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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 14TH, 1919.

ATLANTIC FRUIT CO. v. OKE.

Sale of Goods—Shipment of Car-load of Fresh Fruit from Distant Place—Delivery f.o.b. at Place of Shipment—Delay of Carriers and Neglect to Ice Car—Fruit Arriving in Overripe Condition—Loss upon Resale by Purchaser—Attempt to Make Vendor Responsible—No Neglect Shewn—No Implied Warranty or Condition—Risk of Transit—Evidence—Correspondence—Invoice—Terms of Sale—Express Exemption of Vendor—Liability of Carriers.

An appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Peterborough dismissing an action for the balance of the price of a car-load of bananas shipped by the plaintiffs to the defendant.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

F. D. Kerr, for the appellants.

G. N. Gordon, for the defendant, respondent.

MEREDITH, C.J.C.P., giving the judgment of the Court, said that the defendant was a wholesale dealer in fruit, carrying on business at Peterborough, Ontario; and the plaintiffs were large dealers in the like goods, carrying on business in Baltimore, Maryland.

The parties had dealt with each other in the purchase by the defendant and sale by the plaintiffs of such goods to a considerable extent before the transaction in question took place; and both were quite familiar with the course of business in, and the nature and incidents of, the trade.

The transaction in question was a purchase by the defendant from the plaintiffs of a car-load of bananas at Baltimore, the delivery of the goods to be f.o.b. at Baltimore.

The goods were so delivered in good condition, and were delivered to the competent carriers, with all the care and precaution usually taken and necessary in such cases.

In the ordinary course of carriage the goods should have reached the defendant in good marketable condition; but something unusual happened: the goods were delayed by the carriers, and, according to the evidence, they neglected "to ice" the car, in order to retard ripening of the fruit too rapidly for the Peterborough market: the result was that the fruit arrived in too ripe a condition for marketing purposes, though in better condition for immediate consumption. The defendant was consequently obliged to sell it at once at a considerable loss; and contended that the loss should fall on the plaintiffs.

The sale was f.o.b. Baltimore; and the bill of lading was at once sent on in the usual way to, and received by, the defendant; and so plainly the property in the goods, and, in usual course, the possession of them also, passed to the defendant: if, therefore, he could have any claim against the plaintiffs by reason of the condition in which the goods reached Peterborough, it must be by reason of some implied warranty or condition. But why should any such warranty or condition be imputed in the circumstances of this case?

There was no neglect on the plaintiffs' part of any precaution which is usually taken in the shipping of such goods; and they were goods which ordinarily should, in such a case, arrive in marketable condition without any unusual care. But something unusual happened while the goods were the defendant's, out of the control of the plaintiffs, something which, if the facts really were as they now appeared to be, gave the defendant a right of action against the carriers.

But it was said that things which happened subsequent to the arrival of the goods shewed that the plaintiffs were to bear the risks of the transit; and, standing alone, the correspondence immediately following that event might well prove that; but the evidence made it plain that the intervention of the plaintiffs was only for the purpose of assisting their customer, according to their common practice, in recovering his loss from the carriers; it being considered that they, being such large customers of the carriers, were better able than their own customers to obtain a satisfactory settlement of such claims.

And all this was made very plain by the later correspondence, in which the defendant demanded a return of his bill of lading so that he might make his own claim against the carriers, and by the

fact that he did make it as owner of the goods for the whole loss sustained by the unmarketable (for wholesale purposes) condition of the fruit when it was received by him.

In this action, taken by him and maintained for months against the carriers, the defendant sustained that view of the case which the Court now deemed to be the right one: that is, that he should look to the carriers for his loss. He did not seem to have receded from it until the plaintiffs' claim for the price of the goods was pressed.

Besides all this, the invoice of the goods, according to the course of trade between the parties, expressly exempted the sellers from liability for loss such as that which is the basis of this action. That particular invoice did not come to the defendant's hands until after the purchase of the goods, but others had; and he must have known that, in regard to goods shipped as these were, that was one of the sellers' terms of such a sale as that in question. In the face of such an expressed term, an implied term, the opposite of it, was out of the question.

