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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 4TH, 1916.

MORRIS v. MORRIS.

Contract—Agreement as to Land by Tenants in Common—Intention to Sell—Judgment for Partition or Sale—Postponement of Proceedings under, until Expiry of Period Mentioned in Agreement.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 10 O.W.N. 287.

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

H. E. Rose, K.C., and G. H. Pettit, for the appellants.

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

THE COURT allowed the appeal with costs, and struck out para. 6 of the judgment.

SECOND DIVISIONAL COURT. OCTOBER 4TH, 1916.

*BANK OF OTTAWA v. CHRISTIE.

Promissory Note—Demand Note—Accommodation Endorsers—Advances by Bank—Defence to Action on Note—Unreasonable Delay in Presentation for Payment—Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 181—"Continuing Security"—Agreement for Payment out of Moneys Deposited to Credit of Maker—Evidence.

Appeals by the defendants from the judgment of MIDDLETON, J., 10 O.W.N. 335.

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

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. B. Northrup, K.C., for the defendant Staples, appellant.

G. E. Kidd, K.C., for the defendants Kidd and Craig, appellants.

The defendant Christie was not represented.

Wentworth Greene, for the plaintiffs, respondents.

THE COURT dismissed the appeals with costs.

SECOND DIVISIONAL COURT. OCTOBER 5TH, 1916.

McCONNELL v. TOWNSHIP OF TORONTO.

Negligence—Municipal Corporations—Ditches and Watercourses Act—Failure to Provide Sufficient Outlet—Injury to Land—Damages—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of BRITTON, J., 10 O.W.N. 234.

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

W. D. McPherson, K.C., and W. S. Morphy, for the appellants.

R. U. McPherson, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

TOWNSHIP OF HARVEY v. GALVIN.

Highway—Purchase by Township Corporation of Land—Dedication for Road—By-law Assuming—Defect in Registration—Notice to Grantee of Vendor—Width of Road—Action for Declaration of Right—Appeal—Costs.

Appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Peterborough dismissing the

action with costs and awarding the defendant $165 and costs upon his counterclaim.

The action was brought to obtain a declaration that certain land claimed by the defendant in reality formed part of a public highway in the township of Harvey, and for damages and an injunction in respect of obstruction by the defendant. The counterclaim was for trespass.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and CLUTE, J.

E. D. Armour, K.C., for the appellants.

D. O'Connell, for the defendant, respondent.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the County Court Judge was perhaps right in considering that the plaintiffs' claim could not be supported alone upon a certain by-law passed by the township council, owing to a defect in registration. The legislation respecting the validity of such a by-law was not passed for the purposes of the registry law and was not enacted in the Registry Act only; it was contained also in the Municipal Act, and was passed to control generally the compulsory powers of municipalities in acquiring land for highways: see 31 Vict. ch. 20, sec. 63 (O.); 36 Vict. ch. 17, sec. 6 (O.); ib. ch. 48, sec. 445; and Rooker v. Hoofstetter (1896), 26 S.C.R. 41.

But it is not needful to consider that question for the purpose of determining the right of the parties, because the substantial question involved—the question whether the highway is a way 66 feet or only 20 feet in width—can easily be determined on other grounds and upon the defendant's testimony alone, in connection with the indisputable circumstances of the case.

The defendant's contention was, that he knew that there was an old trail where the road now is, and that he had no notice, when he bought the land, that the way over it extended beyond the width of the trail that had been commonly used, which, he says, was just wide enough for two teams to pass each other upon it.

Upon all the facts of the case, however, the finding should be that the defendant bought with notice of the existence of a highway, dedicated to the public by the municipality, over the land purchased by the municipality for the purposes of such a highway, that is, a highway of the common width of 66 feet.

The appeal should be allowed, and judgment entered in favour of the plaintiffs, enjoining the defendant from encroaching upon the highway in question, 66 feet in width.

The plaintiffs should have the costs of the appeal, but there should be no order as to the costs of the action—such disregard of the plain words of the statute regarding the registration of the by-law as the plaintiffs were guilty of should be discouraged.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

WEDEMEYER v. CANADA STEAMSHIP LINES LIMITED.

Negligence—Seaman Swept from Ship and Drowned—Action under Fatal Accidents Act—Failure to Prove Negligence Causing or Contributing to Death—Acts or Omissions of Fellow-seamen—Common Employment—Application of Ontario Workmen's Compensation for Injuries Act—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of BRITTON, J., 10 O.W.N. 284.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and CLUTE, J.

A. C. Kingstone, for the appellants.

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

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the question involved was not whether there was any evidence upon which reasonable men could find that the death of the plaintiffs' son was caused by the actionable negligence of the defendants, nor whether there was any evidence upon which a reasonable man could find, as the trial Judge did, that they were not so guilty; if it were, the appeal must obviously fail, as it also must if the case had been tried with a jury and their verdict had been—as the Judge's was—"not guilty."

Bearing in mind the obvious advantages which a trial Judge has over a court of appeal, the findings of fact of the trial Judge should not lightly be interfered with.

The question was whether the trial Judge was wrong in refusing to hold the defendants guilty of causing the death of the plaintiffs' son by actionable negligence and of hanging a judgment for substantial damages upon it.

The grounds of negligence relied on were: (1) that the ship was overloaded; (2) that the man at the wheel was inexperienced;

(3) that a life-line was not in place; (4) that there were no life-buoys on deck; (5) that the means of lowering a boat were out of order; and (6) that there was no crew competent to lower and man a boat.

