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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 12th, 1917.

*MORTIMER v. FESSERTON TIMBER CO. LIMITED.

Assignments and Preferences—Assignment for Benefit of Creditors—Mortgage Made to one Creditor—Agreement of Principal Creditors with Debtors that all Creditors be Paid pro Rata—Consideration—Assignments and Preferences Act, R.S.O. 1914 ch. 134—Status of Assignee—Addition of Creditor as Party-plaintiff—Mortgage Declared to Form Part of Assets for Distribution—Accounting as of Date of Agreement—Equalising of Payments.

An appeal by the defendant company from the judgment of BOYD, C., at the trial, on the 17th November, 1916, in favour of the plaintiff, the assignee for the benefit of the creditors of Richard Smith & Son, in an action to set aside a mortgage made by the defendant Richard Smith to the defendant company, dated the 1st February, 1915.

The judgment of the Chancellor declared that the plaintiff, as trustee for creditors, was entitled to hold the mortgage made to the defendant company, and that the mortgage was available for the ratable payment of all creditors of the firm of Richard Smith & Son.

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

G. W. Mason, for the appellant company.

Gideon Grant, for the plaintiff, respondent.

HODGINS, J.A., read a judgment in which he said that the Chancellor had found that a meeting between the debtors and

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

their three principal creditors on the 21st July, 1914, resulted in an arrangement by which the three creditors formed themselves into a committee to look after the affairs of the debtors upon the basis that all the creditors were to be paid pro rata. That finding rested upon contradictory evidence. In the mortgage itself there was a statement that it was made subject to the provisions of an agreement bearing even date herewith made between the mortgagee and the mortgagor. It was impossible, upon the whole evidence, to disturb the finding of the Chancellor.

Upon the argument it was pointed out that the plaintiff, as assignee, was empowered by the Assignments and Preferences Act, R.S.O. 1914 ch. 134, to take action only to set aside transactions made or entered into in fraud of creditors or in violation of the Act. It was said that the transaction was not covered by the provisions of the Act. It might be that the preference given by the mortgagee, while unjust if regarded in the light of the arrangement of the 21st July, 1914, was not strictly within the provisions of the Act. It was not necessary to determine that now, because the plaintiff as assignee would, at all events, succeed to the right of the debtors to be relieved from the mortgage upon payment of whatever was the stipulated amount referred to in the evidence of Smith.

Application was made to add as a plaintiff a creditor of the Smith firm and to amend by making the action one brought on behalf of all creditors. There was no reason why this should not be granted if provision was made for carrying out the arrangement originally made, as found by the Chancellor, i.e., payment pro rata to all the creditors, except the small ones who might be paid in full. This was not a case of the plaintiff having no claim at all and another being substituted. The appellant company (one of the three creditors), in face of its agreement, had obtained an advantage inconsistent with the position it had been found to occupy. The arrangement between the debtors and these creditors was intended for the benefit of the body of creditors; but it included, so far as the three were concerned, a restriction to pro rata payments, in consideration that the others refrained from pressure or suit against the debtors. This consideration was sufficient to uphold the bargain.

There was no difficulty in determining that, so far as it could be done, the security should form part of the assets which it was the duty of the plaintiff to distribute pro rata. An account might be taken of the creditors' claims on the 21st July, 1914, and those who elected to take advantage of the scheme then settled upon could prove their claims with the plaintiff.

The judgment of the Chancellor, as entered, did not carry out the underlying idea to be found in the opinion expressed at the close of the case. It would be unfair to the appellant company if the mortgage were vested in the plaintiff for the benefit of creditors upon the basis existing at the date of the assignment (the 5th January, 1915), if in fact the appellant company had not then received its right proportion in reduction of its claim.

It should be declared that the respondent will hold the mortgage, in the first place, to equalise the claims of creditors as existing on the 21st July, 1914, having regard to the foregoing and excepting the small creditors who may have been paid in full, taking into account the payments made, but excluding from consideration goods supplied after that date and payments specifically applied thereon, and then for the general benefit of all creditors who file claims with the assignee. His allowance of the claims as far as this security is concerned will depend on their accounting for their due proportion of overpayment, if any.

The creditor proposed may be added as a party plaintiff on filing his consent.

There should be no costs of this appeal.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

FERGUSON, J.A., read a dissenting judgment. He was of opinion that the action should be dismissed with costs.

Judgment below varied.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

FOX v. DEBELLEPERCHE.

Fraud and Misrepresentation—Sale of Land—Statements of Vendors —Action for Rescission—Misrepresentation of Material Fact— —Failure to Shew—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 11 O.W.N. 224, dismissing an action brought by the purchaser to rescind, on the ground of misrepresentation, two agreements for the sale by the defendants to him of certain building lots in the township of Sandwich West, and to recover back the money paid.

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

T. Mercer Morton, for the appellant.

J. H. Rodd, for the defendants, respondents.

MACLAREN, J.A., read the judgment of the Court. After stating the facts, he said that it was well-settled law that to entitle a purchaser to rescission in a case like the present, subject to certain qualifications none of which were applicable, he must shew that the transaction was brought about by a misrepresentation of a material fact, and that the representation complained of was not a matter of mere opinion or intention: Pollock on Contracts, 8th ed., p. 598 et seq. In this respect, the plaintiff's own testimony fell far short of what was required. The whole circumstances and the plaintiff's conduct throughout tended to throw discredit on his testimony. The real ground of the plaintiff's action was, that another purchaser of some of the adjoining lots succeeded in an action of rescission in the summer of 1916; but the trial Judge inquired into the matter, and found that the facts and evidence were entirely different in that case.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

*ROBLIN v. VANALSTINE.

Promissory Note—Death of Payee on Date of Maturity—Dishonour—Renewal by Note in Favour of Husband of Payee—Delivery up of Original Note—Action on Renewal Note—Delivery to Plaintiff after Maturity and Dishonour—Title to Note—Fraud—Bills of Exchange Act, sec. 138—Right to Transfer Note—Warranties—Equities—Onus—Disposition of Original Note.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Lennox and Addington in favour of the plaintiff in an action for the balance due upon a promissory note made by the defendant on the 26th June, 1912, for $300, payable three months after date, to the order of one W. H. Davis and endorsed by him. The judgment was for the recovery of $231.58.

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

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

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

MACLAREN, J.A., in a written judgment, said that the note sued on was a renewal of one for the same amount, dated the 6th May, 1912, payable to the order of Hannah E. Davis, one month after date, which was endorsed by the payee and placed for collection in a bank at Picton, where it was made payable. Hannah E. Davis died on the day the note became due. W. H. Davis was her husband. He was not examined as a witness. There was no evidence as to when or how he obtained possession of the first note; but he had it in his possession on the 26th June, 1912, when he delivered it to the defendant, on getting from her the renewal note now sued upon. The evidence of the manager of the bank at Picton was, "that the first $300 note was deposited with him for collection only, and that, if he had collected it, he would have placed the proceeds to the credit of Mrs. Hannah E. Davis, unless otherwise instructed."

The only proper inference from this evidence, in the circumstances, was, that the bank held the note up to the date of its maturity for Hannah E. Davis, and after her death for her estate, in the absence of further instructions from her. There was no evidence as to when or how W. H. Davis obtained possession of the note; but, as he obtained it only after its maturity and dishonour, he took it subject to the same trust, and consequently had only a defective title.

His obtaining from the defendant a new note on the 26th June would not improve his title or strengthen his position. The same defence may be set up to a renewal as could have been urged against the first note: Byles on Bills, 17th ed., p. 164; Daniel on Negotiable Instruments, 6th ed., para. 205.

The giving up of the original note did not form a valid consideration for the renewal, as it did not release the defendant from her liability to the estate of Hannah E. Davis. It did not appear that Hannah E. Davis left a will, but she left a son, still under age, and letters of administration of her estate had not been obtained. The plaintiff acquired the note only in May, 1915—nearly three years after its maturity and dishonour, so that he stood in no better position than W. H. Davis, who, so far as appeared, never had any right or title either to the original note or the renewal.

