The
Ontario Weekly Notes

VOL. VIII. TORONTO, JUNE 4, 1915. No. 12

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. MAY 27TH, 1915.

KOHLMEYER v. CANADIAN BARTLETT AUTOMOBILE CO. LIMITED.

Patent for Invention — Absence of Novelty and Usefulness — Adaptation of Principle Previously Discovered—Evidence —Infringement—Costs.

The plaintiff sued the defendants for invasion by them of his patent rights in respect of an alleged invention — suspended pneumatic rubber tires.

The defendants denied the validity of the plaintiff's patent, and also denied any infringement of it or of his rights under it, and asserted that that which was complained of by him was lawfully done by them under other patent rights, to the benefit of which they were entitled.

The action was tried without a jury at Toronto.

L. F. Heyd, K.C., for the plaintiff.

F. B. Fetherstonhaugh, K.C., and A. C. Heighington, for the defendants.

MEREDITH, C.J.C.P., said that the validity of both the plaintiff's and the defendants' patents was in question and must be investigated to some extent. The validity of a patent depends, in the first place, upon the question whether it really covers a new and useful invention—the invention must be really new, and must be substantially useful. That each patent in question here was based upon a useful principle was obvious. The principle of suspended pneumatic rubber tires was not new when the plaintiff obtained his patent, more than two years ago; and it was less new when the other patent was obtained, little more than a

year ago. All that either patentee could claim was a new and useful adaptation of that principle; and there was no strong evidence of that as to either patent. If the plaintiff's invention was patentable, every other of the several other ways, including the defendants', of applying the principle, must be patentable too. Though the defendants' method was not, as they contended, preferable to the plaintiff's, it was different.

Action dismissed; but, in the exercise of discretion in the matter of costs, dismissed without costs.

KELLY, J. MAY 27TH, 1915.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Judgment—Correction—Power of Court where Judgment as Issued does not Conform to Judgment as Pronounced—Judgment of Trial Judge—Affirmance with Variation on Appeal—Effect of, as Regards Power to Correct Original Judgment.

Motion by the plaintiffs for an order correcting the judgment of KELLY, J., after the trial of this action, as drawn up and issued, so as to conform to the judgment as pronounced. The judgment bore date the 25th October, 1913. The reasons are noted in 5 O.W.N. 183. The judgment was in the plaintiffs' favour, with a reference to the Master in Ordinary to calculate interest, etc. An appeal was taken to the Appellate Division, and the judgment, with one variation, was affirmed: see 6 O.W.N. 100. The reference then proceeded, and the Master calculated interest, compounded, on several items found in favour of the plaintiffs. An appeal by the defendant from the Master's report came before KELLY, J., who dismissed it: see 7 O.W.N. 684. From the order dismissing the appeal, the defendant appealed to the Appellate Division; and that appeal was pending and undisposed of when the present application was made.

A. B. Cunningham and J. J. Maclennan, for the plaintiffs.
A. J. Russell Snow, K.C., for the defendant.

KELLY, J., said that the judgment of the 25th October, 1913, in the form in which it was settled and issued, did not correctly

express the judgment which he pronounced, or which at the time he intended to pronounce.

Where the judgment as issued fails to express the judgment as pronounced it may be corrected: Laurie v. Lees (1881), 7 App. Cas. 19, 34; In re Swire (1885), 30 Ch.D. 239, 243, 245, 247; Hatton v. Harris, [1892] A.C. 547; Milson v. Carter, [1893] A.C. 638; Preston Banking Co. v. William Allsup & Sons, [1895] 1 Ch. 141, 143.

If the effect of the decision of the Appellate Division upon the appeal from the judgment now sought to be corrected is to declare that the interest chargeable against the defendant is to be computed by a different method and on a different principle from that which the learned Judge intended to apply when he pronounced judgment, it would be beyond his power—in fact it would be useless—now to attempt to amend the judgment. Had he the power to do so, he would now amend the judgment; but, as the judgment had been in review before the Appellate Court, he could not interfere.

Motion refused without costs.

CLUTE, J. MAY 27TH, 1915.

*BURROWS v. GRAND TRUNK R.W. CO.

Railway—Public Footway under Tracks in City—Dangerous Condition—Injury to Pedestrian—Liability of Railway Company—Dominion Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 241—*Liability of City Corporation Added as Party after Action Begun—Action Barred by Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 460 (2)—*Action Treated as Begun when Party Added—Damages—Expert Witnesses—Costs.*

Action against the railway company and the Corporation of the City of Guelph to recover damages for injuries sustained by the plaintiff by concrete falling upon him when he was passing under the railway tracks by a public covered foot subway, in the city.