The trial Judge apparently thought that, if all these things had been proved, he should not find that any or all of them, having regard to the whole evidence, was or were the cause of the young man's death. He was washed overboard by a heavy wave, which swept over the deck of the ship, and he was lost in the sea.

The evidence regarding the various grounds of negligence alleged was not clear and satisfactory.

Most of the acts or omissions charged, even if they had been proved, were not chargeable against the defendants, but only against fellow-workmen in a common employment.

It seemed impossible for a reasonable man conscientiously to find that any actionable negligence on the part of the defendants caused the death of the plaintiffs' son; to find that it was not an accident for which no one is blamable, or that it was not an accident caused by the want of a proper performance by their son and the other members of the crew of the duties they owed to one another as well as to the defendants.

The Ontario Workmen's Compensation for Injuries Act did not preclude the defendants from setting up the defence of common employment. The injury was sustained in a Glasgow, Scotland, ship, upon the high seas, by a workman serving under a contract made in Nova Scotia for a voyage from Sydney, in that Province, to Manchester, England, and return.

There was no course open to the Court but to dismiss the appeal.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

ROWSWELL v. TORONTO R.W. CO.

Negligence—Street Railway—Man on Bicycle Struck by Car—Contributory Negligence — Ultimate Negligence — Evidence—Findings of Jury—Appeal.

Appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff, upon the findings of a jury, for the recovery of $75 and costs, in an action for

damages for injury sustained by the plaintiff, while riding a bicycle on a highway, by being struck by a car of the defendants.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

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

J. Hales, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the appellants contended that there was no evidence upon which reasonable men could find that the driver of the defendants' car, after becoming aware of the plaintiff's danger, could have prevented the injury for which the jury had awarded him $75 damages; that the only evidence upon the question was that of the driver, and that he exonerated himself; but the Chief Justice was not able to agree with that contention in either respect. There was other very material evidence, upon the question, contained in the testimony of the plaintiff and in the circumstances of the case; and there was common knowledge which the jury were at liberty to apply to it.

The driver's story was that, when he first saw that the plaintiff was in danger from the car, he applied the brakes and threw off the power in the manner which he deemed best calculated to prevent injury; but that, then, he was so near to the plaintiff that the injury could not be prevented. If there were no other evidence upon the subject, that would exonerate the man; but there was other evidence, part of it given by this witness himself, from which reasonable men could discredit his views of his own blamelessness, and find him to be ultimately blamable.

In the first place, the jury discredited his story that, when he first saw the plaintiff, the car was only 25 feet away from him; they found that it was about 100 feet away, that is, 75 feet and half the width of Concord street (a street crossing that on which the car was running); and, if they gave credit to the story of the plaintiff as to the place where he was actually struck, the distance was more than enough to condemn the driver upon his own testimony as to what he could and should have done.

The plaintiff's story was that he was struck about 120 feet east of Concord street; and the jury found, on conflicting testimony, that the car was 75 feet west of Concord street when the driver first saw the plaintiff, which the driver said was, when he "came out of Concord street," to which distances must be added the width of Concord street, making in all considerably over 200 feet; whilst the driver's testimony was that, by succes-

sive applications of the brakes, in the manner which he thought the best, and as he on this occasion applied them, the car should be stopped, when going as it was on this occasion, in a distance of about 180 feet, whilst, if applied with full force, it should stopped in about 120 feet.

So that, if the jury found, as they well might, upon the whole evidence, that the distance run between first seeing the danger and running the man down was over 180 feet, the driver not only failed to exonerate, but condemned, himself; because not only did he say in effect that he should immediately have done all in his power to stop the car, but also that he actually did all in his power to stop it by the most effectual means.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

BULL v. STEWART.

Contract—Building Contract—Action by Contractor for Amount Due upon Contract—Rulings of Architect—Cross-claim by Defendant for Damages for Bad Work—Court not Precluded from Determining Claim on Merits—Assessment of Damages—Money Paid into Court—Set-off—Costs.

Appeal by the defendant from the judgment of LATCHFORD, J., 10 O.W.N. 235.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

W. A. J. Bell, K.C., for the appellant.

H. S. White, for the plaintiff, respondent.

LENNOX, J., reading the judgment of the Court, said that the defendant's appeal was only as to the disallowance of his cross-claim for damages; it seemed that the trial Judge was fully satisfied as to the right of the defendant, upon the merits, to recover damages; and a careful perusal of the evidence and consideration of the appeal led to the conclusion that the defendant had sustained actual damage by the negligent and improper execution of the plaintiff's contract. There was evidence to shew that, in respect to the chief grounds of complaint, and without any reference to the delay, the damages amounted to $1,000 or more.

The only question for determination appeared to be whether any act of the architect, by correspondence or otherwise, precluded the defendant from recovering by way of damages or reduction of the plaintiff's claim the loss he was shewn to have sustained; and the learned Judge said that he could find nothing in the contract, the action of the architect, or the evidence at the trial, to compel or justify this manifestly unfair result.

Reference to Smallwood Brothers v. Powell (1910), 1 O.W.N. 1025, 16 O.W.R. 615; Price v. Forbes (1915), 33 O.L.R. 136, 137; Contractors Supply Co. v. Hyde (1912), 3 O.W.N. 723, 725; Hickman & Co. v. Roberts, [1913] A.C. 229.