The appeal should be allowed, and judgment should be entered for the plaintiffs for the amount of their claim.

SECOND DIVISIONAL COURT. APRIL 15TH, 1919.

SETTERINGTON v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY.

Street Railway—Injury to Passenger Alighting from Moving Car—Negligence of Servants of Railway Company Operating Car—Overcrowding—Exit-door Left Open—Absence of Contributory Negligence—Findings of Jury.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex., upon the findings of a jury, in favour of the plaintiff, for the recovery of $500 damages.

The plaintiff was a passenger in a car of the defendants, from which she attempted to alight while it was in motion; she fell and sustained the injury of which she complained. She alleged negligence on the part of the servants of the defendants operating the car.

The jury found that the defendants were guilty of negligence, which consisted "of an open door while the car was still in motion," and that there was no contributory negligence on the part of the plaintiff; they assessed her damages at $1,500.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Peter White, K.C., for the appellants.

F. W. Wilson, for the plaintiffs, respondent.

MEREDITH, C.J.C.P., giving the judgment of the Court at the conclusion of the argument, said that this case was one essentially for the jury. It was fairly and fully tried: it went to the jury upon a charge not objected to on either side; and the jury found unequivocally in favour of the plaintiff, and assessed damages at a sum not said to be unreasonable by any one.

A verdict so found ought to stand: no appeal lay against it; the Court could interfere with it only if it were such an one as reasonable men could not find. It was anything but that. The car upon which the woman was a passenger was crowded: approaching the place where she desired to alight, she gave the proper signal to those in control of the car to stop—pressed the electric bell button—and at the proper time began to work her way, through the crowd, to the going-out door of the car, to alight. The driver of the car had accepted and was acting upon her signal to stop; and then the conductor in charge of the car, seeing her, called out to those who were blocking her way to make way for her so that she might "get off." Having made her way to the proper door, and finding it open, she stepped off and was thrown down and hurt, because, at the moment, the car was moving—it had almost, but not quite, stopped. Her way was impeded by other passengers even to the last step before alighting; and all this, as well as all the woman did, was done near to, and under the eyes of, the conductor; and so all that she did was apparently done with his approval. The door of the car ought to have been closed until the car had stopped; the car was one of that kind known as "pay-as-you-enter" cars, which are opened and closed ordinarily by the conductor from his place within the car; but on this occasion the door had not been closed while the car was in motion, only because the car was so overcrowded that the door could not be closed; one man at least was standing on the last step when the woman worked her way through the crowd and stepped off; but no one, either conductor or passenger, did or said anything to prevent her, or warn her against, stepping off. So that what she did could hardly have seemed imprudent to her or to any one there. In all these circumstances, if reasonable men could not find that the proximate cause of the woman's injury was a neglect on the defendants' part of the duty they owed to her as a passenger, then the Chief Justice himself must be counted among the unreasonable. The overcrowding was a breach of the defendants' duty and contract; the open door and

the call to make way for the woman to get off the car were breaches of that duty and contract, unless some means were taken to warn her, or stay her going-out until the car had stopped. The defendants could not reasonably expect any one whom they put in the position of having to work a way through a crowded passage, in going out, to be able to take as much care in alighting as if the way were clear, and body and mind not engaged in a struggle to pass through the crowd. The circumstances well warranted the jury's finding that the woman was not guilty of contributory negligence: they would have been more justified in finding the conductor, and those who saw her going to step off, guilty of negligence in doing nothing to prevent her, seeing the difficulties she was in through the defendants' fault.

The jury's finding as to the nature of the defendants' negligence was not literally as wide as it might have been; but it must be read together with the evidence and charge, and must mean that, in all the circumstances of the case, the open door was an intimation by the defendants to the plaintiff that it was proper for her to alight at the time when she stepped off the car. Boarding and alighting must be done with some celerity; deliberation and discussion are out of place; and would properly be resented by passengers as well as crew.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. APRIL 15TH, 1919.

