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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 15TH, 1917.

RICHARDSON v. LONDON GUARANTEE AND ACCIDENT CO.

Guaranty—Action on Suretyship Bond—Assurance of Due Performance of Contract—Material Alterations in Proposed Contract—Absence of Assent of Guarantors.

Appeal by the plaintiffs from the judgment of LATCHFORD, J., ante 223.

The appeal was heard by MEREDITH, C.J.C.P., FERGUSON, J.A., RIDDELL and SUTHERLAND, JJ.

J. L. Whiting, K.C., for the appellants.

W. N. Tilley, K.C., and C. Swabey, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 17TH, 1917.

HISLOP v. CITY OF STRATFORD.

Highway — Dedication — Acceptance — Sale of Land Including Portion Dedicated—Acquiescence of Purchasers.

Appeal by the plaintiffs fom the judgment of SUTHERLAND, J., 10 O.W.N. 430.

The appeal was heard by MEREDITH, C.J.C.P., FERGUSON, J.A., RIDDELL AND ROSE, JJ.

T. Hislop, for the appellants.

R. S. Robertson, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 17TH, 1917.

RE NEILLY AND LESSARD.

Mines and Mining—Mining Claims—Staking out—Conflicting Boundaries—Mining Act of Ontario, R.S.O. 1914 ch. 32, secs. 51 et seq.—Imperative Requirements—Sec. 59 (5) (4 Geo. V. ch. 14, sec. 2)—Meaning of.

Appeal by Felix Lessard and others from a decision and order of the Mining Commissioner upon a confliction of boundary-lines between mining claim C-1009, being the south-west quarter of the east half of the south-west quarter, block 2, Gillies limit, in the Temiskaming mining division, and mining claim C-940, being the north-east quarter of the east half of the south-west quarter of the same block 2.

Balmer Neilly, in his application to record claim C-940, applied for the north-east quarter of the east half, with his eastern and western boundaries 20 chains and his northern and southern boundaries 10 chains each, and stated that a discovery had been made upon the said lands at one second after 12 o'clock on the 20th August, 1912.

Felix Lessard staked and applied for C-1009 on the 20th August, 1912, and made a discovery at 12.05 a.m. on the same day. In his application to record, he described the lands staked as being the south-west quarter of the east half, the outlines being 10 by 20 chains.

Upon a survey of the two claims being made, it appeared that part of the northern boundary of C-1009 extended over and above C-940 at the south-east quarter thereof to the extent of half an acre or thereabouts.

The Mining Commissioner, in written reasons for his decision, said that neither party had strictly complied with the requirements of the Mining Act, R.S.O. 1914 ch. 32, and neither had

staked his claim in conformity with the regulation of the 3rd August, 1912; and, therefore, the Act could not be strictly applied as against Neilly so as to allow the fraction in dispute to be included in the Lessard claim; and he ordered that mining claim C-940, as shewn on the plan of survey prepared by G. F. Summers, dated the 8th July, 1913, should stand as recorded, and that a patent should issue therefor.

The appeal from that order was heard by MEREDITH, C.J.C.P., RIDDELL, SUTHERLAND, and ROSE, JJ.

A. G. Slaght, for the appellants.

J. M. Ferguson, for Neilly, respondent.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that what a discoverer is entitled to is 20 acres laid out in the manner imperatively and minutely (with diagrams) prescribed by the Act. (See secs. 51 et seq.) The provision upon which the respondent relied, sec. 59, sub-sec. (5), added by 4 Geo. V. ch. 14, sec. 2, meant only this: that, notwithstanding the fact that the discoverer has not laid out his claim in the way which the Act requires, he may, in the circumstances there provided for, have that which the Act so gives to him, not that which he has inaccurately laid out. And, that being so, the ruling of the Commissioner was wrong; the claims of both parties should be laid out as the Act imperatively prescribes; and, that being done, there is no conflict; the boundaries of the one do not come in contact anywhere with those of the other.

Appeal allowed with costs.

SECOND DIVISIONAL COURT. JANUARY 18TH, 1917.

SNITZLER ADVERTISING CO. v. DUPUIS.

Account — Reference — Procedure—Direction to File Statement of Account—Settled Account—Surcharge.