Notwithstanding anything said or done by the architect, the learned Judge was clearly of opinion that the defendant was entitled to have the claim he set up determined by the Court upon the merits, and to an award of damages, to be set off against the amount otherwise payable to the plaintiff. The damages should be assessed at $413.30, and the $913.30 found due to the plaintiff at the trial reduced by that sum. The sum of $500 was paid into Court by the defendant. The appeal should be allowed; there should be a judgment for the plaintiff for $500 with costs down to the date of the payment into Court; and a judgment for the defendant for his costs in the Court below from the date of payment in and costs of the appeal. The money in Court as far as necessary might be applied in payment or part payment of the defendant's costs.

No case for a new trial was made.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

FLEXLUME SIGN CO. LIMITED v. VISE.

Contract—Hire of Chattel—Personal Liability of Defendant—Liability of Incorporated Company—Material Alteration in Written Contract.

Appeal by the plaintiffs from the judgment of the County Court of the County of York dismissing with costs an action to recover $163 for rent of an electric sign, in pursuance of an alleged contract.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

J. L. Counsell, for the appellants.
J. H. Cooke, for the defendant, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that it was not necessary to consider what the effect of the contract sued on should be if it could be now enforced, because it was vitiated by a material alteration made in it whilst in the custody of the plaintiffs, and indeed made by them, as their seeking to enforce it in its altered form only, and the evidence generally, proved.

Whatever—if anything conclusive—otherwise could have been said in support of any liability of the defendant, personally, on the contract, nothing could be said in support of any liability apart from it. The sign was delivered to and used by an incorporated conpany (J. Vise & Co. Limited) only; the monthly charge for it was made against and paid by the company only; and the unpaid charges for the last four months, before the plaintiffs re-took the sign—being all of such charges remaining unpaid—were made against the company only.

No recovery could be had on the altered writing; and no other ground of action against the defendant personally existed.

The company had admitted and still admitted liability; so there was no justification for this litigation.

LENNOX, J., read a judgment to the same effect.

MAGEE and HODGINS, JJ.A., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

*DUFFIELD v. PEERS.

Master and Servant—Liability of Master for Act of Servant—Scope of Employment—Finding of Jury—Evidence.

Appeal by the defendants the Computation Scale Company from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,500 damages and costs, in an action for damages for injuries sustained by the

plaintiff by being thrown down by a horse and waggon when he was crossing Yonge street, in the city of Toronto.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

M. C. Cameron, for the appellants.

D. L. McCarthy, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the only question arising on the appeal was, whether there was any evidence upon which reasonable men could find, as the jury did, that the man who was found by the jury to be in law blamable for the accident was, at the time of the accident, acting within the scope of an employment by the appellants. He was a "sales-agent;" he sold and delivered the appellants' wares, being paid for his services by a commission on the price of the goods only. The plaintiff's injury was caused in a collision with the horse which the "sales-agent" was driving back to the appellants' stables after his day's work was done. The horse and waggon were not the appellants', but were necessary for the performance of the man's duties, and were hired for the purpose.

The learned Chief Justice was of opinion that, upon the evidence adduced at the trial, reasonable men might find that the man was, when the accident happened, about his employers' business, and conforming to the terms of his contract with them, as well as about his own business of earning his livelihood by the commissions he won in doing the work involved in selling and delivering his employers' wares.

Reference to Parker v. Owners of Ship "Black Rock," [1915] A.C. 725; Richards v. Morris, [1915] 1 K.B. 221; Edwards v. Wingham Agricultural Implement Co. Limited, [1913] 3 K.B. 596; Whatman v. Pearson (1868), L.R. 3 C.P. 422; Turcotte v. Ryan (1907), 39 S.C.R. 8.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

*RE TORONTO AND HAMILTON HIGHWAY COMMISSION AND CRABB.

Highway—Expropriation of Land for, by Highway Commission—Compensation—Award of Ontario Railway and Municipal Board—Motion for Leave to Appeal in Order to Increase Amount Awarded to Land-owner—Value of Land Taken—Fair Estimate by Board—Irregularity in Award—Consultation by Members of Board who Heard Appeal with one who did not.

Motion by a land-owner for leave to appeal under sec. 32 of the Ontario Public Works Act, R.S.O. 1914 ch. 35, from an award or decision of the Ontario Railway and Municipal Board; and motion on behalf of the Commission for leave to cross-appeal.

The motion was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

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

H. E. Rose, K.C., for the Commission.

MEREDITH, C.J.C.P., read a judgment in which he said that the one substantial purpose of this motion was, that the compensation awarded to the applicant in respect of land taken for the new highway between Toronto and Hamilton might be increased, counsel contending that there had been an under-estimation of the applicant's losses upon all the items of his claim. Leave to appeal ought not to be given unless the Court was convinced that there was good ground for thinking that some substantial injustice might have been done to the applicant in the amount awarded.

The learned Chief Justice was fully convinced that the Board dealt with the applicant's claim, in all its particulars, in not only a fair but a generous manner.