The note now sued upon was, in the hands of the plaintiff,

subject to the further equity that it was obtained by fraud, inasmuch as he did not become the holder until nearly three years after dishonour. Although W. H. Davis did not endorse the original note, he became subject, under sec. 138 of the Bills of Exchange Act, R.S.C. 1906 ch. 119, to all the warranties of a transferrer by delivery, viz.: that the note was what it purported to be; that he had a right to transfer it; and that at the time of the transfer he was not aware of any fact which rendered it valueless. It was not shewn that he had a right to transfer it—the contrary appeared. In view of what was proved, the onus was upon the plaintiff to shew that Davis had a right to transfer the note, and he gave no evidence to that effect.

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

As the defendant was thus released from the payment of the renewal note, she was not entitled to the original note, which had been deposited in Court. It should not be given out except upon the order of a Judge and to the person entitled to possession of it; and the defendant was not to be entitled to set up this judgment as a defence in any action or proceeding against her by a legal holder of the original note.

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

MAGEE and FERGUSON, JJ.A., dissented, each stating reasons in writing.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

JACKSON v. CUMMING.

Limitation of Actions—Title by Possession—Uncultivated Land—Boundary—Acts of Possession.

Appeal by the defendant from the judgment of the County Court of the County of Peel in favour of the plaintiff for possession of a strip of land and an injunction and $10 damages.

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

H. S. White, for the appellant.

Harcourt Ferguson, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the strip of land in question lay to the west of a creek and lake. On the east side of the creek was an old fence which extended down for half or three-quarters of the distance to where the creek emptied into the lake. From the end of this fence to the lake, the land was swampy and covered with underbrush, forming a barrier for cattle. From the creek south-eastward the shore of the lake formed a natural boundary.

The appellant bought in 1913 and the respondent in 1901. In June, 1915, the appellant took down the old fence near the creek and built one cutting off the land in dispute from the respondent's farm. The question was, whether the respondent had acquired by possession a good title against the appellant, who had the paper title to the land.

The test in cases of land unsuitable for cultivation or other easily proved use, is, that such acts should be shewn as would naturally be done by the true owner if he were in possession: Davis v. Henderson (1869), 29 U.C.R. 344; Piper v. Stevenson (1913), 28 O.L.R. 379, 391; Nattress v. Goodchild (1914), 6 O.W.N. 156.

The respondent was not a mere trespasser, having entered under the belief that he owned up to the creek and lake. The respondent himself said that in conversation with Hannah, the appellant's immediate grantor, the latter asked that, if any of his cattle had got through the fence on the respondent's land, they should not be turned into the road. This understanding as to the boundary was acted on for 20 years and till Hannah died, and during that time the fence on the east side of the creek, which was there when he bought in 1878, remained standing. The lake and this fence formed the visible boundary. The use made of the land was that which would be natural if the respondent had been actually, as he thought he was, a riparian proprietor. He pastured his cattle, watered his stock, cut ice in the lake, cut and hauled off trees, and all this, during fourteen years, in full view of the appellant. The old fence, the dense underbrush, and the lake formed a visible boundary, and no single instance of any invasion beyond it was shewn, either during the respondent's ownership or his predecessor's—a period of 37 years—until the appellant crossed the line and built a new fence.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

*D. v. B.

Trial—Action for Breach of Promise of Marriage—Jury—Prejudice—Address of Counsel for Plaintiff—Allusion to Nationality of Defendant—Alien Enemy—Improper Admission of Evidence—Inflaming Minds of Jury—Substantial Wrong—Judicature Act, sec. 28—Excessive Damages—New Trial.

Appeal by the defendant from the judgment of LATCHFORD, J., upon the verdict of a jury at the trial, in favour of the plaintiff for the recovery of $5,000 damages and costs in an action for breach of promise of marriage.

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

I. F. Hellmuth, K.C., for the appellant.

Peter White, K.C., and J. J. Gray, for the plaintiff, respondent.

FERGUSON, J.A., read a judgment in which he said that the plaintiff was a Russian Jewess, 19 years of age; the defendant was born in Galicia, Austria, educated in Canada, and was a barrister and solicitor in Ontario.

The plaintiff did not prove actual damage, and the verdict of $5,000 was almost entirely sentimental.

The fact that the defendant was of Austrian birth was contrasted with the plaintiff's Russian nationality and made use of to prejudice the defendant with the jury. The plaintiff's counsel should not in his address have made use of the defendant's Austrian origin as he did: Slazengers Limited v. C. Gibbs and Co. (1917), 33 Times L.R. 35; Gage v. Reid (1917), 38 O.L.R. 514.

Evidence was improperly admitted and presented to the jury for consideration to the effect that the defendant's near relatives insulted, slandered, and otherwise persecuted the plaintiff. There was a deliberate attempt on the part of the plaintiff and her counsel to prejudice the jury with evidence and suggestions of misconduct by the defendant's near relatives.

Evidence was improperly admitted to shew the effect upon a Jewish girl's reputation of a man's declining to marry her after taking out a marriage license. The jury may have been greatly impressed and misled by this.

Reference to Smith v. Woodfine (1857), 1 C.B.N.S. 660, 667; Halsbury's Laws of England, vol. 16, p. 277, para. 508; 5 Cyc. 1014 et seq.

The trial Judge did not direct the jury as to what evidence they were to consider or not to consider in assessing the damages; and it must be concluded that the jury took into consideration all the portions of the evidence improperly admitted, to the prejudice of the defendant.

In all the circumstances, the award of damages was excessive, and was materially increased by the wrongful acts and improper evidence complained of, and substantial wrong, within the meaning of sec. 28 of the Judicature Act, had been done. The Court should not deny the defendant a new trial simply because his counsel failed at the trial to object to the evidence and acts now complained of: Gage v. Reid, 38 O.L.R. at pp. 521, 523.

The judgment should be set aside and a new trial directed; the costs of the former trial and of this appeal to be costs to the defendant in any event.

MEREDITH, C.J.O., read a short judgment in which he said that he agreed that it was proper that there should be a new trial, though he did not subscribe to all that Ferguson, J.A., had said.

The learned Chief Justice said that he was always reluctant to interfere with the finding of a jury, and endeavoured to be on his guard against usurping the functions of a jury in a case in which they had come to a conclusion different from that which he had formed as to the result of the evidence; but, at a time like this, when the minds of the people were rightly inflamed against the Germans and Austrians, it was incumbent on the Court to guard against that feeling being used to the detriment of a litigant, and to be astute to see that where it has been played upon by the successful litigant he is deprived of any advantage thus unfairly obtained, and it is not unfair to presume against such a litigant that his effort has had the desired effect.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A., read a judgment in which he examined with care the various objections made by the defendant now to the course taken and the evidence admitted at the trial, and concluded that there was no ground for directing a new trial—the appeal should be dismissed with costs.

MAGEE, J.A., agreed with HODGINS, J.A.

New trial ordered; MAGEE and HODGINS, JJ.A., *dissenting.*

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

*RE COLEMAN AND TORONTO AND NIAGARA POWER CO.

Easement—Expropriation of Right to Place Poles, Wires, and Conduits for Conveyance of Electric Current upon Land—Compensation to Land-owner—Award—Notice of Expropriation—Acquisition of Larger Powers than actually Used—Damage or Depreciation Caused by—Act Incorporating Toronto and Niagara Power Company, 2 Edw. VII. (D.) ch. 107, secs. 12, 21 (c.)—Power of Company to Bind itself and Successors not to Exercise Powers Vested in it—Reference back to Arbitrators—Costs.