Appeal by the plaintiffs from the order of FALCONBRIDGE, C.J.K.B., ante 165, dismissing an appeal from a ruling of a Local Master.

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

T. Mercer Morton and H. S. White, for the appellants.

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

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 18TH, 1917.

MILLS v. FARROW AND LAZIER.

Fraud and Misrepresentation—Purchase of Land—Failure to Prove Misrepresentations—Reliance on Opinion rather than Allegations of Fact—Action for Rescission of Contract or Damages for Deceit—Dismissal—Appeal.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 10 O.W.N. 440.

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

D. J. Coffey, for the appellant.

I. F. Hellmuth, K.C., and E. C. Cattanach, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 19TH, 1917.

*HOFFMAN v. McCLOY.

Judgment—Declaration that Plaintiff Entitled to Percentage of Royalties Received by Defendant—Subsequent Order Directing Account of Royalties Received by Defendant since Judgment—Jurisdiction—Rules 65, 523—Merits.

Appeal by the defendant from an order of BOYD, C., in the Weekly Court at Toronto, of the 19th October, 1916, directing a reference to the Local Master at Stratford to take certain accounts.

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

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

F. C. Richardson, for the appellant.

R. T. Harding, for the plaintiff, respondent.

RIDDELL, J., in a written judgment, said that this action was begun in February, 1915; the plaintiff alleged that he and the defendant had entered into an agreement whereby they were to sell a certain United States patent partly for cash and partly on time or on royalty payments, the plaintiff to receive one-fifth of the money as it was paid in until the defendant received $1,500, and then the remainder of the receipts; that a sale was made whereby the defendant received $1,000, and was to receive a royalty of $1.50 for each machine manufactured; and the plaintiff claimed his share.

At the trial before the Chancellor, in May, 1915, judgment went for the plaintiff for $150 and costs on the County Court scale and declaring the plaintiff entitled to 20 per cent. of all royalties thereafter received by the defendant from the purchasing company, after that company should be recouped for the advance payment of $1,000. There was no appeal; the judgment was properly entered, and was in full force.

In October, 1916, the plaintiff moved for an order for a receiver, for the taking of accounts, etc., and the Chancellor made the order now appealed against, which directed that an account be taken, pursuant to the judgment, of the royalties received by the defendant since the date of the judgment and of the moneys (if any) paid by the defendant to the plaintiff since the date of the judgment out of the royalties pursuant to the judgment; reserving further directions and costs.

It was not contended that this was a correction of the judgment by the Chancellor as trial Judge; but it was said that the order was made under Rule 65 by the Chancellor sitting as any other Judge might in Court.

The power of the Court, in a proper case, to make an order under this Rule at any stage of the action was undoubted: see the cases in England under the corresponding Rule (Order xxxiii., r. 2) referred to in the Red Book for 1917, p. 474, and in the White Book for 1917, pp. 560 et seq. But an order such as this, as to matter subsequent to the trial, should not have been made.

Reference to Witham v. Vane, [1884] W.N. 98; Stewart v. Henderson (1914), 30 O.L.R. 447, 460.

Meyers v. Hamilton Provident and Loan Society (1892), 15 P.R. 39, was relied upon, but that was quite a different case;

if and so far as it conflicted with the present decision it was not to be followed.

The appeal should be allowed with costs here and below.

MASTEN and KELLY, JJ., concurred, for reasons stated by MASTEN, J., in writing.

MEREDITH, C.J.C.P., read a judgment in which he expressed the opinion that the order was one that might properly be made after judgment if the circumstances warranted it, pointing especially to the provisions of Rule 523. On the question of jurisdiction, he said, he would have no hesitation in dismissing the appeal; but, on the merits, the order ought not to have been made.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 19TH, 1917.

*WALSH v. WEBB.

Division Courts—Increased Jurisdiction—Division Courts Act, R.S.O. 1914 ch. 63, sec. 62 (1) (d)—Ascertainment of Amount Claimed—Necessity for Extrinsic Evidence—Lease—Action for Rent—Liability of Guarantor—Appeal—Dismissal of Action—Costs.

Appeal by the defendant William S. Webb from the judgment of the First Division Court of the United Counties of Northumberland and Durham in favour of the plaintiff in an action to recover a year's rent of land.