No injustice having been done to the applicant in the amount awarded, it was unnecessary to consider any question of irregularity in the making of the award; but, the Chief Justice added, he was not able to agree with the argument of counsel for the applicant in regard to the course taken by the Board. The Board was composed of persons occupying positions analogous to those of Judges rather than of arbitrators merely; and it was not suggested that they heard any evidence behind the back of either party; the most that could be said was that the members of

the Board who heard the evidence and made the award allowed a member who had not heard the evidence nor taken part in the inquiry to read the evidence and to express to them some of his views regarding the case. Whether the Board was within its powers under the 9th or other section of the Ontario Railway and Municipal Board Act need not be considered, and so should not be. If every Judge's judgment were vitiated because he discussed the case with some other Judge, a good many judgments existing as valid and unimpeachable ought to fall.

The motion for leave to cross-appeal, it was understood, was not to be pressed unless the other motion was successful. Both motions must accordingly be dismissed; but the dismissal should be only on the Commission carrying out, if the applicant desired it, their offer to connect the tile drains on each side of the new road by means of water-tight pipes under or through the road.

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

HODGINS, J.A., also agreed in the result, for reasons stated in writing.

LENNOX., J., said that he agreed in the conclusion reached by the learned Chief Justice; but, with respect, he was not at present able to agree that the action of the two members of the Board in submitting the evidence to the third and consulting with him was proper or justifiable.

Both motions dismissed.

SECOND DIVISIONAL COURT. OCTOBER 6TH, 1916.

*RE J. McCARTHY & SONS CO. OF PRESCOTT LIMITED.

Company—Winding-up—Order Delegating Powers of Court to Master under sec. 110 of Winding-up Act, R.S.C. 1906 ch. 144—Order of Judge Allowing Claimants to Bring an Action, instead of Proving Claim before Master—Appeal from—Leave of Judge—Jurisdiction of Appellate Division—Sec. 101 of Act.

Appeal by the liquidator of the company from an order of KELLY, J., giving leave to the British Columbia Hop Company Limited to begin an action instead of proving their claim in the

liquidation. The liquidation was under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, and was proceeding before the Local Master at Ottawa, to whom the powers of the Court were delegated.

The appeal came on for hearing before MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

H. E. Rose, K.C., for the respondents, objected that no appeal lay.

R. G. Hunter, for the appellant.

HODGINS, J.A., in a written judgment, said that the objection taken to the appeal was, that, although leave to appeal was obtained from RIDDELL, J., he should not have granted it, because no one of the three conditions named in sec. 101 of the Winding-up Act was present.

The learned Judge said that he was not sure that this objection was well-founded—the contemplated action involved more than $3,000, and future rights were or might be involved—but, in any case, the Court ought not to give effect to it. No appeal lies from an order granting leave to appeal: Ex p. Stevenson, [1892] 1 Q.B. 394, 609; Re Central Bank of Canada (1897), 17 P.R. 395.

But, if the question was, whether the conditions existed enabling the leave to be granted, the Court appealed to should adopt the rule laid down in Gillett v. Lumsden, [1905] A.C. 601, and followed in Townsend v. Northern Crown Bank (1913), 4 O.W.N. 1245, and Re Ketcheson and Canadian Northern Ontario R.W. Co. (1913), 5 O.W.N. 271, 350, and treat the right to appeal as being established.

The order appealed from was made by KELLY, J., notwithstanding the fact that an order under sec. 110 had been made on the 15th February, 1916, delegating the powers of the Court to the Local Master at Ottawa. It appeared that no application was made to the Master to grant leave to bring the action. After such an order of delegation, great confusion would occur if motions were made in the winding-up to different Judges of the High Court Division, instead of to the Referee or Master who, by special order of the Court, was directed to exercise its functions.

It could not be said that an order under sec. 110 absolutely prevented the Court from exercising its powers except by way of appeal; but it seemed reasonable that, save in exceptional cases, the parties should be required to seek necessary directions from the Referee in charge. That, however, must be considered when the appeal comes on for hearing.

The objection should be overruled, and costs should be costs in the appeal.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

MAGEE, J.A., and LENNOX, J., concurred.

Objection overruled.

HIGH COURT DIVISION.

LATCHFORD, J., IN CHAMBERS. OCTOBER 2ND, 1916.

FLANAGAN v. FRANCE.

Third Party Procedure—Rule 165—Right to Claim Indemnity against Third Parties—Notice Served by one Defendant only—Service of Notice—Original not Exhibited—Appearance—Waiver.

Appeal by the third parties from an order of the Local Judge at Port Arthur refusing to set aside an ex parte order allowing the defendant Walker to serve the third party notice; and substantive application to set aside the third party notice, or for leave to enter a conditional appearance on behalf of the third parties.

The action was brought against France and Walker to recover principal and interest upon a covenant contained in a mortgage upon certain lands purchased in 1913 by the defendants from the plaintiffs, the mortgage being given for a balance of the purchase-money.

The defendant Walker's claim against the third parties was based upon an agreement, alleged to have been made between Walker and the third party Mathieson, that Mathieson "and his associates" would assume the mortgage and indemnify and save harmless the defendant Walker from any liability thereupon. The third parties were the defendant Mathieson and his associates.

The main ground for the appeal and motion was, that the circumstances did not warrant the issue of a third party notice.

D. L. McCarthy, K.C., for the third parties.
Casey Wood, for the defendant Walker.

LATCHFORD, J., in a written judgment, after setting out the facts, said that, so far as the defendant Mathieson was concerned, the third party procedure was properly invoked: Rule 165. Mathieson's associates might or might not be properly joined with him as third parties—that could be determined only by a trial. The circumstances in which the right to invoke the third party procedure exist are stated by Middleton, J., in Swale v. Canadian Pacific R.W. Co. (1912), 25 O.L.R. 492, 504.