Appeal by A. B. Coleman, the land-owner, from a majority award of $2,500, being an increase of $137.50 over a former award, the matter in question being the compensation to be paid to the appellant by the company in respect of an easement expropriated by the company under the powers conferred by its Act of incorporation, 2 Edw. VII. (D.) ch. 107, sec. 21 (*c.*)

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

I. F. Hellmuth, K.C., for the appellant.

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

The judgment of the Court was read by HODGINS, J.A., who said that the amount originally allowed was based upon the damage by the then existing state of affairs; but it was, on appeal from the first award, decided that the land-owner could urge before the arbitrators that he was to be paid in addition for all the damage caused to him by the power given to the company, whether it had in fact exercised it or not, provided the company's notice covered the user. An order was made referring the matter back to the arbitrators. Upon the reference back, the majority of the arbitrators fell into the error of deciding that what they had to determine was, what additional detriment was caused to the appellant's property by the possible, though improbable, exercise of the unused powers of the company to string wires lower down than at present. What was really in issue was the damage or depreciation caused by reason of the possession and potential use by the company of that and its other powers.

The easement is comparable to the right in question in Dolan v. Baker (1905), 10 O.L.R. 259.

What is to be valued is the property, in the owner's hands, subject to the restrictions or easements by which it is affected, though their discharge or the unlikelihood of their use or enforcement must be considered in ease of the loss: Re Gibson and City of Toronto (1913), 28 O.L.R. 20; Corrie v. McDermott, [1914] A.C. 1056.

By the combined effect of secs. 12 and 21 (*c.*) of the Act of incorporation and the provisions of the Dominion Railway Act of 1888 made part thereof by sec. 21, the company had power to take the appellant's land or to acquire an easement to carry its wires etc. across it. Upon giving a notice under sec. 146 of the general Act and securing an award, the company became entitled to possession of that which its notice covered and to exercise the consequent rights for which compensation must be given. The company had no power to bind itself and its successors not to exercise powers vested in it: Ayr Harbour Trustees v. Oswald (1883), 8 App. Cas. 623; In re South Eastern R. W. Co. and Wiffin's Contract, [1907] 2 Ch. 366.

The Court is not called on to determine what would be the effect of desistment and a new notice.

The award should not be interfered with on the ground that the arbitrators had no right to deal with the costs of the former arbitration, the award in which was set aside. The costs of the reference back were made by the order of the Court "costs in the arbitration." It must be understood that the statute, where applicable, must govern.

Order made setting aside the last award and referring the matter back again to be considered by the arbitrators upon the basis and from the standpoint now indicated. The evidence used before them on the two previous occasions may be used and supplemented in any way by the parties.

No costs of the appeal, the terms of the former order (as issued) referring the matter back having been misleading. Costs of the reference back now ordered to be in the discretion of the arbitrators in so far as they may not be governed by the statutory provision.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

*RE GINSBERG.

Constitutional Law—Evidence Act, R.S.O. 1914 ch. 76, sec. 7—Intra Vires—Evidence—Assignments and Preferences—Assignment for Benefit of Creditors—Examination of Assignor—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 38—Refusal to Answer Questions—Privilege Taken away by Statute—Canada Evidence Act, R.S.C. 1906 ch. 145, secs. 2, 5—Civil Right—Criminal Law of Canada—Assignor Compelled to Answer—Immunity in other Proceedings.

Appeal by the Consolidated Trust Corporation, assignee for the benefit of creditors of William Ginsberg, from the order of FALCONBRIDGE, C.J.K.B., 11 O.W.N. 345, dismissing the appellant's application to commit William Ginsberg for his refusal to answer questions upon his examination held under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914 ch. 134.

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

P. H. Bartlett, for the appellant.

J. M. McEvoy and W. G. R. Bartram, for Ginsberg, the respondent.

MEREDITH, C.J.O., read a judgment in which he said that the only question for decision was as to the right of the respondent to refuse to answer questions put to him on his examination, on the ground that his answers would tend to criminate him—whether the privilege to refuse to answer which formerly existed had been abrogated by legislative enactment.

The basis upon which the argument for the respondent rested was, that the privilege in question was part of the criminal law, and could not, therefore, be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumed to take it away—sec. 7 of the Evidence Act, R.S.O. 1914 ch. 76—was ultra vires. No case which supported that contention was referred to, and it was not well-founded; effect could not be given to the contention without overruling Chambers v. Jaffray (1906), 12 O.L.R. 377, which was well-decided.

Two of the other cases cited for the respondent made against

his contention: Weiser v. Heintzman No. 2 (1893), 15 P.R. 407, and Regina v. Fox (1899), 18 P.R. 343; and Regina v. Roddy (1877), 41 U.C.R. 291, Regina v. Lawrence (1878), 43 U.C.R. 164, and Regina v. Hart (1891), 20 O.R. 611, afforded no assistance.

There was also in the Canada Evidence Act, R.S.C. 1906 ch. 145, a clear recognition of the right of the Provincial Legislatures to take away the privilege: sec. 5 (2). This was not conclusive, but might be considered in determining the question which the Court was called upon to decide.

But, assuming that the privilege is part of the criminal law, it has been abrogated by sec. 5 (1) of the Canada Evidence Act; and sec. 2 of that Act provides that Part I. shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf. The latter words of sec. 2, if counsel for the respondent is right, cover the question of privilege, because ex hypothesi that is a part of the criminal law, and therefore a matter as to which the Parliament of Canada had jurisdiction to legislate as it did by the subsequent sections.

But, in the opinion of the learned Chief Justice, the privilege is a civil right and may be taken away by a Provincial Legislature as to matters with respect to which it has authority to legislate, as it undoubtedly has as to the matters dealt with by the Assignments and Preferences Act.

In plain and unmistakable language, the privilege is taken away by both enactments. It might have been taken away absolutely; and the question whether sufficient protection has been afforded by the sections to the witness who is compelled to answer is not for the Court but for Parliament and the Legislature to determine.

The appeal should be allowed, and an order should be made requiring the respondent to attend for examination at his own expense and to answer all questions that may be put to him as to the disposition of his property, he having the right, by objecting, to obtain the immunity for which the legislation provides.

The costs throughout must be paid by the respondent.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS and FERGUSON, JJ.A., agreed in the result, each giving written reasons.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

*UNION NATURAL GAS CO. v. CHATHAM GAS CO.

Parties—Contract for Supply of Natural Gas—Injunction—Terms of—Addition of Subpurchaser as Party—Necessary Party—Rule 134—New Trial.

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of LENNOX, J., 11 O.W.N. 353, 38 O.L.R. 488.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and ROSE, J.

W. N. Tilley, K.C., and J. G. Kerr, for the plaintiffs.

I. F. Hellmuth, K.C., and J. M. Pike, K.C., for the defendants.

The judgment of the Court was read by HODGINS, J.A. He said that attention was called during the hearing of the appeal to the fact that the Dominion Sugar Company was not a party to the action, although its contract with the defendants was attacked by the plaintiffs. By para. 2 of the judgment in appeal it was adjudged that, "subject to the provision hereinafter contained, the defendants . . . be and they are hereby perpetually restrained from diverting gas supplied by the plaintiffs to the defendants under the . . . agreement . . . to the Dominion Sugar Company Limited . . . or to or for the purposes of its sugar factory under or pursuant to the agreement entered into by said Dominion Sugar Company Limited with the defendants . . . and from diverting gas so supplied by the plaintiffs to the defendants to or for the purposes of the said sugar factory under any agreement hereafter entered into or under any conditions hereafter arising unless and until this Court or a Judge thereof upon an application made herein sanctions and approves thereof." The adjudication virtually annulled the sugar company's agreement, or at all events deprived that company of any right to specific performance, and placed it under such a disability that it could not make an agreement with the defendants except by the permission of the Court. The latter prohibition could not be upheld.

So far as the defendants were restrained by the judgment from complying with the sugar company's agreement and supplying gas thereunder, there was a difficulty in the plaintiffs' way. That agreement was not merely one for the supply of gas generally, but was limited to the gas received by the defendants from the plaintiffs under the agreements between them. The provisions

of the sugar company's agreement distinguish this case from cases in which it might be said that a contract for the supply of a commercial article may be attacked in litigation between the two parties to it without bringing in a subpurchaser or a person to whom the purchaser was to hand over the article bargained for under the contract. In such a case the remedy would be in damages, and the subpurchaser would be expected to go into the market and supply himself. Here, however, while such a course might be open to the sugar company—see Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105—the other rights given by the contract would entitle the sugar company to a larger remedy than mere damages. Besides this, if the learned trial Judge's view that the relation of the defendants and plaintiffs is that of partners is sustainable, there is all the more reason why the outsider should be heard in his own interest and not left in the lurch in the settlement of the partnership differences. The contract was described as one-sided, perplexing, and practically unworkable—making it a very difficult thing for the sugar company in any subsequent litigation to overcome this handicap.