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

F. Regan, for the appellant.

No one appeared for the plaintiff or the other defendant.

RIDDELL, J., read a judgment in which he said that the plaintiff sued the defendant William P. Webb, as tenant under a written lease dated the 19th September, 1912, for $200 for rent from the 1st March, 1915, to the 1st March, 1916, and the defendant William S. Webb (the appellant), who was a party to the lease, and had thereby "covenanted and agreed to pay said lessor said rent in case the lessee makes default in payment of same when due and payable." The appellant filed a dispute-note, setting

up (inter alia) that the Division Court had no jurisdiction. The County Court Judge presiding in the Division Court held against that contention, and on the merits gave judgment for the plaintiff against both defendants.

In 1904, the Act 4 Edw. VII. ch. 12 was passed, the original of sec. 62 (1) (*d*) of the Division Courts Act, R.S.O. 1914 ch. 63, providing that a Division Court has jurisdiction in "an action for the recovery of a . . . money demand where the amount claimed . . . does not exceed $200 and . . . is ascertained by the signature of the defendant;" but "an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

Reference to Renaud v. Thibert (1912), 27 O.L.R. 57, and Re Harty v. Grattan (1916), 35 O.L.R. 348.

This case goes down to trial, the plaintiff puts in the lease and proves the signature. As against the tenant, who expressly and unconditionally covenants to pay, he may rest—but what of the guarantor? He had not unconditionally promised to pay—he had promised to pay not simply when the rent became due, but if and when that happened and the tenant made default. The plaintiff must prove that the condition upon which the liability of the guarantor was based had been fulfilled. He could not do that by producing the document—he must "give other and extrinsic evidence."

In such a case a Division Court has no jurisdiction.

Where an appeal succeeds on the ground that the Court appealed from has no jurisdiction, the proper course now is to allow the appeal with costs and dismiss the action with costs (Rule 766), and there was no reason why this course should not be followed here.

KELLY, J., was of the same opinion, for reasons stated in writing.

MASTEN, J., agreed, and had nothing to add.

MEREDITH, C.J.C.P., in a dissenting judgment, considered the question of jurisdiction and the merits of the case, and referred to many authorities. He was of opinion that the Division Court had jurisdiction, and that the judgment below was right upon the merits.

In the result, the appeal was allowed with costs and the action dismissed with costs.

SECOND DIVISIONAL COURT. JANUARY 19TH, 1917.

*HISLOP v. CITY OF STRATFORD.

Assessment and Taxes—Assessment Roll—Description of Land—Duty of Assessor—Remedy by Appeal to Court of Revision—Assessment Act, R.S.O. 1914 ch. 195, secs. 53, 54, 69, 70, 79, 82, 83—Local Improvement By-law—Validity — Municipal Act, 1903, secs. 420 (3), 672 (1)—Purchase of Debentures by Municipality itself.

Appeal by the plaintiffs from the judgment of LATCHFORD, J., ante 191.

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

T. Hislop, for the appellants.

R. S. Robertson, for the defendants, respondents.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that what was objected to and found fault with was the action of the assessor in setting out in the assessment roll some of the details of the assessment: it was said that in some respects, in his description of the lands, he did not fully comply with that which the Assessment Act, R.S.O. 1914 ch. 195, required him to do; and that, as to part of the intended taxation, a by-law authorising and requiring it was not altogether in conformity with the provisions of the Municipal Act under which it was enacted; and also that, as the municipality had not sold to a stranger the debentures provided for by the by-law, there could be no taxation under it.

The first-mentioned matters were things over which the Courts of Revision of assessments, provided for in the Assessment Act, now had complete control, with full power to make all such changes, and give all such relief, as the nature of the case might require, if any; and so they were not the proper subject of an action in this Court, as they might be if the case were one in which there was no power in the municipality to tax; or one with which the Courts of Revision had not power to deal properly. If the appellants were right in their contention in this respect, the proper remedy for all that they complained of was an alteration of the assessment roll so that it might be in the form they contended for, and that remedy the Courts of Revision could apply, and this Court could not: see the Assessment Act, secs. 53, 54, 69, 70, 79,

82, and 83. Section 70 provides that the assessment roll as finally passed, as it must be, by the Courts of Revision, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error, or misstatement in the notice of assessment or the omission to deliver or transmit such notice.