It was urged that the issue of the notice was irregular, because only one of the two parties interested in any relief over applied for the notice. But, as Walker was liable to the plaintiffs—if at all—for the whole sum claimed by them, and entitled—if at all—to claim indemnity in regard to that sum, he was obviously not bound to seek or obtain the co-operation of his co-defendant before issuing the third party notice.

The service was said to be ineffective because the affidavit of service did not disclose that the original order was exhibited to the third parties when they were served with it. No Rule requires the original of an order to be exhibited at the time of the service of a copy of it. Moreover, any irregularity in regard to service was waived by the unconditional appearance to the third party notice entered on behalf of the third parties.

Appeal and motion dismissed with costs.

MASTEN, J. OCTOBER 2ND, 1916.

*CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Company—Directors—Payment of Dividend Partly out of Capital—Liability to Refund—Status as Plaintiff of Shareholder who Received and Retained Dividend—Counterclaim of Company—Commission Paid to Director—Sums Paid to Trustees by Vendor, before Incorporation of Company—By-laws and Resolutions of Directors and Shareholders—Ineffectiveness as Validation.

Action by J. P. Crawford, suing on behalf of himself and all other shareholders of the defendant company, other than the individual defendants, against the company and six individuals who were directors of the company: first, for a judgment de-

claring that a sum of $11,601.75, or in the alternative two-thirds of it, being profits made by one Wallace in connection with the purchase and sale to a preliminary syndicate of a farm in the township of York, which syndicate transferred the farm to the defendant company, really belonged to the company, having been received by Wallace and the defendants Fullerton and Doran while they were promoters of and trustees for the defendant company or its shareholders, the members of the syndicate; second, for repayment to the company of a sum of $8,122.22 paid to the defendant Doran by way of commission for his services as agent of the company in reselling the farm; and, third, for a declaration that the individual defendants, as directors of the company, illegally declared and paid out a dividend of 57 per cent., thereby impairing the capital of the company, and for repayment by those defendants of the sums so paid out to the extent to which they were paid out of the capital of the company.

There was a counterclaim by the defendant company against the plaintiff.

The action was tried without a jury at Toronto.

A. C. McMaster and J. H. Fraser, for the plaintiff.

N. W. Rowell, K.C., and H. J. Macdonald, for the defendant Fullerton.

H. H. Dewart, K.C., for the defendant Doran.

D. Urquhart, for the other defendants.

MASTEN, J., in a written judgment, set forth the facts, formulated findings of fact, and discussed the many questions of company law which arose.

Dealing first with the third branch of the case, he said that it was plain that the payment of the 57 per cent. dividend to the extent of $11,020.28 was ultra vires of the directors; that the act of the directors in this respect was incapable of ratification by the shareholders; and that, in an action properly constituted for that purpose, the directors would be liable to a judgment directing them to repay to the company the sum of $11,020.28; but that the plaintiff was personally incompetent to maintain the action (in regard to this dividend), he having himself received and retained his share of the dividend, knowing that it consisted in part at least of a return of capital; and he had no greater right of complaint because his action was on behalf of other shareholders: Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 95; Towers v. South African Tug Co., [1904] 1 Ch. 558. The plaintiff in this regard could not succeed; but the defendant company should

have judgment on its counterclaim against the plaintiff and the individual defendants for the return of so much of the dividend paid to him and them as involved an impairment of capital.

Dealing with the commission of $8,122.22 paid to the defendant Doran, the learned Judge said that, having regard to the facts as found and to the provisions of sec. 92 of the Act, the payment appeared to have been, at the time it was made, entirely irregular and indefensible: Bartlett v. Bartlett Mines Limited (1911), 24 O.L.R. 419, and cases cited. The judgment of Rose, J., in Re Ontario Express and Transportation Co. (1894), 25 O.R. 587, must be taken to be overruled.

On the remaining question, the learned Judge was of opinion that, in the circumstances of the case, it was not competent for the defendants Fullerton and Doran, promoters of the company and guardians of the interests of the syndicate's subscribers, to receive, even as gifts from Wallace, the sums respectively paid to them. At the time these sums were paid by Wallace to Fullerton and Doran, they were not directors, the company not having been incorporated, but they stood in a fiduciary relationship to the members of the syndicate, and the general rules laid down with regard to directors should be applied: Hamilton's Company Law, 3rd ed., p. 352.

In regard to all the payments, the learned Judge was of opinion that various by-laws and resolutions passed by the directors and shareholders were ineffective to validate them.

He was also of opinion that the plaintiff was competent to maintain the action, except as to the dividend.

Judgment for the plaintiff against the defendants Fullerton and Doran, in respect of the sums paid to them by Wallace, for payment of these sums to the defendant company. Judgment also for the plaintiff against all the individual defendants, except the defendant Ruckle, for the sum paid to Doran as commission. The plaintiff's claim in respect to payment of dividends dismissed, and the defendant company's counterclaim allowed. The plaintiff to have his general costs of the action against all the defendants except Ruckle. Ruckle to have his proportionate share of the costs of defence against the plaintiff.

RIDDELL, J., IN CHAMBERS. OCTOBER 3RD, 1916.