The action was tried without a jury at Guelph.

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

G. H. Watson, K.C., and W. E. Buckingham, for the plaintiff.

Leighton McCarthy, K.C., and W. E. Foster, for the defendant railway company.

I. F. Hellmuth, K.C., and P. Kerwin, for the defendant city corporation.

CLUTE, J., said that the subway was made under the authority of an order of the Dominion Board of Railway Commissioners; and the footway was constructed by the railway company at the expense of the city corporation. The subway was in a dangerous condition at the time of the accident and for a long time previously, and both the defendants were aware of its dangerous condition.

The accident occurred on the 10th November, 1914; and the action was begun on the 17th December, 1914. The city corporation was added as a party on the 4th March, 1915, more than three months after the accident. As against the city corporation, the action was barred by sec. 460, sub-sec. 2, of the Municipal Act, R.S.O. 1914 ch. 192—the action being treated as brought against the city corporation at the date when it was added as a party, and not at the date of the issue of the writ of summons.

The railway company was liable under the Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 241.

The plaintiff's damages were assessed at $3,500.

Objection was taken by counsel for the railway company that more than three experts were called as witnesses by the plaintiff, without leave. As to this, the learned Judge said that only three of the professional witnesses called were regarded by him as experts.

There should be judgment against the railway company for $3,500 with costs; and, inasmuch as that company, in corresponding with the plaintiff's solicitors, took the ground that the city corporation was liable, it was reasonable and proper that the plaintiff should add the city corporation as a defendant; and the plaintiff was entitled to include his costs incident to the city corporation being a party in the costs recoverable against the railway company: Till v. Town of Oakville (1915), 33 O.L.R. 120; Besterman v. British Motor Cab Co., [1914] 3 K.B. 181. As the city corporation was negligent in not seeing that repairs were properly done on the subway, it was not entitled to costs—the action as against it should be dismissed without costs.

CLUTE, J., IN CHAMBERS. MAY 28TH, 1915.

RE INTERNATIONAL TRAP ROCK CO. LIMITED.

Company — Winding-up — Petition by Unsecured Creditors under Winding-up Act, R.S.C. 1906 *ch.* 144 — *Previous Assignment by Company for Benefit of Creditors —Sale of Assets Ordered by County Court Judge—Charge of Collusion—Discretion.*

Petition by creditors of the company for a winding-up order under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, and amending Acts.

The company was incorporated under the Ontario Companies Act, by letters patent issued on the 7th December, 1912.

On the 26th December, 1914, the company executed a general assignment, under the Ontario Assignments and Preferences Act, to one Stephenson, for the benefit of creditors. The statement of the assignee shewed liabilities amounting to $315,200 and assets of the nominal value of $500,000. The unsecured creditors' claims aggregated about $80,000.

The petitioners shewed that an action to remove the assignee had been commenced by a large creditor and shareholder of the company, and that in that action an interim injunction had been granted restraining the assignee from selling the assets. Collusion was charged.

J. A. Macintosh, for the petitioners.
T. H. Willison, for the company.
D. Inglis Grant, for the assignee.
P. T. Rowland, for certain creditors.
J. A. McPhail, for certain creditors and shareholders.

CLUTE, J., was of opinion that the unsecured creditors, who supported the petition, were entitled to test the truth of the allegations as to collusion and other matters and to preserve the assets until these matters could be fully inquired into; and it was in the interest of all parties that a winding-up order should be made.

There was a discretion to grant or refuse the order; and nothing decided in Re Strathy Wire Fence Co. (1904), 8 O.L.R. 186, or in other cases of the same class, prevented an order being made, although there was an assignment, and a sale of the assets had been directed by a County Court Judge.

Order made for the winding-up.

MEREDITH, C.J.C.P., IN CHAMBERS. MAY 29TH, 1915.

*AUGUSTINE AUTOMATIC ROTARY ENGINE CO. LIMITED v. SATURDAY NIGHT LIMITED.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Rule 507—Libel—Newspaper—Security for Costs—Dismissal of Action—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 12—Costs of Motion for Leave.

Motion by the plaintiff for leave to appeal to a Divisional Court from the order of MIDDLETON, J., ante 426, requiring the plaintiffs to give security for the defendants' costs of an action for libel—the alleged libellous publication being in the defendants' newspaper. The order of MIDDLETON, J., was made upon appeal from an order of the Master in Chambers refusing security for costs. By the order of MIDDLETON, J., the action was to be dismissed unless the security was given within a reasonable time.