RE CANADA FURNITURE MANUFACTURERS LIMITED v. LEVINE.

Division Courts — Jurisdiction — Amount of Claim — Action for Balance of Unsettled Account — Abandonment in Particulars of Claim of Excess over $100 — Division Courts Act, R.S.O. 1914 ch. 63, sec. 62 (1) (c), (d) (iii.).

An appeal by the defendant Max Levine from an order of SUTHERLAND, J., in Chambers, dismissing a motion by the appellant for prohibition to the Eighth Division Court of the County of Bruce.

The claim of the plaintiffs in the Division Court was for the amount of an account, $244.45, less certain credits, leaving a balance of $119.08, from which the plaintiffs, in the particulars of their claim annexed to the summons, deducted $19.08, "by

allowance off," thus further reducing their claim to $100, so as to bring it within the jurisdiction of a Division Court.

The motion for prohibition was based on want of jurisdiction in the Division Court, and one of the grounds stated by the appellant in an affidavit was, "that the particulars of claim in said suit set forth the amount of claim as $244.45, and I am advised by counsel there is no sufficient abandonment by the plaintiffs to bring this action within the jurisdiction of the said Division Court."

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. H. Fraser, for the appellant.

H. H. Davis, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs, being of opinion that none of the grounds urged were sustainable.

Upon the question of abandonment, it was argued for the appellant that a plaintiff could not give a Division Court jurisdiction by abandoning the excess over $100 except in cases coming under sec. 62 (1) (*d*) (iii.) of the Division Courts Act, R.S.O. 1914 ch. 63.

The claim in this case came under sec. 62 (1) (*c*), which declares that a Division Court shall have jurisdiction in "an action on a claim or demand of debt, account or breach of contract, or covenant, or money demand . . . where the amount or balance claimed does not exceed $100; provided that in the case of an unsettled account the whole account does not exceed $600."

Clause (*d*) of sec. 62 (1) gives jurisdiction up to $200 in respect of certain claims where the amount is ascertained by the signature of the defendant, one being—"(iii.) The balance of an amount so ascertained which did not exceed $400 and the plaintiff abandons the excess over $200."

The Court held, that the plaintiffs' claim for $100 was within the jurisdiction of the Division Court: there was no reason why they should not abandon the excess, although there was no express provision in clause (*c*) such as that in clause (*d*).

SECOND DIVISIONAL COURT. APRIL 17TH, 1919.

*READ v. WHITNEY.

Mechanics' Liens—Claim of Assistant Architect Employed by Architect—Superintendence of Building—Drawing Plans—"Work and Service"—Mechanics and Wage-Earners Lien Act, sec. 6—Contractor—Sub-contractor—Sec. 2 (a), (f)—Payment on Account Made by Architect to Assistant—Appropriation to Item not Chargeable upon Land.

Appeal by the defendant Whitney from the judgment of the Assistant Master in Ordinary in favour of the plaintiff in an action to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

J. H. Cooke, for the appellant.

J. M. Ferguson, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that the defendant, a theatre proprietor, desiring to rebuild a theatre building in Toronto, employed the defendant Crane, an architect of Detroit, to draw the plans, supervise the construction, etc., for 5 per cent. of the cost. The plaintiff, a Toronto architect, was, according to the usual (if not universal) custom, employed by Crane to superintend the building and act as assistant architect, the remuneration being fixed at $1,500 if the building cost $125,000, and 1½ per cent. of any excess cost.

The defendant Whitney and his manager knew that the plaintiff was so superintending the building etc. (at least in part) and knew that he was employed by Crane for that purpose.

A change being determined on in the front of the theatre, so that it would be two storeys instead of one, the plaintiff was instructed by Crane to draw the plans for the change. He did so, and these plans were used.