HARGRAVE v. HARGRAVE.

Husband and Wife—Alimony—Failure of Defendant to Deliver Statement of Defence—Motion for Judgment on Statement of Claim—Rule 354—Admission of Facts—Quantum of Alimony Settled by Court in Lieu of Directing Reference.

Motion by the plaintiff for judgment on the statement of claim, in default of defence, in an action for alimony.

Grayson Smith, for the plaintiff.
G. R. Roach, for the defendant.

RIDDELL, J., in a written judgment, said that the statement of claim set out facts sufficient to justify if not compel the Court to grant the plaintiff alimony. The defendant, by an affidavit, asserted that he had no property, and that the amount claimed was excessive. Upon the motion the defendant was offered leave to deliver a statement of defence and a reference as to amount, upon his paying the costs of this motion; this offer was declined. Under Rule 354 the defendant, notwithstanding what he now said on affidavit, declining to get rid of the noting of the pleadings as closed, "shall be deemed to admit all the statements of fact set forth in the statement of claim." The "statements of fact" as to his means were that he had a cash income of not less than $6,000 a year, had a large sum of money on hand, and had interests in real estate, etc. These admissions being sufficient to enable the Court to dispose of the case, it should not be sent to the Master: Soules v. Soules (1851), 3 Gr. 113, 121. Under the usual rule, the defendant could not complain if one-third of his income should be taken to support his wife and children—or a little more. The judgment should be for the plaintiff, requiring the defendant to pay alimony fixed at $40 per week from the teste of the writ: Hagarty v. Hagarty (1885), per Boyd, C., Holmested's Judicature Act, p. 902; and the costs of the action.

CLUTE, J. OCTOBER 4TH, 1916.

RE BAUMAN.

Will—Construction—Distribution of Estate after Death of Widow—Brothers and Sisters and Children of Deceased Brothers and Sisters—Period of Ascertainment—Death of Testator—Vested Shares—Per Capita Distribution—Children of Deceased Children.

Motion by the executor of the will of Abraham Bauman, deceased, for an order determining certain questions, as to the distribution of the estate of the testator, arising upon the terms of his will.

The will gave to the wife of the testator the household goods and furniture absolutely, and directed that she should have the privilege of occupying and remaining on the testator's farm during her lifetime, and be entitled to all the income that might be derived therefrom, and should she at any time surrender the farm to the executor, it should be sold, and a portion of the sale-price be invested and the income paid to the wife during her life. The gifts to the wife were stated to be in lieu of dower. He also gave legacies to his two adopted children. Then followed clause 4: "I also direct that after the dower for my said wife and the above mentioned legacies are provided for all balances of money remaining in the hands of my executors or that may from time to time come into their hands belonging to my estate shall be and also the money invested for my wife's dower after her decease be divided equally share and share alike among all my brothers and sisters living and also to the children of those who have died when they attain the age of 21 years."

This clause gave rise to the motion.

The testator died in 1896; his widow in November, 1915. The testator had eight brothers and sisters, two of whom survived him; none survived his widow.

The motion was heard at the non-jury sittings at Kitchener.

J. A. Scellen, for the executor.

J. C. Haight, for Amos Bowman, appointed to represent the children of the testator's brothers and sisters.

E. W. Clement, for Angus H. Winger, appointed to represent the children of the deceased children of the testator's brothers and sisters, and for the Official Guardian.

CLUTE, J., in a written judgment, discussed the terms of the will, with copious references to authorities, and determined as follows:—

(1) That the persons entitled to share were to be ascertained at the death of the testator; the gifts to the children of the deceased brothers and sisters was not contingent upon their attaining the age of 21; there was an immediate vesting upon the testator's death, but the date of payment was deferred.

(2) That two classes are indicated in clause 4: first, the brothers and sisters living at the testator's death; second, the children of those who predeceased the testator; the brother and sister who survived took each a one-eighth share, and the children of the brothers and sisters who had died took the remaining six-eighth shares per capita. Reference to Wright v. Bell (1890), 18 A.R. 25; S.C., sub nom. Houghton v. Bell (1892), 23 S.C.R. 498; Jarman on Wills, 6th ed., vol. 2, p. 1711; In re Stone, [1895] 2 Ch. 196; Capes v. Dalton (1902), 86 L.T.R. 129; S.C., sub nom. Kekewich v. Barker (1903), 88 L.T.R. 130 (H.L.); and other cases and text-books.

(3) That children of deceased children of the testator's brothers and sisters do not share with the surviving children of the brothers and sisters; the property having vested at the date of the testator's death, persons entitled are then to be ascertained, and the property would pass to the personal representatives of such deceased children.

Order accordingly; costs out of the estate.

BOYD, C. OCTOBER 5TH, 1916.

*WEESE v. WEESE.

Gift—Voluntary Bestowment in Joint Tenancy—Husband and Wife—Savings Bank Deposit—Survivorship—Will—Benefits of Widow under—Commutation for Block Sum—Interests of Infant Devisee—Authority to Raise Sum by Mortgage.

Action by the son and grandson of David Weese, deceased, for a declaration that certain moneys deposited with the defendants the Dominion Bank, in the savings department of their Napanee branch, formed part of the estate of the deceased and were subject to the dispositions of his will. There was also a counterclaim by the defendant Weese for a declaration of her rights under the will.