W. J. Elliott, for the plaintiffs.
G. M. Clark, for the defendants.

MEREDITH, C.J.C.P., in a written opinion, discussed the provisions of Rule 507 and of sec. 12 of the Libel and Slander Act, R.S.O. 1914 ch. 71. He referred to Paladino v. Gustin (1897), 17 P.R. 553; Robinson v. Morris (1908), 15 O.L.R. 649; Stewart v. Royds (1904), 118 L.T.J. 176; and Robinson v. Mills (1909), 19 O.L.R. 162. He suggested that the order of Middleton, J., was perhaps an order finally disposing of the action, in which case, under clause (1) of Rule 507, there would be an appeal to a Divisional Court without leave; but, if leave was necessary, his opinion, for which he gave the grounds, was, that there was good reason to doubt the correctness of the order of Middleton, J., and that an appeal therefrom would involve matters of such importance that leave to appeal should be given: Rule 507 (3) (b). Such leave as he had power to give was accordingly given; and the costs of the motion were made costs in the action to the plaintiffs in any event.

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

RE MURRAY.

Will—Construction—Residuary Bequest—Income or Corpus—"The same"—"Blood Relatives"—Next of Kin.

Motion by the executor of Charles Stuart Murray, who died in 1913, for an order determining certain questions arising in the administration of the estate of the deceased as to the interpretation of portions of his will.

Clause 10 of the will was as follows: "All the rest residue and remainder of my estate, other than accident policy hereinafter referred to, I hereby give the income arising therefrom to my wife for life and after the death of my wife I give *the same* to such of the following persons as may be living at the time of my wife's death"—naming them. The question as to this was, whether the words "the same" referred to the residue of the estate or the income therefrom.

By clause 9, the testator bequeathed certain specific chattels to named persons, "and to such of my blood relatives as my wife may by writing appoint all and any other chattels not herein disposed of." As to this, the question was, who were included in the term "blood relatives"—no appointment having been made by the testator's wife, who died in February, 1915.

The motion was heard in the Weekly Court at Toronto.

A. E. Knox, for the executor.

M. H. Ludwig, K.C., for seven beneficiaries.

J. M. Godfrey, for four beneficiaries.

H. M. East, for Adelaide Gouinlock.

J. M. Langstaff, for Jeannette Hunt.

J. J. Kehoe, for J. P. Murray.

MEREDITH, C.J.C.P., said, with regard to clause 10, that literally the words "the same" referred to the income; but it was plain that the testator meant the whole of the property; and, if that was not so, the absolute gift of the income, after the wife's death, would carry with it a right at that time, to the property.

In regard to the 9th clause, the learned Chief Justice said that "blood relatives" meant no more than "relatives;" and "relatives" meant the persons who would, under the Statute of

Distributions, take the personal estate in case of an intestacy; and that they ordinarily take per capita: Tiffin v. Longman (1852), 15 Beav. 275; Eagles v. Le Breton (1873), L.R. 15 Eq. 148; Fielden v. Ashworth (1875), L.R. 20 Eq. 410; Re Cawthrope (1914), 6 O.W.N. 716.

The costs of the application are to be dealt with when a substantial question raised by the motion, but not yet argued, shall be disposed of.

RIMAND v. LINES—CLUTE, J.—MAY 25.

Contract—Condition not Expressed in Written Agreement—Oral Evidence of Condition—Inoperative Agreement—Principal and Agent—Sales of Land Made by Agent not Assented to by Principal—Commission.]—Action to recover commission or damages under an agreement of the 28th April, 1914, between the plaintiff and defendant, whereby the defendant, the owner of a block of land, agreed to subdivide the same, appointed the plaintiff the exclusive agent for the sale of the lots, and agreed to pay him a commission of 2 per cent. upon all sales that he might make of the said lots. The agreement did not state at what price the lots were to be sold. The action was tried without a jury at Toronto. The learned Judge finds that the writing evidencing the agreement was prepared by the plaintiff's solicitor, and that the agreement was subject to the condition that it was not to go into effect unless a certain prior sale agreement, which the defendant had assumed to cancel, was out of the way. It turned out that it was not out of the way. That condition should have been, but was not, embodied in the writing; and the defendant ought not to be bound by the terms of the agreement in disregard of the understanding upon which it was entered into; if the condition were disregarded, the agreement would operate as a fraud upon the defendant. The learned Judge also finds that no sales were in fact ever made by the plaintiff to which the defendant assented. The price not having been stated in the agreement, the defendant had a right to fix it; and he never did assent to the terms upon which the sales which the plaintiff said he had made were made. Action dismissed without costs. J. M. Laing, for the plaintiff. J. W. Bain, K.C., for the defendant.