The rule laid down in Hartlepool Gas Co. v. West Hartlepool Harbour and R.W. Co. (1865), 12 L.T.R. 366, should be followed—the Court will not ordinarily interfere by injunction where the effect will be to injure materially the rights of third persons not before the Court.

Reference to Lumley v. Wagner (1852), 1 De G. M. & G. 604; Wilson v. Church (1878), 9 Ch. D. 552; McCheane v. Gyles No. 2, [1902] 1 Ch. 911; Dix v. Great Western R.W. Co. (1886), 34 W.R. 712; Metropolitan District R.W. Co. v. Earl's Court Limited (1911), 55 Sol. Jour. 807; Cornell v. Smith (1890), 14 P.R. 275, 276.

The case is one within Rule 134. Without the presence of the sugar company it is impossible to say that the Court can effectively and completely adjudicate upon the questions involved in this action, and if the company is not added the Court will be prevented from effectively doing justice.

Reference to Minnesota v. Northern Securities Co. (1902), 184 U.S. 199.

The action is not properly constituted, and a new trial should be ordered. If, however, the parties agree to add the sugar company forthwith, and the sugar company is willing to have the case decided upon the argument already had, the Registrar may be so notified. If further pleadings or evidence are required, the parties may attend before a Judge of this Divisional Court, who will settle the exact terms of the order to be made.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

BANK OF TORONTO v. MORRISON.

Guaranty—Action on—Mistake of Guarantor as to Person whose Indebtedness to be Guaranteed—Intention of Guarantor—Neglect to Read Instrument of Guaranty—Evidence—Findings of Fact—Appeal.

Appeal by the defendant from the judgment of CLUTE, J., at the trial (without a jury), in favour of the plaintiff bank, in an action on a guaranty given by the defendant to the plaintiff bank on the 14th October, 1907, guaranteeing payment of the indebtedness of Dewar & Co. to the bank.

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

A. J. Russell Snow, K.C., for the appellant.

R. S. Robertson, for the plaintiff bank, respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that the business of Dewar & Co. was managed by J. J. Dewar, though Agnes Dewar, his wife, was registered as the person carrying on business under that name. The defence set up was that the appellant never intended to guarantee an indebtedness of Dewar & Co. or of J. J. Dewar's wife, but to guarantee the indebtedness of J. J. Dewar; that the guaranty was brought by J. J. Dewar to the appellant, who did not read it, but signed it believing it to be a guaranty for the indebtedness of J. J. Dewar; and at the trial the appellant testified that he did not know that the business which J. J. Dewar was managing was carried on in the name of Dewar & Co. or that it was the business of Dewar's wife.

It was impossible to reconcile these statements with the fact that the appellant had previously demanded notes payable to Dewar & Co., and his admission that these notes were payable to Dewar & Co.; and it must be taken that the appellant intended to guarantee and knew that he was guaranteeing the indebtedness of that firm.

As to the representation which, according to the testimony of the appellant, was made by J. J. Dewar, the highest the case could be put, on the appellant's own testimony, was that Dewar, in answer to an inquiry whether "he was going to run the business," replied that he was. The proper inference was, that the appellant knew that he was guaranteeing the indebtedness of Dewar & Co.,

and that all that he desired to be sure of was that J. J. Dewar was going to "run the business," which meant, "to have the management of it."

In view of this conclusion, it was unnecessary to consider the further contention that the guaranty was not binding on the appellant because he signed it under the belief that it was a guaranty of the indebtedness of J. J. Dewar. If that question had been open upon the facts, it would have been necessary to decide whether the appellant was not so negligent as to deprive him of the right to succeed: Foster v. Mackinnon (1869), L.R. 4 C.P. 704; Howatson v. Webb, [1907] 1 Ch. 537, [1908] 1 Ch. 1; Bank of Ireland v. McManamy, [1916] 2 I.R. 161.

To the suggestion that it was singular that no claim was made upon the appellant to implement his guaranty until shortly before this action was begun, the answer was, that the account of Dewar & Co. was current in the bank as late as May, 1916, at least, and the occasion did not arise for calling on the appellant to perform his contract until Dewar & Co. made default in meeting their obligations at that time.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

IMRIE v. EDDY ADVERTISING SERVICE LIMITED AND E. B. EDDY.

Contract—Advertising—Liability for Price of—Advertising Agent—Incorporated Company—Agitation against both—Judgment by Default Recovered against Company—Personal Liability of Agent—Liability upon Guaranty—"Willing to Guarantee"——Construction—Recognition as Present Guaranty.

Appeal by the defendant E. B. Eddy from the judgment of CLUTE, J., ante 27.

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

M. G. Hunt, for the appellant.

D. Inglis Grant, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that, whatever difficulties there might be in the respondent's retaining

his judgment against the appellant as the principal debtor, after having signed final judgment against the defendant company—and the difficulties were serious—the judgment might be supported on the guaranty on which the respondent relied, viz., that contained in a letter written by the appellant to the respondent on the 11th March, 1913, as follows: "In the meantime I am willing to guarantee personally payment of any indebtedness contracted by the service should any of the publishers doubt the good faith of my present movements, and shall be glad to notify you immediately the reorganisation is complete." This was not a mere expression of the writer's willingness to guarantee, but, in view of the circumstances in which the letter was written, it was intended to be a binding obligation; the respondent so understood it and intimated his understanding by letter to the appellant of the 18th March, 1913; and the appellant made no objection to that interpretation.

This conclusion was a satisfactory one, because there was no merit in the defence; and, but for the question as to the effect of signing judgment against the company, there would be no difficulty in agreeing with the learned trial Judge as to the defendant's personal liability, altogether apart from the guaranty.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

ORSINI v. BOTT.

Contract—Work Done in Erection of Building—Whether Contract Made with Ostensible Building-owner or with Company Represented by him—Undisclosed Principal—Personal Liability of Agent—Acceptance of Promissory Notes of Company—Revival of Liability upon Dishonour—Recovery of Judgment on one Note against Company—Judgment against Individual—Return of Notes—Assignment of Judgment.

Appeal by the plaintiff from the judgment of BRITTON, J., after trial of the action without a jury, dismissing it with costs.

The action was brought to recover a balance due for work done in connection with the erection of two buildings; and two

questions were presented for decision: (1) whether the plaintiff's contracts were entered into with the defendant personally or with the Upper Canada Investors Limited, of which company the defendant was the president; and (2) whether, if the defendant was the contractor, the plaintiff had accepted in satisfaction of his liability promissory notes of the company.

The action was dismissed by the trial Judge on the ground that the question for decision was, "To whom was credit given?" and that it had not been established that it was given to the defendant.

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

A. J. Russell Snow, K.C., for the appellant.

S. H. Bradford, K.C., for the defendant, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that he was, with respect, of opinion that, upon the facts in evidence, the contract was with the respondent; and that, even if he were in fact acting for the company, he was contracting for an undisclosed principal, and was therefore personally liable.

The second question must also be decided in favour of the appellant. "If a debtor, instead of paying his creditor, directs him to take a bill of a third person, which the creditor does, and the bill is dishonoured, the liability of the original debtor revives:" Byles on Bills, 17th ed., p. 329.

The respondent, upon payment of his indebtedness, will be entitled to a return of the notes of the company which he gave to the appellant.

The fact that the appellant had recovered judgment on one of the notes of the company did not affect his right to look to the respondent for payment; but the respondent, when he pays, will be entitled to an assignment of the judgment.