The building cost at least $133,000. The plaintiff rendered his bill for $1,500
1½ per cent. of excess 120
Plans 200
Travelling expenses to Detroit 20

$1,840
The defendant Crane paid on account 500

Leaving unpaid $1,340

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

Crane not paying the plaintiff, he filed a claim for a lien for $1,340. The Assistant Master in Ordinary allowed the claim, and the defendant appeals.

By sec. 6 of the Act it is provided that "any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting . . . or repairing of any erection, building . . . shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building . . . limited however" as in the said section set out.

The question was whether this could include the plaintiff's claim.

The learned Judge referred to Arnoldi v. Gouin (1875), 22 Gr. 314, which he thought well decided. Whatever doubt there might have been had the language of the statute remained unchanged must disappear when all pretext for applying the ejusdem generis doctrine has disappeared; and, moreover, the words are now "work or service." There was no reason why superintending the building was any less "service upon" the building than carrying bricks and mortar to the bricklayers.

The work and services of the plaintiff, then, were such as the Act contemplated.

Crane was a "contractor" under sec. 2 (*a*), contracting with the defendant for the "doing of work or service;" and the plaintiff was a "sub-contractor" under sec. 2 (*f*), "employed by" Crane, "a contractor;" and there was no reason why the plaintiff should not have a lien limited as set out in secs. 6 and 10.

As to the item of $20, expenses of trip to Detroit, it was difficult to make such a trip come under "service upon . . . a building;" and, while the plaintiff had a just claim against Crane for this sum, he could not claim it against Whitney.

But, when Crane paid the sum of $500 on the account generally, without specific appropriation, the plaintiff had the right to apply the sum on any of the claims made; he applied it to pay the $20 (as well as the $200), and he had the right to do so.

The appeal should be dismissed.

BRITTON and LATCHFORD, JJ., agreed with RIDDELL, J.

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

Appeal dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J. APRIL 7TH, 1919.

CROW v. CROW.

Deed—Conveyance of Land—Description—Falsa Demonstratio—Intention of Grantor—Evidence—Costs.

Action by Daniel W. Crow against his son George T. Crow and the infant sons of George T. Crow to have it declared that a deed from the plaintiff to the defendants, dated the 21st April, 1915, conveyed no part of or interest in lot 4 in the 3rd concession by the western boundary of the township at Raleigh and no interest that the plaintiff had at the time of the making of the deed in that part of the allowance for road lying or running between lot 4 in the 2nd and lot 4 in the 3rd concession of the said township, or, in the alternative, for reformation of the deed.

The action was tried without a jury at Chatham.

O. L. Lewis, K.C., and W. G. Richards, for the plaintiff.

A. Clark, for the defendant George T. Crow.

S. B. Arnold, for the Official Guardian, representing the infant defendants.

LENNOX, J., in a written judgment, said that the property and rights conveyed or purporting to be conveyed by the deed were described as, "all and singular that certain parcel or tract of land and premises situate lying and being in the township of Raleigh . . . and being composed of the north-east half of lot 4 in the 2nd or front concession by the river Thames in the said township . . . containing 100 acres more or less." The deed was made "in pursuance of the Short Forms of Conveyances Act," and "subject to the reservations limitations provisoes and conditions expressed in the original grant thereof from the Crown." It was a deed of gift, expressed to be in consideration of natural love and affection and the sum of $10, and was made and registered voluntarily by the grantor without any communication with the grantees. The land in the 2nd concession was only about 64 acres.

It was substantially accurate to say that at the time he executed the deed the plaintiff owned the north-easterly half of lot 4 in the 2nd and 3rd concessions. It was contended that the deed passed land in the 3rd concession because the plaintiff owned land in that concession, and because of the words "containing 100 acres more or less" in the deed.

The learned Judge was of opinion that the specification of quantity added nothing to the deed, and in no way controlled or affected the definite description by lot, locality, and concession.