The action was tried without a jury at Napanee.

E. G. Porter, K.C., for the plaintiffs.

U. M. Wilson, for the defendant Weese, the widow of the deceased.

J. L. Whiting, K.C., and T. B. German, for the defendants the Dominion Bank.

THE CHANCELLOR, in a written judgment, set forth the facts with regard to the deposit. The moneys belonged to the deceased, but on the 21st June, 1912, he had them transferred to a special savings bank account opened in the joint names of the testator and his wife, upon the terms shewn in a memorandum addressed to the bank and signed by both husband and wife, in these words: "All moneys deposited and that may be deposited by us and each of us to the credit of this account, but they may be withdrawn by cheques made by either of us or the survivor of us."

The Chancellor was of opinion that thenceforth the money was held to the joint account and for the joint usufruct of the two co-owners, to which kind of ownership the law attaches the right of survivorship to the one who lives as to all that remains at the death of the one who dies. The source of the money before its being deposited to the joint account is immaterial; and, being so deposited, it is not subject to disposition by the will of either.

Reference to Williams on Personal Property, 17th ed. (1913), pp. 451, 452; Vance v. Vance (1839), 1 Beav. 605.

The requirements to establish a gift inter vivos or mortis causa are distinct from those which go to create a voluntary bestowment in joint tenancy.

Reference to Re Ryan (1900), 32 O.R. 224; Everly v. Dunkley (1912), 27 O.L.R. 414.

Action dismissed with costs from the time of filing the defence of each defendant.

Upon the counterclaim of the defendant Weese, an adjustment was made by the parties, whereby certain personal rights given by the will were commuted to a block payment of $1,500. Sanction was given to the raising of this amount by mortgage on the land, as it was in the interests of the infant plaintiff, to whom the land was devised.

MIDDLETON, J., IN CHAMBERS. OCTOBER 6TH, 1916.

*YOUNG v. SPOFFORD.

Interpleader—Parties to Issue—Who should be Plaintiff—Onus—Goods Seized by Sheriff under Execution in House Owned by Wife of Execution Debtor—Claim of Ownership by Wife—Contest between Execution Creditor and Wife—Costs.

Appeal by the execution creditor from that part of an interpleader order made by a Master which directed that the appellant should be plaintiff in an interpleader issue between the appellant and the claimant the wife of the execution debtor; the interpleader application being made by a sheriff who had seized goods under the execution.

R. L. McKinnon, for the execution creditor.
Goetz, for the claimant.
P. Kerwin, for the sheriff.

MIDDLETON, J., in a written judgment, said that the claimant, the wife, being the owner of the house in which the goods seized were contained, was in apparent possession of the goods, and the execution creditor was rightly the plaintiff in the issue: Farley v. Pedlar (1901), 1 O.L.R. 570. Had the husband been the owner or tenant of the house, the wife would rightly have been made plaintiff: Hogaboom v. Grundy (1894), 16 P.R. 47. The fact that the execution creditor had, in another proceeding, attacked the wife's title to the land could make no difference.

The dictum of Strong, J., in Crowe v. Adams (1892), 21 S.C.R. 344, that the goods found in the possession of the wife are prima facie the goods of the husband goes too far.

As a rule, it is of no great importance which party is plaintiff in an interpleader issue: Bryce Brothers v. Kinnee (1892), 14 P.R. 509. If the wife were made plaintiff and proved that the goods were in her possession at the time of the seizure, the onus would shift.

Appeal dismissed with costs to be paid by the execution creditor to the claimant in any event. The sheriff had no interest in the question and should have no costs.

MIDDLETON, J. OCTOBER 6TH, 1916.

RE DURNFORD ELK SHOES LIMITED.

Contract—Lease of Machinery—Provision for Cancellation upon Insolvency of Lessee-company—Payment of Sums to Put Machinery in Good Order and for Deterioration—Fraud on Insolvency Laws—Penalty—Lessor's Claim Made upon Contract in Winding-up of Company—Construction and Enforcement of Contract.

Appeal by the United Shoe Machinery Company from the order of the Local Master at Stratford, made in the winding-up of Durnford Elk Shoes Limited, under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, disallowing two items of the appellants' claim against the assets of the Durnford company in litigation.

The appeal was heard in the Weekly Court at Toronto.
J. Jennings, for the appellants.
G. S. Gibbons, for the liquidator of the Durnford company.

MIDDLETON, J., in a written judgment, said that the claimants manufactured and owned certain machinery designed for use in the manufacture of boots and shoes. Agreements were entered into in April, 1912, between the claimants and the Durnford company by which the company obtained the right to use certain machinery necessary for the equipment of their factory. These agreements, speaking generally, were leases of the machinery; the company agreeing to pay certain royalties, and further agreeing to purchase certain material used in the operation of the machines, from the claimants alone, and further agreeing, upon the happening of certain events—inter alia, insolvency—that the agreements might be cancelled and that the machines should be returned in good condition, reasonable wear and tear excepted, and that, in that event, or upon the expiry of the term of the agreements, there should be paid "such sum as may be necessary to put such machinery in suitable order and condition to lease to another lessee." Upon the expiration or termination of the agreement, in addition to all other sums payable, it was stipulated that there should be a named sum paid "as partial reimbursement to the lessors for deterioration of the leased machinery, expenses in connection with the installation thereof, and instruction of operators." The claims which were disallowed were (1) those in respect of the repairs and (2) in respect of the items for deterioration etc.