It was clear, upon the evidence, that the appellant did not take the notes of the company in satisfaction of his claim against the respondent.

The appeal should be allowed with costs, and judgment should be entered for the appellant for the amount of his claim with costs.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

McCARTHY v. BOUGHNER.

Appeal—Verdict of Jury—Evidence to Support—Refusal to Interfere—Wrongful Eviction and Trespass.

Appeal by the defendant from the judgment of CLUTE, J., upon the verdict of a jury, in an action for damages for wrongful eviction and trespass. The judgment was for the plaintiff for $200 and costs on the County Court scale without set-off.

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

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

C. W. Bell, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the appeal must be dismissed. The result was unsatisfactory, but there was evidence which, if believed, supported the verdict, and the Court could not interfere without usurping the functions of the jury.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

McDERMID v. FRASER.

Money Lent—Claim for—Defence—Agreement of Settlement or Compromise—Evidence—Finding of Trial Judge—Appeal—Interest Recoverable only from Date of Demand for Repayment—Costs.

Appeal by the defendant from the judgment of LATCHFORD, J., after trial of the action at Cornwall without a jury, in favour of the plaintiff.

The action was brought to recover money lent by the plaintiff to the defendant; and the defence was, that a settlement was effected between the parties by which the plaintiff agreed to accept $1,100 without interest in full satisfaction of her claim.

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

G. H. Watson, K.C., for the appellant.

J. J. Maclennan, for the plaintiff, respondent.

MEREDITH, C.J.O., read the judgment of the Court. The finding at the trial, he said, was against the appellant as to the alleged settlement, and the Court saw no reason for differing from that finding. According to the testimony of the appellant, no one but the respondent and himself was present when the alleged settlement was made. The testimony of the respondent, which the learned trial Judge believed, was that no such nor any settlement was made; that the appellant proposed to her that she should agree to accept $1,100 in satisfaction of her claim, and that she refused to do so.

Much stress was laid in argument for the appellant on the fact that, in stating his reasons for judgment after the argument at the close of the evidence, the trial Judge made no reference to the testimony given by the father and mother of the appellant that the respondent had told them that she had come to a settlement with the appellant, and that the terms of it were as stated by the appellant. It was impossible to believe that that evidence was forgotten or overlooked by the learned Judge. That it afforded strong corroboration of the appellant's testimony must have been urged at the trial by counsel for the now appellant; and there could be no doubt that the Judge rejected it because he believed the testimony of the respondent.

The respondent, however, was not entitled to interest from the time when the loan was made. No time was fixed for repayment, and the respondent admitted that nothing was said as to interest and that she did not intend to charge interest. The loan, made in that way, was repayable on demand, and interest should be allowed only from the time when repayment was demanded. Interest should be allowed only from the 2nd February, 1915, when a demand for repayment was made.

The judgment should be varied as to interest accordingly, and affirmed with that variation, and there should be no order as to the costs of the appeal.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

ARMSTRONG v. BROOKES.

Contract—Work Done by Substitute for Sub-contractor after Default and Abandonment—Assignment of Sub-contract—Payment for Work Done—Liability of Principal Contractor—Implied Contract or Promise to Pay—Costs.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Lambton, after the trial of the action without a jury, in favour of the plaintiff, for the recovery of the amount claimed in the action, which was for work done by the plaintiff on a municipal drain.

The claim endorsed on the writ of summons was: "To contract price for work in Brooke-Enniskillen town-line drain from station O to station 135, $926.60;" and the balance claimed, after deducting payments made, was $183.60.

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

J. C. Elliott, for the appellant.

G. M. Willoughby, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the contract for the entire drainage system of which that now in question formed a part was let by the township corporation to the appellant, and the appellant sublet the whole of the work on the three sections of the Brooke-Enniskillen town-line drain to Henry Booker, who undertook to do it at the same price as was to be paid by the township corporation to the appellant.

The learned Chief Justice, after setting out the facts, said that he was quite unable to discover any ground upon which the respondent's claim could be supported. If the respondent claimed as assignee of Booker, he could stand in no better position than Booker himself would have stood in had he done the work which the respondent did; and there could be no question that Booker could not have recovered because he had been paid all that he was entitled to receive from the appellant.

The ground upon which the judgment was based was, that, in the circumstances, there was an implied contract by the appellant to pay the respondent for the work which he did; that the contract between the appellant and Booker was put an end to by the action of the appellant in letting the work to be done between

station O and station 108; and that, the work in question having been done by the respondent, and the appellant having taken the benefit of it, he is liable to pay for it.

There was no ground for holding that the appellant put an end to the contract with Booker. Booker had made default in performing his contract, if indeed he had not abandoned it; and the appellant had the right to have the work which Booker should have done done by some one else, and to look to Booker for any loss that he should sustain owing to his default.

It was impossible, in view of the respondent's testimony, to hold that a promise to pay him for the work was to be implied. It was clear that the respondent had no idea that he was doing the work between station O and station 108 otherwise than as assignee of Booker; the very purpose of his getting the assignment was to enable him to do the work which the appellant had refused to employ him to do.

The appeal should be allowed and the action dismissed.

It was unfortunate for the respondent that he was not advised as to the position he would be in if he did the work as assignee of Booker; but that afforded no ground for relieving him from paying the costs of the unsuccessful litigation in which he had embarked; the costs throughout should follow the result.

FIRST DIVISIONAL COURT. JUNE 12TH, 1917.

DAVIES v. BENSON.

Gift—Parent and Child—Purchase of Chattel by Son with Money Given by Father—Subsequent Bill of Sale by Son to Father—Attack upon, by Creditor of Son—Creditor's Claim Arising after Transaction—No Creditors at Time of Transaction—Failure to Prove Fraud—Finding of Official Referee in Partnership Action—Claimant under Bill of Sale not a Party—Res inter Alios Acta.

Appeal by the defendant from the judgment of the County Court of the County of York pronounced by COATSWORTH, Jun. Co. C.J., finding in favour of the plaintiff an issue as to the ownership of a motor-car, after trial thereof without a jury.

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

W. E. Raney, K.C., and E. F. Raney, for the appellant.
George Wilkie, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the appellant was a judgment creditor of S. Grossman, and the car was seized by the sheriff under an execution issued upon the judgment. The issue was, whether the car was, at the time of the delivery of the execution to the sheriff, the property of the respondent.

The car was originally purchased in June, 1913, by S. Grossman for $2,800, of which $1,000 was paid in cash; the balance was to be paid in monthly instalments of $100 with interest at 6 per cent. per annum. The $1,000 was advanced to S. Grossman by his father (now dead), and was intended at the time to be a gift.

A bill of sale of the car and another car was made by S. Grossman to his father on the 26th November, 1913, for the expressed consideration of $1,800; and the bill of sale was duly filed on the same day. The $1,800 appeared to have been made up of the $1,000 advanced to buy the car and $800 paid by the father on the price of the other car.

The learned Chief Justice could find no ground for impeaching the transaction by which the father acquired the ownership of the two cars. There was nothing to shew that S. Grossman owed any one but the vendors of the car, and they were amply secured by retaining, as they did, the ownership of the car until the whole of the purchase-price should be paid. It was competent for the father and son to agree that what was originally a gift to the son should become a debt due by him to his father, unless the son's creditors were prejudiced by the transaction, which was not the case.

However subject to attack the transaction between the father and the respondent might be, that attack could not be made by any one who was not a creditor of the father, and the appellant was not such a creditor.

The learned Chief Justice was unable to discover in the evidence anything to justify the conclusion that the car was at all times the property of S. Grossman and that the transaction by which the two cars were transferred to the father was a mere sham. There was nothing to shew that S. Grossman was indebted to any one except the appellant; his indebtedness to the appellant arose out of a partnership transaction, and the partnership was not formed till June, 1915, and was not in contemplation when the transfer from the son to the father was made.