BANK OF TORONTO v. HALL—BRITTON, J.—MAY 25.

Promissory Note — Application of Payments — Renewal — Waiver—Guaranty — Misrepresentation — Findings of Fact of Trial Judge.]—Action to recover $1,300, the amount of a promissory note made by the defendant Hall and endorsed by the defendant Bennett, and to recover $2,500, the amount of the indebtedness of Hall to the plaintiffs, guaranteed by Bennett by a written instrument. Hall made no defence, and judgment by default was signed against him. Bennett defended, setting up that he did not know, when signing the guaranty sued upon, what the real effect of the document was. The action was tried without a jury at Cobourg. BRITTON, J., said that the allegations of the defendant Bennett amounted to a charge of a fraudulent misrepresentation by the manager of the plaintiffs' bank at Port Hope, whereby Bennett was induced to sign a document now produced as a guaranty which Bennett did not understand to be a guaranty. The learned Judge was unable to find that this defence had been made out. The defence as to the note sued upon was, that it was to be taken care of by the plaintiffs out of the money which would pass through the plaintiffs' hands going to the credit of the defendant Hall from contracts executed by him, and that the plaintiffs failed to apply upon the note the moneys so received. The learned Judge finds that there was no fraud, and that Bennett, by renewing the note, must be deemed to have waived his right to complain of any misapplication prior to renewal. Judgment for the plaintiffs for the amounts of the note and guaranty, with interest, amounting in all to $3,986.62, with costs. M. K. Cowan, K.C., for the plaintiffs. F. M. Field, K.C., for the defendant Bennett.

HUME v. MCCARTHY—LENNOX, J.—MAY 26.

Dentistry—Charge for Services—Counterclaim for Malpractice — Evidence — Onus — Findings of Fact of Trial Judge.]—Action by a dentist to recover a sum alleged to be due for dentistry work done for the defendant's daughter. Counterclaim by the defendant for malpractice. The learned Judge, who tried the action without a jury, said that he entertained no doubt as to the defendant's entire good faith in resisting the plaintiff's claim and claiming damages against him. If the alleged malpractice had been established, and with the result complained of, the refusal to pay the balance of the account and the claim of

$5,000 damages would both be eminently reasonable and proper. The law, however, cast upon the defendant, to maintain his counterclaim, the onus of establishing that the plaintiff was negligent or unskilful or both in the professional duties he undertook to perform, and that the conditions complained of were the result—and emphatically the last. The evidence did not satisfy the learned Judge as to either of these points. It was not contended that the services rendered as a mere matter of mechanical dentistry, and as touching the defective formation of the teeth or mouth, were not satisfactory and successful; and, on the contrary, the evidence preponderated in favour of the plaintiff's assertion that the work was carefully and well and skilfully executed. Judgment for the plaintiff for $50, and dismissing the counterclaim, with costs of action and counterclaim to the plaintiff. George Wilkie, for the plaintiff. W. N. Tilley, for the defendant.

MILLER v. BUCHAN—LENNOX, J.—MAY 26.

Mortgage—Estate Passing — Estoppel — Charge on Land — Sale—Equitable Relief.]—A mortgage action, tried without a jury at Woodstock. The learned Judge said that the plaintiff had made out a case entitling her to relief against the defendant George R. Buchan to the extent claimed. Further than this the Court could not go, as this defendant did not appear and was not represented at the trial. The mortgage was read over to this defendant, he was paid the purchase-money, and became the attesting witness to the mortgage; he was clearly estopped from asserting that the mortgagee took as security any estate other than the estate in fee simple in the mortgage recited. The plaintiff was entitled to judgment declaring that she had a lien and charge upon the lands in question for the $275 of mortgage-moneys remaining unpaid, with interest upon this sum from the 18th October, 1912, at 6 per cent., and that these lands were liable for the payment of this money; and the judgment could be registered in the proper registry office. The plaintiff was entitled also to the costs of the action against this defendant. Although, in the state of the action, a sale of the lands could not be ordered, that could probably be worked out upon notice to the said defendant and an application to the Court under the Rules. It was a matter of regret that nothing could be done for the other defendants, the executors, or the persons they represented—even

the payment to them of the costs they had incurred could not be directed. The learned Judge suggested, however, that before the entry of judgment the counsel might devise some plan to prevent the said defendant George R. Buchan's sisters from losing the money they paid out upon the mortgage, while they were wholly ignorant of the state of the title. It would be a cruel thing if they were not only not to benefit, but actually to lose, by their father's will. F. L. Pearson, for the plaintiff. P. McDonald, for the defendants.