And as to the by-law, it did not seem to be open to any substantial objection; it, in substance, complied with all the requirements of the Act upon which it was based: and the assessments under it too were subject to appeal to a Court of Revision, but no appeal against them was made, nor was any motion to quash the by-law made; instead, the appellants had, ever since it was passed, been paying, without objection or fault-finding, all the taxation upon these lands under it.

Nor was there any good reason for holding that the lands benefited by the work done under the by-law were freed from payment for that benefit merely because the municipality had in effect purchased the debentures made under it in connection with their sinking fund, instead of selling them to a stranger: see the Consolidated Municipal Act, 1903, sec. 420 (3), the Act applicable to the case.

Appeal dismissed.

HIGH COURT DIVISION.

CLUTE, J. JANUARY 17TH, 1917.

*RE BAYLISS AND BALFE.

Deed—Conveyance of Land in Contemplation of Marriage—Grant to Trustee to Uses of Wife—Habendum—Separate Use—Operation of Statute of Uses—Future Contingency—Title to Land.

Motion by the vendor for an order declaring that an objection made by the purchaser to the title to land, the subject of a contract for sale and purchase, was not a good objection.

The motion was heard in the Weekly Court at Toronto.

F. F. Treleaven, for the vendor.

E. E. Gallagher, for the purchaser.

CLUTE, J., in a written judgment, said that the objection was in respect of a deed dated the 26th October, 1886, made in antici-

pation of marriage. The deed recited that a marriage was intended shortly to be solemnised between J. N., the grantor, and M. C. T., the intended wife, etc., and witnessed that, in consideration of the said intended marriage and solemnisation and consummation thereof and of the covenants and conditions thereinafter contained and of the sum of one dollar, J. N. did grant unto J. T., the father of the intended wife, his heirs and assigns for ever, the lands in question, to have and to hold unto J. T., his heirs and assigns, unto and to the use of J. N., his heirs and assigns, until the solemnisation of the marriage, and from and after the solemnisation thereof unto and to the uses of M. C. T., her heirs and assigns, for her own sole and separate use and benefit for ever and as her separate estate and property and free and clear from all estate etc. of J. N. The marriage was solemnised, and the wife went into possession and had ever since continued in possession and in receipt of the rents and profits, and no question had ever been raised in respect of her title. The husband died; the wife remarried; and contracted to sell the land. The purchaser's objection was that, because the grant was to J. T., his heirs and assigns for ever, nothing passed to M. C. T.; that no trust was created; and that the instrument was ineffective to convey any estate to the vendor.

The purchaser relied upon Langlois v. Lesperance (1892), 22 O.R. 682; but the learned Judge thought that case distinguishable.

Under the Statute of Uses, immediately upon the marriage the uses, by the operation of the statute, became merged in the legal estate; and that is so whether designated in the instrument as a use or a trust. To prevent the legal estate being executed in the cestui que trust, it is necessary to vest in the trustee not only the ancient common law fee, but also the primary use, as by conveying or devising "to the trustee and his heirs to the use of the trustee and his heirs:" Lewin on Trusts, 12th ed., pp. 5, 233.

The fact that the grant is for the wife's separate use does not prevent the operation of the statute: Williams v. Waters (1845), 14 M. & W. 166.

The use need not be executed the moment the conveyance is made, but may go into operation upon some future contingency, as where a marriage is contemplated: Halsbury's Laws of England, vol. 24, paras. 501, 506; Gilbert on Uses and Trusts, 3rd ed., pp. 184, 185, note (9).

Declaration that the objection is not well taken, and that, as against it, the vendor has a good title in fee simple.

No order as to costs.

BRITTON, J. JANUARY 18TH, 1917.

GERMAN v. CITY OF OTTAWA.

Highway—Nonrepair—Icy Sidewalk—Injury to Pedestrian—Municipal Act, R.S.O. 1914 ch. 192, sec. 460 (3)—Gross Negligence—Absence of Contributory Negligence—Damages.

Action by William Manley German, K.C., M.P., for damages for injury sustained by him by a fall upon an icy sidewalk in Besserer street, in the city of Ottawa, on the 2nd February, 1916.