It was argued that the question as to the ownership of the car was concluded by the finding of an Official Referee upon a reference in the partnership action in which the appellant's judgment was obtained. The respondent was not a party to the action, and his only connection with it was as a witness for S. Grossman in that action to prove that the partnership owed him for rent of the car. The finding was not binding on the respondent. It might have had that effect if there had been an inquiry as to the debts owing by the partnership, and the respondent had sent in a claim for the rent, but in the circumstances it was res inter alios acta.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 14TH, 1917.

*RE HIRAM WALKER & SONS LIMITED AND TOWN OF WALKERVILLE.

Assessment and Taxes—Appeal from Order of Ontario Railway and Municipal Board—Questions of Fact—Assessment Act, R.S.O. 1914 ch. 195, sec. 80(6)—"Business of a Distiller"—"Business" Assessment—Sec. 10 (1) (a) of Act.

Appeal by Hiram Walker & Sons Limited from an order of the Ontario Railway and Municipal Board dismissing an appeal by the appellant company from an order of the Judge of the County Court of the County of Essex dismissing an appeal from the decision of the Court of Revision for the Town of Walkerville, which confirmed the "business" assessment of the appellant company.

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

A. W. Anglin, K.C., and J. H. Coburn, for the appellant company.

E. D. Armour, K.C., and J. Sale, for the Corporation of the Town of Walkerville, respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that the contention of the appellant company was, that its business consisted not only of distilling liquors, but of blending them,

and warehousing the product of distillation, as well as the liquors which were blended, and that only that part of the premises in which the process of distillation takes place should be taken into account in ascertaining the amount for which the appellant is assessable under clause (*a*) of sub-sec. 1 of sec. 10 of the Assessment Act, R.S.O. 1914 ch. 195.

An appeal does not lie from the decision of the Board, the question raised being one of fact and not of law: sec. 80 (6).

The taxation is in respect of "the business of a distiller." The Court cannot know judicially what such a business is; and the question what it is must therefore be a question of fact. The question arising in each case of the kind is, what is generally understood to be comprehended in the particular business designated?

The questions which fell to be determined by the Board were questions of fact, and no appeal lay from the decision of the Board.

It was argued that a taxing Act must be construed strictly. See Attorney-General v. Salt Union Limited (1917), 33 Times L.R. 365, where it is said that, although the language of a taxing Act must be clear and unequivocal, "one must construe words in their ordinary sense and give their ordinary effect to them."

Appeal dismissed with costs.

HIGH COURT DIVISION.

MASTEN, J. JUNE 14TH, 1917.

*GABEL v. HOWICK FARMERS MUTUAL FIRE INSURANCE CO.

Insurance—Fire Insurance—Proofs of Loss—Failure of Assured to Make Statutory Declaration—Mistake—Further Proofs not Demanded—Insurance Act, R.S.O. 1914 ch. 183, sec. 194 (Condition 18 (c)); sec. 199 — Inequitable Result if Forfeiture Decreed—Application for Insurance—Failure to Disclose Apprehension of Incendiarism—Adequate Disclosure to Agent—Failure of Agent to Communicate to Company—Unreasonable Condition in Application — Liability of Insurance Company.

Action upon a policy of fire insurance for $5,000, dated the 8th November, 1916, issued by the defendants, covering the

barns and other buildings and contents situate upon a farm owned by the plaintiff Gabel subject to a mortgage to the plaintiff Marks, the loss being payable to the latter.

At the time the policy was issued, the plaintiffs held a policy, issued by the defendants, for $4,000 upon the same property. The policy sued on stated on its face that it cancelled and replaced the former policy.

The amount of the plaintiffs' claim for loss—by a fire which occurred on the 1st December, 1916—was $3,480.

The defences were: (1) that in applying for the insurance the plaintiff Gabel misrepresented or omitted to communicate to the defendants a circumstance material to be made known in order to enable the defendants to judge of the risk they undertook; (2) that Gabel failed to deliver proofs of loss pursuant to conditions 17 and 18, sec. 194 of the Insurance Act, R.S.O. 1914 ch. 183.

The action was tried without a jury at Guelph.

D. L. McCarthy, K.C., and G. Bray, for the plaintiffs.

H. Guthrie, K.C., and W. M. Sinclair, for the defendants.

MASTEN, J., in a written judgment, after setting out the facts, said that the amount of the loss was not disputed—the contest was as to liability only. The documents constituting the proofs of loss were properly executed except that the statutory declaration, though made out in the name of the plaintiff Gabel, was sworn by two of his representatives on the board of inspection and valuation. The proofs of loss were dated the 9th December, and were sent to the defendants on or about that day. No objection was made to them by the defendants, and no further or other proofs were ever asked for by the defendants.

The learned Judge, acting under sec. 199 of the Insurance Act, finds that the failure to make the statutory declaration arose from mistake; that the plaintiff Gabel did sign the schedules setting forth the amount of the claim, and that, no further or other proofs of loss having been asked for, it would be inequitable that the insurance contract should be deemed void or forfeited for imperfect proofs of loss or from failure to furnish the plaintiffs' declaration as called for by statutory condition 18(*c*): Prairie City Oil Co. v. Standard Mutual Fire Insurance Co. (1910), 44 S.C.R. 40; Bell Brothers v. Hudson Bay Insurance Co. (1911), 44 S.C.R. 419. The second defence, therefore, failed.

As to the first defence, the learned Judge finds that on the 7th October, 1916, incendiarism was apprehended; that this danger was a circumstance material to be made known to the defendants to enable them to judge of the risk; and that it was not disclosed to the defendants by the application.

In the application, the question, "Is incendiarism threatened or apprehended?" was asked, and in the place for the answer a line was drawn thus——. This, the learned Judge considered, indicated that the question was not answered at all.

The application was signed by Gabel, but it was in blank, except that the amount of insurance sought was filled in. Gabel left Fallis, the insurance agent, to fill in the application and send it in, thus making Fallis for that purpose his (Gabel's) agent; Gabel was responsible for the answers made by Fallis, who was aware of the fear of incendiarism entertained by Gabel and of the reason for it, and who was an agent with large powers. It was Fallis's duty to disclose to the defendants the material facts which had been made known to him bearing on the apprehension of incendiarism. In this he failed. Who was to suffer for his failure?

Reference to Kinseley v. British America Assurance Co. (1900), 32 O.R. 376; Sinclair v. Canadian Mutual Fire Insurance Co. (1876), 40 U.C.R. 206, at p. 212.

Disclosure was essential, but the necessary disclosure could be effectively made dehors the answers in the printed form of application. Adequate disclosure was made to an agent of a high class. That was disclosure to the defendants, and any provision to the contrary in the conditions or in the application was unreasonable, and therefore ineffective. This ruling is based upon the facts of the case, and is not a general ruling that the last clause of the application—the usual one as to what forms the basis of the liability of the insurance company, and as to the agency for the applicant of the company's agent—is in all circumstances unreasonable.

Judgment for the plaintiffs for the amount of their claim with costs.

ROSE, J. JUNE 15TH, 1917.

DONER v. WESTERN CANADA FLOUR MILLS CO. LIMITED.

Sale of Goods—Credit Sale—Contract—Construction—Non-delivery—Action for Damages for—Monthly Deliveries—Failure to Take Stipulated Quantities—Default—Payment "Due" when Demanded—Waiver—Justifiable Refusal to Ship—Right of Action—Death of Partner—Damages.

Action for damages for non-delivery of 3,460 bags of flour in accordance with an agreement made by the firm of William Reynolds & Son with the defendants on the 12th October, 1915. By the agreement, 5,000 bags of flour were to be delivered by the defendants between the day mentioned and the 30th September, 1916. William Reynolds, the active partner of the firm, died on the 14th August, 1916. The action was brought by the plaintiff Doner, the administrator of the estate of William Reynolds, and the plaintiff John Reynolds, the surviving partner.

The action was tried without a jury at Toronto.