The contracts were not impeached for fraud, nor was it suggested that they did not represent the true bargain between the parties. So long as the contract represents the bargain actually made, and no case is made out of fraud or undue influence, it is the duty of the Court to give effect to the contract; and, so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequence or of public policy. It is the duty of the Court to ascertain from the contract itself its force and effect, quite irrespective of any consideration of the fairness of its provisions.

The claimants owned the machines; the company desired the privilege of using them, but did not desire to purchase; the terms under which user was permitted were arranged, and must be carried out. These terms called for the return of the machines in good repair, save ordinary wear and tear. The contract also called for the payment of such sum as would be necessary to put the leased machinery in suitable order and condition to lease to another lessee. It was said that this is in conflict with the provision "except wear and tear" in the clause for the return of the machinery. Not so, however; for reasonable wear and tear might have taken so much life out of the machine as to render it unsuitable and unfit for the purpose of another lessee.

The evidence as to the repairs was not entirely satisfactory, but was sufficient. The amount to be paid was not the cost of actual repair, so that the repairs would have to be made before any claim arose, but the sum necessary to make the repair. The claim was in the first place based upon estimate, and later on repairs were actually made, and the estimate was found to be substantially correct.

With regard to the second item (deterioration) also, the Master erred. The claim was mainly resisted on two grounds: first, it was said that, by reason of the fact that the machines were returned in good order and that repairs were made and claimed for, there could not be any deterioration, and that it was not shewn that there was any expense in connection with the installation and the instruction of operators; and, secondly, it was said that this sum is in the nature of a penalty, and that the Court ought to relieve against it.

Upon the first ground, it was sufficient to say that the parties, who were probably far better able to judge what was right and fair, agreed to fix this sum. It was open to them to agree upon a sum as a pre-estimate of the amount. Although a machine may be restored to a condition suitable for leasing to another customer, it does not by any means follow that there has not been depreciа-

tion. The moment the machine is installed and used in a factory it becomes a second-hand machine; and, even if the machine never left the claimants' custody and remained perfectly new, the mere lapse of time would result in depreciation.

Nor could this be regarded as a penalty. The sum was payable at the termination of the hiring contract. If the hiring terminated by bankruptcy, the amount was payable at an earlier date; but it was always a sum to be paid. There was no unfairness in this stipulation.

Some suggestion was made that this stipulation was a fraud upon the bankruptcy laws. This was clearly not brought within the authorities. It was not a larger sum payable in the event of bankruptcy for the purpose of obtaining some advantage over other creditors, but it was a sum which the company undertook to pay quite irrespective of bankruptcy, the payment being accelerated in the event of bankruptcy.

The appeal should be allowed with costs.

FORBES v. DAVISON—RIDDELL, J., IN CHAMBERS—OCT. 4.

Discovery—Production of Documents—Affidavit on Production—Right to Contradict.]—Appeal by the defendant from an order of the Master in Chambers requiring the defendant to make a better affidavit on production. In the defendant's affidavit, he undertook to produce certain entries in a diary, swearing that he had read every entry carefully, and that none of the other entries referred to the matters in issue. The Master in Chambers ordered him to produce the whole diary for inspection. RIDDELL, J., said that the Rules of Practice do not now permit a cross-examination on an affidavit on production; and what was desired here was in effect a contradiction of the affidavit, which should not have been ordered. Appeal allowed; costs here and below to the defendant in any event. T. R. Ferguson, K.C., for the defendant. M. L. Gordon, for the plaintiff.

REX v. PYBURN—RIDDELL, J., IN CHAMBERS—OCT. 4.

Criminal Law—Rape—Bail.]—An application for bail in the case of a charge of rape. RIDDELL, J., said that the charge was a peculiarly atrocious one; and there was no reason, in his view, why bail should be allowed—the prisoner could be tried in a few weeks. Application refused. B. H. Symmes, for the prisoner. Edward Bayly, K.C., for the Crown.

TROMBLEY v. CITY OF PETERBOROUGH—LATCHFORD, J.—OCT. 5.

Highway—Nonrepair of City Street—Cap of Pipe Projecting above Sidewalk—Injury to Pedestrian—Negligence—Absence of Contributory Negligence—Damages.]—The plaintiff Eliza Trombley, while walking upon a concrete sidewalk in a business street of the city of Peterborough, was tripped by the cap of a water cut-off pipe set in the sidewalk and projecting above it about three-quarters of an inch; falling, she broke her right leg at the hip joint. She and her husband brought this action to recover damages caused by the injury which she suffered. The action was tried without a jury at Peterborough. LATCHFORD, J., in a written judgment, detailed the effect of the evidence and a view of the locus taken by him; and stated his finding that the street was out of repair, and that its condition was due to negligent construction, of which the defendants, the city corporation, had or ought to have had notice and knowledge; that the plaintiff Eliza Trombley was not guilty of contributory negligence; and that her injury was caused by the want of repair. The defect was an obvious one, which should have been remedied when the walk was first put down: Roach v. Village of Port Colborne (1913), 29 O.L.R. 69, 70. Judgment for the plaintiffs for $2,600 with costs, the husband's damages being assessed at $600 and the wife's at $2,000. D. O'Connell and J. R. Corkery, for the plaintiffs. G. N. Gordon, for the defendants.