The action was tried without a jury at Ottawa.

The plaintiff appeared in person (E. R. Chevrier with him).

F. B. Proctor, for the defendants.

BRITTON, J., in a written judgment, said that the employees of the defendants knew of the dangerous condition of the sidewalk as early as the Monday before the plaintiff's injury, and the dangerous condition was allowed to remain until Wednesday, the day of the injury. That was gross negligence within the meaning of sec. 460 (3) of the Municipal Act, R.S.O. 1914 ch. 192. There was nothing negligent in the system adopted by the defendants of keeping their sidewalks in proper condition; the negligence was in failing to carry out the details of the system—in not providing for the weather conditions or other conditions at the place where the plaintiff fell.

Reference to Huth v. City of Windsor (1915), 34 O.L.R. 245, 542; City of Kingston v. Drennan (1897), 27 S.C.R. 46.

The plaintiff was not guilty of contributory negligence.

Judgment for the plaintiff for $2,250 damages with costs.

MASTEN, J. JANUARY 18TH, 1917.

RE DARDIS.

Will—Construction—Gifts to Brothers and Sisters after Death of Widow—Alternative Gifts to Children of Deceased Brothers and Sisters and Heirs of those Dying Childless — Time of Vesting—Period of Distribution—Ascertainment of Persons Entitled to Share—Divestment of Vested Estates.

Motion by the administrators (with the will annexed) of the estate of Thomas Dardis for an order determining the true con-

struction of the following clause of the will: "Fifthly, I will devise and bequeath that at my said wife's death or within two years thereafter my said real estate be sold by my executors surviving her and the proceeds of said sales be divided by my executors and paid by them to my brothers and sisters and children of any of said brothers or sisters as may have died, said children to receive portion that would have been due their parent or heirs of any brother or sister dying without children, hereby giving power to my said executors to convey any property so sold."

Thomas Dardis died in 1884, leaving him surviving three brothers and three sisters, and the five children of his sister Bridget Gormley, who predeceased him. His widow, to whom he gave a life estate in the lands of which he died seized, died in January, 1916—being predeceased by all the brothers and sisters of the testator. Ellen Dardis, one of the sisters, died without children, and willed her share of the estate to her Gormley nieces.

The motion was heard in the Weekly Court at Toronto.

I. Hilliard, K.C., for the administrators.

Arthur Flynn, for T. L. Dardis, Elizabeth Allen, and others.

G. W. Mason, for Agnes Gormley and others.

E. C. Cattanach, for Francis and Harry McNulty, infants.

Grayson Smith, for R. J. Slattery.

J. G. Harkness, for R. J. Dillon.

R. F. Lyle, for the children of James Allen, a deceased nephew.

MASTEN, J., in a written judgment, said that the intention of the testator was that after his wife's death the proceeds of his land should go to the Dardis family. The words "or heirs of any brother or sister dying without children" provided for the cases of his two unmarried brothers and one unmarried sister—their shares, if they died childless, were yet to remain in the family. There was nothing in the will to shew any intention to prefer one family of nephews and nieces to another or to exclude the Gormleys from the benefits of the clause. The Gormleys were entitled to share, and were in the same position as would have been the children of any brother or sister who might have died between the date of the will and the testator's death.

The will came within the class of cases illustrated by Loring v. Thomas (1861), 1 Dr. & Sm. 497, and other cases, the latest of which is In re Kirk (1915), 85 L.J. Ch. 182; and not within the line of cases beginning with Christopherson v. Naylor (1816), 1 Mer. 320.

As all the alternative gifts are declared and embraced in one

sentence, the sentence is to be treated as a whole, and not severed into parts; and the gift over to children and the gift over to heirs are direct alternative gifts, and not substitutionary. The term "brothers and sisters" indicates a whole class, embracing all brothers and sisters, both living and dead.

The remainders expectant on the termination of the widow's life estate vest at the earliest possible moment: Kirby v. Bangs (1900), 27 A.R. 17, 30, 31; Re Bauman (1916), ante 55. All the interests given by the will vested at the death of the testator. But the gift over to the "heirs of any brother or sister dying without children" was subject to be divested upon the death of any brother or sister without issue. While the testator's brothers Laurence and John and his sister Ellen took vested interests on his death, those interests, they dying childless, were divested in favour of their heirs, and became distributable among their heirs, who took, not by substitution, but as a direct alternative gift under the terms of the will. The will of Ellen was ineffective to pass any interest in the estate.