RICHMAN v. BRANDON—SUTHERLAND, J.—MAY 28.

Partnership — Contribution of Capital — Construction of Written Agreements—Evidence to Vary.]—Appeal by the plaintiff from the ruling of the Master in Ordinary, in the course of a reference for the winding-up and taking of the accounts of a partnership, that the effect of the written agreements between the partners was that each was to contribute capital in equal shares, and that the plaintiff was not at liberty to adduce oral testimony to contradict the writings. There were two writings. The first did not explicitly state that the contribution of capital by both partners was to be the same, but it provided for "a mutual investment not to exceed $2,500." Held, that this meant an investment of capital towards which each was to subscribe an equal portion. In the second writing there was nothing about capital or investment; it provided for a variation or extension of the business. In each agreement there was a provision for dividing the profits equally. Held, that the first writing contained the whole bargain on the subject, and the ruling of the Master was right: Wigmore on Evidence, Can. ed. (1905), vol. 4, para. 2430 (3), p. 3427. Appeal dismissed with costs. G. H. Hopkins, K.C., for the plaintiff. W. Laidlaw, K.C., for the defendant.

RE HUNT AND BELL—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MAY 29.

Appeal—Failure to Set down in Time—Order Extending Time—Special Circumstances.]—Motion by the vendor to extend the time for appealing from the order of MIDDLETON, J., ante 424, to a Divisional Court. The Chief Justice said that

he had conferred with MIDDLETON, J., who thought that, as a nice question of law was involved, and the effect of his decision was seriously to impair the title to a valuable property, the time for appealing ought to be extended. The Chief Justice, being of the same opinion, made an order extending the time; the appeal to be set down at once; and costs of the application to be disposed of by the Court which shall hear the appeal. Merritt A. Brown, for the vendor. J. H. Bone, for the purchaser.

COUNTY COURT OF THE COUNTY OF HALTON.

ELLIOTT, CO.C.J., IN CHAMBERS. APRIL 23RD, 1915.

TWISS v. CURRY.

Assault—Civil Action for—Previous Conviction by Justice of the Peace Pleaded in Bar—Criminal Code, sec. 734—Jurisdiction of Justices—Information under sec. 295—Conviction for Common Assault—Secs. 732, 733, 734, 785, 791, 792 of Code.

In an action for damages for an assault by the defendant occasioning severe physical injuries to the plaintiff, the defendant, besides other defences, set up, in paras. 4, 5, 6, and 7 of his statement of defence, that an information was laid against him by the plaintiff for the same assault, upon which he was convicted by two Justices of the Peace of a common assault, and fined $20 and costs, which he paid; and he claimed the benefit of sec. 734 of the Criminal Code as a bar to the action.

The plaintiff moved to strike out these paragraphs as improper, embarrassing, and irrelevant.

It appeared that the information was laid under sec. 295 of the Code, charging the assault and that it occasioned actual bodily harm to the plaintiff. The information was not amended.

The motion was heard by the County Court Judge in Chambers.

J. A. E. Braden, for the plaintiff.

W. I. Dick, for the defendant.

ELLIOTT, Co.C.J., said that both parties consented to his disposing of the motion in Chambers, on the admitted facts. After referring to Nevills v. Ballard (1897), 28 O.R. 588; Clarke v. Rutherford (1901), 2 O.L.R. 206; Hardigan v. Graham (1897), 1 Can. Crim. Cas. 437; Larin v. Boyd (1904), 11 Can. Crim. Cas. 74; and Miller v. Lea (1898), 25 A.R. 428; he said that, in his view, secs. 732, 733, and 734 of the Code did not apply; that the magistrates had no jurisdiction to try the defendant summarily upon the information as laid; that the procedure indicated by sec. 785 should have been followed; that, although the consent of the defendant was obtained to a summary disposition of the charge, it was irregular, because not obtained at the beginning of the trial; that the magistrates had no authority to make a conviction for common assault; that, with the consent of all parties, the information might have been amended so as to charge the lesser offence, but this was not done; that secs. 791 and 792 applied to this case, and the effect was that the defendant was released from further criminal proceedings for the same cause, but not from civil proceedings, as would have been the case if secs. 732, 733, and 734 had been applicable.

Order made striking out the paragraphs complained of; costs to be costs in the cause to the plaintiff.

CORRECTION.

In TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & CO. LIMITED, ante 409, the appeal was from the judgment of MIDDLETON, J.