Reference to Stone v. Corporation of Yeovil (1876), 1 C.P.D. 691, 701.

Having reference to the subject-matter, no sensible meaning could be attached to the additional words—they were repugnant to an already unmistakable description. The deed must be construed not only according to the ordinary grammatical meaning of the language used, but also with reference to the subject-matter: Thames and Mersey Marine Insurance Co. v. Hamilton Fraser & Co. (1887), 12 App. Cas. 484; Lion Mutual Marine Association v. Tucker (1883), 12 Q.B.D. 176; Watson v. Toronto Harbour Commissioners (1918), 42 O.L.R. 65; and other cases.

As a matter of interpretation, the learned Judge was clearly of opinion that the secondary description contained in the deed, "containing 100 acres more or less," must be rejected as falsa demonstratio, and the deed must be read as if those words were not there.

The learned Judge considered with great care the evidence bearing on the intention of the grantor and generally on the merits, and found the facts against the contentions of the defendants.

Judgment declaring that the plaintiff intended to convey only the part of lot 4 in the 2nd concession, and that no part of the lot in the 3rd concession was conveyed or passed, and for payment by the plaintiff of the infants' costs, fixed at $100, with the right to the Official Guardian, if he prefers it, of a taxation on a solicitor and client basis, and for payment by the defendant George T. Crow to the plaintiff of the plaintiff's costs of the action, including costs occasioned by joining the infants, but not the costs payable to the Official Guardian.

CLUTE, J., IN CHAMBERS. APRIL 7TH, 1919.

REX v. POWNELL.

REX v. POWNELL, LEDUC, AND TOWNS.

Ontario Temperance Act—Magistrate's Convictions for Offences against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling-house—Evidence.

Motions by the defendants to quash convictions by a magistrate for offences against sec. 41 of the Ontario Temperance Act, the charges against the defendants being that they had intoxi-

cating liquor in their possession, in a place or places other than their private dwelling-houses, contrary to that section.

The motion was heard at the Weekly Court, Ottawa.

A. E. Fripp, K.C., for the defendants.

No one appeared for the magistrate or for the prosecutor.

CLUTE, J., in a written judgment, said that the motions were made upon the ground that there was no evidence to support the convictions.

There was sufficient evidence to support the charge in the first case against Pownell. A perusal of the evidence clearly supported this view. The motion in the first case should be dismissed with costs.

It was suggested as a further ground that the magistrate, after hearing the evidence in the first case, did not conclude the case, but proceeded with the second case against the three accused. A letter from the magistrate stated that he first heard the case against Charles Pownell, and found him guilty, and, having pronounced sentence, he proceeded with the case against the three defendants.

The case against the three presented more difficulty. Detectives were employed in Montreal to prevent the conveyance of large quantities of liquor from Montreal to North Bay for illegal purposes. A quantity of liquor was bought by the detectives and enclosed in tin cans, similar to those containing maple syrup, and also a quantity of bottles of liquor. These cans and bottles were shipped from Montreal to North Bay in a locked trunk. The baggage-man in charge of the train from Montreal to Ottawa was not called as a witness, but the baggage-man from Ottawa to North Bay was the defendant Towns. The other two were trainmen. All of the three had access to the baggage-car. The trunk was delivered to the baggage-man at North Bay. Wilson, one of the detectives, saw the packing in Montreal, and had the cans and bottles marked. The trunk was duly checked in Montreal, and the next time Wilson saw it was when it was taken off the train at North Bay. Wilson opened the trunk and found it had been pilfered, and that the cans and bottles were gone; that was 15 or 20 minutes after it was taken off the train. The baggage-check was on it—just the liquor was taken.