At the argument it was apparently assumed that the gift over to nephews and nieces was to be construed as if the will had read, "to my brothers and sisters and children of any who may have died *prior to the period of distribution.*" But it might be that the reference was to the period of vesting. Further argument, written or oral as may be arranged, is required upon this question.

MIDDLETON, J. JANUARY 19TH, 1917.

*RE WEST NISSOURI CONTINUATION SCHOOL.

Contempt of Court—School Trustees—Township Councillors—Continuation School—Failure to Obey Orders of Court—Obedience Tardily Yielded—Remedy under Rule 552—Costs.

Motion by certain ratepayers of the Township of West Nissouri to commit the trustees of the West Nissouri Continuation School for contempt of Court in disobeying a mandatory order made by MASTEN, J., directing them to discharge their duty by opening and carrying on the school; and a second motion was made to commit the members of the township council for contempt in disobeying an order requiring them to appoint members of the school board.

The motions were heard in the Weekly Court at Toronto.

W. R. Meredith, for the applicants.

Sir George C. Gibbons, K.C., and W. N. Tilley, K.C., for the respondents.

MIDDLETON, J., in a written judgment, said that certain members of the school board resigned, and their resignations were accepted by the township council, before this motion was made, but clearly in view of the impending trouble. These ex-members of the school board said, "You cannot punish us, for we cannot act." The township council appointed new members, but they would not accept office, and they said, "You cannot punish us, for we have not accepted office." Other members of the school board said, "We want to do our duty, but we are not a quorum." So, it was thought, a deadlock had been created, and the Court had been rendered powerless.

The learned Judge said that Rule 552 might have been applied, and the applicants placed in control of the situation and empowered to discharge all the duties of the defaulting board; but he had been reluctant to grant that extreme remedy.

An order having been made requiring the township council to appoint trustees qualified, competent, and ready to act, and that order having been affirmed (see ante 33, 197), the motions were allowed to stand; and the learned Judge was now told that trustees had been duly appointed and the school opened.

He declined to express any opinion of the misconduct of the trustees. The blindfolded goddess, he said, was never less attractive than when she forgot her true function and scolded like a termagant. Obedience had been yielded, though none too gracefully—obedience, and not vindictive punishment, was the end to be attained.

The applicants should have their costs as between solicitor and client of both motions—of the first, against the school board, to be paid out of the corporate funds; of the second, against the township corporation, to be paid out of township funds.

ANGUS v. MAITRE—BRITTON, J.—JAN. 16.

Deed—Conveyance of Land to Daughter—Action to Set aside—Absence of Fraud—Improvidence—Lack of Independent Advice—Bill of Sale—Lease—Rent—Mortgage—Interest.]—Action by Annie J. Angus and her husband William Angus to set aside a conveyance of land and a bill of sale of chattels made by her to her daughter, the defendant Mary J. Maitre, on the 20th July, 1915. The plaintiff Annie J. Angus had, on the 1st March, 1915, made a lease of the land to the defendants, her daughter and her daughter's husband, for five years, at the yearly rental of $300. Upon the land a farm-house and a cottage were built. The defendants took possession of the farm-house, and the plaintiffs went to live in the cottage. The plaintiffs alleged that the defendants fraudulently exercised their influence and control over the plaintiff Annie J. Angus and induced her to execute the deed and bill of sale. The plaintiffs asked for a declaration that the deed was fraudulent and that the chattels belonged to the plaintiff William. They also claimed payment of arrears of rent. The action was tried without a jury at Sandwich. BRITTON, J., in a written judgment, found that there was no fraud or fraudulent practice used by the defendants or either of them to induce the plaintiff Annie to execute the conveyance of the land. But the conveyance and bill of sale could not stand. They were prepared and executed without the plaintiff Annie getting or being tendered any independent advice; and the transaction was an improvident one for her—in lieu of the rent of $300 to which she was entitled under the lease, she was to get, under the conveyance, only $200 a year for her maintenance. Nothing need be said as to the ownership of the chattels, nor as to the rights of the parties under the lease, except this, that, if the defendants had paid on account of the mortgage upon the land anything over and above what they were liable for, that sum should be applied on rent; and if, in such application, money should be applied before due for rent, or in excess of the amount due for rent, the defendants should be allowed interest. Judgment setting aside the conveyance and bill of sale without costs. A. St. G. Ellis, for the plaintiffs. A. R. Bartlet and G. A. Urquhart, for the defendants.