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

J. A. Paterson, K.C., and J. C. Macfarlane, for the defendants.

ROSE, J., in a written judgment, after setting out the facts, said that the meaning of the contract was not doubtful. There was a sale and purchase of 5,000 bags of flour "to be taken in an approximately equal quantity of 410 bags per month;" if the buyers' account is kept in such condition as will warrant the sellers, in their judgment, extending credit, the buyers are to have credit; failure to meet payments when due gives the sellers the option of shipping with sight-drafts attached to the bills of lading or of refusing to ship at all. There was a failure on the part of the buyers to take 410 bags a month; but the sellers did not complain; in fact, on at least one occasion, they were asked to postpone delivery of a shipment that had been ordered, and did postpone it. They did not treat the contract as terminated by the failure to take the flour as promptly as stipulated for, but treated it as still subsisting up to August, 1916.

The failure to take the stipulated quantity each month did not excuse the sellers from delivering the remaining quantity; it may have entitled them to an extended time for delivery of the

balance, but that they did not seek: Tyers v. Rosedale and Ferryhill Iron Co. (1875), L.R. 10 Ex. 195.

There was an obvious failure on the part of the buyers to keep the account in satisfactory condition; and they lost the right to demand credit. There was also a "failure to meet payments when due;" and the sellers acquired the right, at their option, to ship with sight-drafts attached to the bills of lading or to refuse to ship at all. They exercised their option; the last three shipments were with a sight-draft attached to the bill of lading; and it was not open to them, when further shipments were called for, to make a new election, and, because of the old defaults, to refuse to ship at all. But, after the last shipment, a mistake as to $18.33, which the sellers had paid for freight and had neglected to include in their draft, was discovered, payment was demanded, and was not made. This sum was "due" when it was demanded; and, when a subsequent order for 3,620 bags was received from the buyers, it was open to the sellers to say, as they did, that, as their past-due account had not been paid, they would not make further shipments. There was no answer to the defendants' contention in this regard, unless the default was waived. But there was nothing which amounted to a waiver of the right of the defendants to say that, because of the failure to meet the payment of $18.33 when due, they would refuse to make further shipments.

The defendants contended that, the contract being with a firm which was dissolved by the death of a partner, the plaintiffs had no right of action. Upon this point, McCraney v. McCool (1890-91), 19 O.R. 470, 18 A.R. 217, was against the defendants.

The action should be dismissed with costs.

Damages, in case the plaintiffs should hereafter succeed, assessed at $6,839.

MASTEN, J. JUNE 15th, 1917.

STRUTHERS v. CHAMANDY.

Assignments and Preferences—Assignment for Benefit of Creditors—Previous Transfer of Leases and Buildings to Creditor—Chattel Mortgage on Buildings (Treated as Chattels) Made to Person Advancing Money—Priorities—Buildings Found to be Fixtures—Preference—Assignments and Preferences Act—Intent—Present, Actual, Bona Fide Advance of Money—Costs.

Action for a declaration that the plaintiffs were entitled to a first lien upon certain leases of lands and buildings on the lands,

and to set aside a chattel mortgage made by one Annie Essa to the defendant.

The action was tried without a jury at London.
G. S. Gibbons, for the plaintiffs.
H. H. Davis, for the defendant.

MASTEN, J., in a written judgment, said that the questions involved related, first, to the priority of the securities held respectively by the plaintiff Struthers and by the defendant; and, second, as between the plaintiff Martin and the defendant, to the validity of the security held by the defendant.

The Nipissing Mining Company Limited, the owners in fee of certain lots in Sudbury, on the 1st November, 1909, leased the lots to Annie Essa for ten years from the 1st December, 1909. The leases of the lots contained no special provision vesting the ownership of the buildings thereon in the lessee. The leases were in special form, permitting the lessors to continue their mining operations, and providing for cancellation of the leases by the lessors on 6 months' notice; in that case only, the lessors were to pay the lessee the value of her buildings.

On the 10th September, 1913, the lessee, being indebted to the plaintiff Struthers, made in his favour a declaration of trust or assignment of the leases by way of collateral security for payment of the defendant; notice of this was given to the lessors. By this instrument, the lessee covenanted to stand possessed of the leases and of the buildings in trust for Struthers, with power to Struthers to sell and convey the leases and buildings; and, in case the leases should be terminated by the lessor before the end of the term, all moneys which should become due and payable to the lessee by the lessors should be payable to Struthers. The lessee also executed a chattel mortgage to the defendant, securing $2,500, covering the buildings, which were thus treated as personal property.

The defendant's chattel mortgage was ineffective because, under the terms of the leases from the Nipissing company, the lessee had no title of any kind to the buildings which were the subject of the chattel mortgage. These buildings were fixtures erected on the lands of the Nipissing company; as such they were a part of the realty; and, in the absence of any provision in the leases varying the situation, they were the absolute property of the company; and Annie Essa conveyed nothing whatever to the defendant by her chattel mortgage to him. The assignment of the leases to the plaintiff Struthers was entitled to priority.

As between the plaintiff Martin and the defendant, if the chattel mortgage was nugatory, the defendant had no security entitling him to any priority over other creditors; and the whole estate, including the residue of the term in the lands and buildings, passed to the plaintiff Martin, the assignee of Essa for the benefit of creditors, subject to the charge in favour of the plaintiff Struthers, but free of any claim on the part of the defendant.

The chattel mortgage was dated the 21st February, 1916, and this action was commenced in April, 1916. On the former date, Annie Essa, the mortgagor, was insolvent and unable to pay her debts in full; both she and the defendant knew it; and the mortgage was given with the intent on her part to prejudice her creditors (including the plaintiff Struthers) or to give a preference to certain of her creditors. The defendant did advance $2,500 to her at the time he received the chattel mortgage; and it could not be found that he took the impeached security with intent to defeat, hinder, delay, etc., nor that the security was not given in consideration of a present, actual, bona fide payment in money.

Judgment declaring that the security of the plaintiff Struthers has priority over the security of the defendant, and that the plaintiff Martin, in dealing with the estate, should treat the defendant's security as nugatory.

The plaintiffs should have the general costs of the action; but there should be no costs to either party of the branch of the action relating to the plaintiffs' claim to set aside the defendant's security as void under the Assignments and Preferences Act, R.S.O. 1914 ch. 134.

MACLAREN, J.A., IN CHAMBERS. JUNE 15TH, 1917.

ELECTRIC DEVELOPMENT CO. OF ONTARIO LIMITED v. ATTORNEY-GENERAL FOR ONTARIO AND HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

Appeal — Allowance of Security on Appeal to Privy Council — Privy Council Appeals Act, R.S.O. 1914 ch. 54, secs. 2, 3— Proposed Appeal from Order of Appellate Division Affirming Order Setting aside Writ of Summons—Jurisdiction to Allow Security.

Motion by the plaintiffs for the allowance of security on an appeal to the Privy Council from a judgment of the First Divis-

ional Court of the Appellate Division, rendered on the 12th January, 1917, reported in 38 O.L.R. 383.

H. A. Harrison, for the plaintiffs.

E. Bayly, K.C., for the defendant the Attorney-General.

I. F. Hellmuth, K.C., for the defendants the Hydro-Electric Power Commission of Ontario.

MACLAREN, J.A., in a written judgment, said that the action was brought against the Power Commission to have it declared that the Ontario Acts 6 Geo. V. chs. 20 and 21, granting them certain powers, were ultra vires. Application had been made to the Attorney-General for a fiat to bring the action, and refused. The Power Commission Act, R.S.O. 1914 ch. 39, sec. 16, provides that no action shall be brought against the Commission without the consent of the Attorney-General. The judgment of this Court now sought to be appealed from affirmed an order setting aside the writ of summons by which this action was commenced, without the consent of the Attorney-General.

The only power which a Judge has to allow security in an appeal to the Privy Council is that given by sec. 3 of the Privy Council Appeals Act, R.S.O. 1914 ch. 54. This is limited to the appeals given by sec. 2 of that Act. The judgment of this Court of the 12th January does not come within the classes of cases mentioned in sec. 2; and, consequently, a Judge has no jurisdiction in the matter: Beardmore v. City of Toronto (1910), 2 O.W.N. 479, where the full Court of Appeal dismissed a similar application.

Motion dismissed with costs.

