rule 398.]—Motion by Neely's Limited in each case to strike out the jury notice served by Dredge. The learned Judge said that the application was made to him as a Judge in Chambers to strike out the jury notice. Rule 398 puts upon such a Judge the responsibility of saying how, in his opinion, the case should be tried; and, in the opinion of the learned Judge, these cases should be tried without a jury. While the Rule compels the Judge in Chambers to take the responsibility and decide, his decision in no way prevents the trial Judge from disregarding the order of the Judge in Chambers. The trial Judge may direct a trial by jury, although the notice has been struck out, or he may strike out the notice, although the Judge in Chambers has refused to do so. The applicants relied upon Rule 258, as well as upon Rule 398; but the learned Judge acted under Rule 398. He referred to Gerbracht v. Bingham (1912), 4 O.W.N. 117, as expressly in point, and binding upon him. Order made striking out the jury notice in each case; costs to be costs in the cause. J. W. Pickup, for the applicants. G. T. Walsh, for Dredge.