KITCHEN v. MALCOLM—BRITTON, J.—JAN. 17.

Contract—Agreement to Supply Bye-product of Manufacture—Promise—Gift—Waiver.]—Action to recover damages for breach of an alleged agreement to supply the plaintiff with whey and buttermilk. The action was tried without a jury at Brantford. BRITTON, J., set out the facts in a written judgment, and said that the only agreement made was for a gift of such buttermilk and whey as was the bye-product of 500 tons of cheese and butter—that is, the whey and buttermilk produced at the defendant's cheese and butter factory. There was no obligation on the part of the defendant to continue the manufacture of cheese and butter and so continue to produce whey and buttermilk. If the plaintiff ever had any right to insist upon the fulfilment of the defendant's promise to supply him with whey and buttermilk, he (plaintiff) had waived his right. Action dismissed with costs. W. S. Brewster, K.C., for the plaintiff. M. A. Secord, K.C., for the defendant.

CAPITAL TRUST CORPORATION v. TESKEY—BRITTON, J.—JAN. 18.

Deed—Action by Administrators of Estate of Grantor to Set aside—Evidence—Mental Incapacity—Undue Influence—Lack of Independent Advice.]—Action by the administrators of the estate of Mary Teskey, deceased, to set aside a conveyance of land made by her to the defendant, her son, on the 15th March, 1916. The action was tried without a jury at Ottawa. BRITTON, J., in a written judgment, after stating the facts, said that he was satisfied that the deceased, at the time of making her mark to the paper, was not of sound mind; that the disease from which she suffered had made such inroads upon her reasoning powers and her judgment that she was not capable of understanding what was intended by the paper put before her and now asserted as a valid deed. She had not the advice of her own solicitor, and she had no independent advice. It was a fair inference from the evidence that the conveyance was obtained by the defendant, and that it was so obtained when the deceased was not capable of fully understanding the nature and effect of what she was signing. Judgment for the plaintiffs as prayed, with costs. E. P. Gleeson, for the plaintiffs. G. F. Henderson, K.C., for the defendant.

SMITH v. ONTARIO AND MINNESOTA POWER CO.—MASTEN, J., IN CHAMBERS—JAN. 19.

Costs—Taxation—Adjournment of Trial—Several Actions—One Motion to Adjourn—Copies of Affidavits—Rule 193—Costs Thrown away—Preparation for Trial—Correspondence—Counsel Fees—Discretion of Taxing Officer—Appeal—Witness Fees.]—Appeal by the defendants from the certificate of taxation by the local officer at Fort Frances of the plaintiffs' costs of the above and several other actions brought against the same defendants. MASTEN, J., in a written judgment, dealt with the objections to the taxation seriatim as follows:—(1) There was only one motion to adjourn—not four motions. Costs of one Chambers motion, begun before the Master and completed before LATCHFORD, J., in Chambers, should be allowed, and no more; counsel fee of $20. As to the costs thrown away in consequence of the adjournment, each action was to be treated separately and costs allowed accordingly. —(2) Objection as to copies of affidavits allowed—the local practice in Fort Frances cannot be taken to abrogate the express provisions of Rule 193.—(3) The costs of "preparation for trial" are not, in the circumstances, covered by any item in the tariff. The block item of $25 relates to costs of preparation where an action is actually tried. What the plaintiffs got under the order of LATCHFORD, J., were the costs thrown away by reason of the postponement. Some of the "preparation" will be of use when the cases are tried. Item reduced from $100 to $50.—(4) As to correspondence, the respondents being entitled to all costs thrown away by the postponement, it could not be said that $3 allowed in each case was not a proper allowance for the correspondence occasioned by the postponement. The fee on the Chambers motion included all profit costs for correspondence, but not disbursements for postage and telegrams.—(5) As to the counsel fee at the trial, the appeal should be dismissed. The discretion of the taxing officer on a matter of quantum only could not be interfered with.—(6) There should be allowed costs of one motion to adjourn, but separate bills were properly taxable for the ascertainment of the costs thrown away in each action.—(7) There should be no interference as to the allowance of witness fees.—Order referring the cases back to the local officer to revise the taxation in accordance with these directions. Costs of the appeal, fixed at $15, to the appellants—to be set off against the costs taxed to the respondents. Glyn Osler, for the appellants. F. Denton, K.C., for the respondents.