LATCHFORD, J. JUNE 16TH, 1917.

WILLARD v. BLOOM.

Practice—Interpleader Order—Irregular Service upon Person Made Plaintiff in Issue—Person Served not Appearing upon Motion—Application to Set aside Order—Powers of Court—Ex Parte Order—Rule 217.

Motion by Adolph Blitz to set aside an order of SUTHERLAND, J., in so far as it affected the applicant, who was by the order made plaintiff in an interpleader issue in respect of a sum of $2,000 and interest, the amount payable on two promissory

notes said to be held by Blitz and made payable to the plaintiff, at the instance of the defendant Bloom, to the defendant Lehigh. A receiver, duly appointed to receive all moneys payable to the defendant Bloom, also claimed to be entitled to payment; and the order directed an issue as to whether Blitz or the receiver was entitled to the sum payable, and directed that the plaintiff should in the meantime pay the money into Court. The plaintiff acted upon the order, and paid the money into Court to abide the determination of the issue.

The motion was heard in the Weekly Court at Toronto.

W. J. Boland, for the applicant.

H. S. White, for the plaintiff and receiver.

LATCHFORD, J., in a written judgment, after setting out the facts, said that Blitz, though served in Chicago with notice of the application for an interpleader order, was not represented on the return of the application. He chose to regard the service as a nullity. No order had been made permitting or allowing service of the notice outside the jurisdiction of the Court. It was admitted that the service was irregular, and that the irregularity was not brought to the attention of Sutherland, J., when he made the order. It was contended that the order was made ex parte, or that Blitz failed to appear through insufficient notice of the application, and that the Court had jurisdiction under Rule 217 to rescind or vary the order.

An order made upon notice cannot be regarded as made ex parte; nor does the fact that the service was irregular bring Blitz within the scope of the Rule. He did not fail to attend though "accident or mistake or insufficient notice," but because, although the promissory notes were made and were payable in this Province, where the whole transaction took place, Blitz did not desire to enter the Courts of Ontario.

The learned Judge added that, if he had power, he would vary the order by making the receiver plaintiff, instead of Blitz, in the issue, and allowing the service made upon Blitz.

The application should be dismissed with costs.

RE ONTARIO SPRING BED AND MATTRESS CO. LIMITED—KELLY, J., IN CHAMBERS—JUNE 13.

Company—Winding-up—Petition for Order—Material in Support—Dominion Winding-up Act.]—Petition for an order for the winding-up of the company under the Dominion Winding-up Act. KELLY, J., in a written judgment, said that, whatever might be the real condition of the company's affairs, and though it might be inferred from the evidence that it was not altogether satisfactory, the petitioner's material fell short of what was requisite under the Winding-up Act to support the application. The company, relying solely on the ground that on its own material the petitioner was not entitled to the order asked for, had refrained from submitting any evidence in answer. Petition dismissed, with costs fixed at $15. P. H. Bartlett, for the petitioner. Sir George Gibbons, K.C., for the company.

HALCRO v. CLOUGHLEY—FERGUSON, J.A., IN CHAMBERS—JUNE 13.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Examination of Witness on Pending Motion—Ex Parte Order for—Rules 227, 346.]—Motion by one Halladay, under Rule 507, for leave to appeal from an order of KELLY, J., directing the applicant to attend and submit to examination as a witness on a motion by the defendant to add the applicant as a party to the action. FERGUSON, J.A., in a written judgment, said that he was informed by KELLY, J., that the latter did not consider the objection now raised, that the proceedings to examine Halladay were ex parte, in that no notice thereof was given to the opposite party, as required by Rule 346. Counsel for the defendant argued that Rule 346 did not apply to proceedings for an examination under Rule 227; or, if it did, that the want of notice had been waived by the attendance of the witness, and he relied on Cooke v. Wilson (1902), 3 O.L.R. 299. It was important to settle whether or not Rule 227 might be used to obtain an ex parte examination of one who would, no doubt, be an important witness at the trial; and, for that reason, leave to appeal should be granted. A. L. Fleming for the applicant. T. N. Phelan, for the defendant.

RE SPINK—MASTEN, J.—JUNE 15.

Will—Construction—Codicil—Ambiguity—"All my other Property"—"All my other Insurance"—Internal Evidence as to State of Mind of Testator—Testamentary Capacity.]—Motion by Blanche Brody, beneficiary under the will of John L. Spink, deceased, for an order determining a question arising upon the will and codicil, and for a declaration that, under the codicil, dated the 23rd December, 1913, all the property of the deceased, other than certain insurance moneys therein mentioned, was willed to the three daughters of the deceased, under the words of the codicil, "All my other property now goes with my last son dead to my three daughters." The motion was heard in the Weekly Court at Toronto. MASTEN, J., in a written judgment, said that, in his opinion, the codicil was not ambiguous; that it was effective; and that in effect it altered and revoked pro tanto the provisions of the will made some months earlier. The situation had meantime substantially changed, owing to the death of the son. The moneys available to the mother had changed owing to the amount which came to her upon the son's death. From the internal evidence of the will itself, the learned Judge was unable to adopt the suggestion that the deceased had not ordinary testamentary capacity; but was of opinion that the deceased's mind was firm, lucid, and clear. The way in which he dealt with the insurance policies, enumerating them and giving particulars, and the fact that he was fully conscious and aware that in order effectively to change the beneficiaries named in the policies it was necessary for him to refer specifically to the policies themselves, indicated such a strength and clarity of mind on the part of the testator that the learned Judge felt quite unable to yield to the suggestion that when, in the codicil, the testator used the term "all my other property," he meant "all my other insurance." That was not possible. Order declaring accordingly; costs of all parties out of the estate. R. J. McLaughlin, K.C., for the applicant. L. Macaulay, for one of the executors. G. H. Watson, K.C., for the other executors, for the executors of the testator's widow, and for the beneficiaries other than the applicant.

BURKETT v. OTT—BRITTON, J.—JUNE 15.

Gift—Moneys on Deposit in Bank—Direction to Bank to Hold for Benefit of Depositor and Wife and Daughter and Survivor—Agreement for Maintenance—Validity and Effect of Direction—Mental Competence—Absence of Fraud or Duress.]—Action by Emma Burkett, one of the two daughters of Joseph Arber Ott, deceased, against her mother, Catherine Ott, her sister, Minerva Barrick, and the Bank of Hamilton, for a declaration that a sum of money now in the possession of the said bank was the property of the personal representative of the deceased, and for other relief. The money had belonged to the deceased; but, by a written memorandum signed by him, in a form prepared by the bank, he directed the bank to hold the money for the benefit of himself, his wife, and his daughter Minerva, and the survivor of them. The action was tried without a jury at Cayuga. BRITTON, J., in a written judgment, found that Joseph Ott, at the time of signing the direction to the bank, was mentally competent, and that there was no duress or fraud; also that the direction was sufficient to pass the money to the defendants the mother and daughter. There was an agreement by the defendant Minerva Barrick and her husband to support the deceased and his wife, which could not be called an improvident one. Action dismissed without costs. R. S. Colter, for the plaintiff. W. M. German, K.C., for the defendants.

MOWAT v. MOWAT—FALCONBRIDGE, C.J.K.B.—JUNE 16.

Sale of Land—Disposition of Proceeds—Allowances for Maintenance—Costs.]—In an action tried at Cornwall, FALCONBRIDGE, C.J.K.B., gave judgment for the sale of the lands in question, with a reference to the Master at Cornwall. After consideration, he fixed the allowances to the plaintiffs at $25 per month each, with leave to move after one year before the Chief Justice or any Judge in Chambers to increase this amount. Costs to all parties out of the proceeds of sale as follows:- to the plaintiffs, $100 *plus* actual disbursements out of pocket; to the Official Guardian, $25, which includes disbursements; to the defendant Catherine Mowat, $40, which includes disbursements. G. A. Stiles, for the plaintiffs. R. Smith, K.C., for the defendant Catherine Mowat. A. L. Smith, for the Official Guardian.