POWELL v. WEAVER—MIDDLETON, J.—JAN. 19.

Contract—Agreement to Pay Money and Deliver Bonds—Action to Enforce—Failure to Deliver Bonds—Money Damages Based on Par Value of Bonds—Form of Judgment—Claim over for Indemnity or Contribution—Third Parties.]—Action to recover $2,912.80 alleged to be due under an agreement, and damages for non-delivery of certain bonds pursuant to the agreement. The defendant claimed indemnity or contribution from two persons brought in as third parties. The action was tried without a jury at Kitchener. MIDDLETON, J., in a written judgment, said that at the hearing he found that the defendant was personally liable to the plaintiff upon the agreement, and there must be judgment for the plaintiff for the amount payable in cash. Part of the price was payable in bonds. If bonds can be delivered within 30 days, the plaintiff must accept them, as the contract provides; if they cannot be found, then damages must be awarded upon the footing of the bonds being worth par. The better form of judgment will be to award a present recovery for money, and to provide that, upon transfer and delivery of bonds within 30 days, there be satisfaction pro tanto of this recovery. The exact amount can probably be computed without difficulty by the Registrar if the parties cannot agree.—The defendant claimed to recover against the third parties, upon the ground that he acted as their agent. The defendant and third parties were interested together in a common venture, and, unfortunately for the defendant, he made the contract with the plaintiff, under which he assumed personal liability. The third parties carefully guarded themselves against any liability over and above the amount of their respective subscriptions. There was no agency, and no right of indemnity. The defendant expected the transaction to be carried out in a way that would free him from liability; he neglected to secure indemnity from any of his associates, and there was no implied obligation to indemnify him. The liability of the third parties was upon their subscriptions, and was limited to the amount subscribed and the terms of the subscription. The claim for indemnity (or contribution) therefore failed. T. A. Beament, for the plaintiff. R. McKay, K.C., for the defendant. H. E. Rose, K.C., for the third party Snider. J. M. Ferguson, for the third party Cronin.

HOE & CO. v. WILSON PUBLISHING CO. OF TORONTO—MIDDLETON, J.—JAN. 20.

Sale of Goods—Action for Price—Defence that Goods not Supplied in Accordance with Contract—Acceptance—Delay in Delivery—Interest—Counterclaim.]—Action for the price of certain printing machinery. Defence that the machinery was not supplied in accordance with the contract, and counterclaim for damages. The action and counterclaim were tried without a jury at Toronto. MIDDLETON, J., in a written judgment, said that the questions involved were entirely of fact. The plaintiffs must fail unless they had complied with the contract or the defendants had waived its provisions either by accepting the machinery delivered or by expressly agreeing to some variation in the contract. The goods were some stereotyping machinery and a printing press. There was one contract and one price for all. The stereotyping machinery was in accordance with the contract. The printing press was accepted by the defendants. It was used by the defendants in the ordinary course of business for the printing of their papers. This constituted acceptance; and the defendants could then rely only upon an abatement of price or damages if it did not comply with the contract. The press was not ready to run as soon as might have been reasonably expected. This was partly owing to delay acquiesced in—indeed requested—by the defendants, and in the endeavour by the plaintiffs to meet the somewhat exacting requirements of the defendants. Only a small sum had been paid on account of the price, and any damages by reason of delay would be compensated for by allowing interest from the 1st May, 1915, only. Judgment for the plaintiffs for $8,510 and interest from the 1st May, 1915, and costs. Counterclaim dismissed with costs. W. N. Tilley, K.C., and W. L. Scott, for the plaintiffs. Glyn Osler and R. C. H. Cassels, for the defendants.