The point of difficulty was, whether there was sufficient evidence to connect the three defendants with the taking of the liquor from the trunk and having it in their possession as charged. The cans of liquor that had been placed in the trunk were found shortly after the liquor was missed in the baggage-room in the station, and Pownell was seen removing some cans from off his

kit-box and placing them at one side in the baggage-room. If the liquor had not been found in the baggage-room at North Bay, that fact would support the suggestion that it might have been removed from the trunk during the transit from Montreal to Ottawa when the baggage-man Towns was in charge. How the liquor was transferred from the car to the baggage-room at North Bay did not appear. It was not brought home to Towns that he was in possession of the liquor either during transit or after its arrival in North Bay, however suspicious the circumstances might be. Pownell was seen handling a part of the liquor. The evidence was not fully taken down. It might be that there was sufficient evidence given to justify the conviction, but it did not now appear in the transcript except as to Leduc. The evidence, though not strong, was sufficient to shew Pownell's possession of part of the liquor. With respect to him, the second conviction should be affirmed, but quashed as to Towns and Leduc.

The officers should be protected so far as the learned Judge had power to protect them. It was not a case for costs.

CLUTE, J. APRIL 7TH, 1919.

HORROCKS v. SIGNAL MOTOR TRUCK CO. OF CANADA LIMITED.

Sale of Goods—Contract for Sale of Motor-truck—Action by Purchasers to Rescind on the Ground of Fraud and Misrepresentation—Evidence—Findings of Fact of Trial Judge—Truck not as Represented—Failure to Prove Fraud—Assignment of Contract by Vendors—Assignees not Made Parties to Action—Failure of Claim for Rescission—Amendment of Statement of Claim—Implied Warranty of Fitness—Sale by Description—Condition Treated as Warranty—Breach—Damages—Costs.

Action by Stephen Horrocks and Fred E. Wilson, carters, and their surety, Ernest Alfred Wilson, against the company, dealers in motor-trucks, to rescind a contract for the purchase of a motor-truck by the plaintiffs Horrocks and Wilson from the defendants, and for the cancellation of certain promissory notes made by the plaintiffs for the price of the truck, on the ground that the plaintiffs were induced by the defendants' misrepresentation and fraud to enter into the contract. The plaintiffs (by amendment) claimed also upon a guaranty or warranty.

The action was tried without a jury at a Toronto sittings.

B. N. Davis, for the plaintiffs.

Frank Denton, K.C., for the defendants.

CLUTE, J., in a written judgment, after setting out the facts, found that the plaintiffs purchased the truck for a 1½ ton truck, manufactured in 1914; that the truck was not what the defendants represented it to be in that regard; that the defendants knew what the truck was required for, and sold it to meet the plaintiffs' requirements of a 1½ truck, 1914, in perfect running order; that the truck was not in perfect running order, and was not fit for the purpose for which it was bought and sold; and that the plaintiffs did not buy the truck upon their own inspection or that made on their behalf by an expert.

The defendants were in possession of the truck, having seized it under their lien.

The learned Judge was unable to find that the defendants were guilty of fraud in the false representations which they made, although they were made carelessly and without knowledge of the facts.

The contract could not be cancelled or set aside, it having been assigned, and the assignees not being parties.

But it was clear upon the facts that, as between the plaintiffs and defendants, there was an implied warranty that the truck was fit for the purpose for which it was sold. It was not fit for that purpose, there was a breach of warranty, and the loss to the plaintiffs (the defendants having repossessed the truck and the property not having passed) was the full amount of the purchase-price, $1,100.

Reference to Bristol Tramways etc. Carriage Co. Limited v. Fiat Motors Limited, [1910] 1 K.B. 831; Canadian Gas Power and Launches Limited v. Orr Brothers Limited (1911), 23 O.L.R. 616; Alabastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited (1914), 30 O.L.R. 394; Randall v. Sawyer-Massey Co. Limited (1918), 43 O.L.R. 602.

The plaintiffs were also entitled to succeed upon the principle recognised in Wallis Sons & Wells v. Pratt & Haynes, [1910] 2 K.B. 1003, [1911] A.C. 394, referred to and applied in the Alabastine case, supra, viz., that, if a man agrees to sell something of a particular description, he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it, and the buyer may treat the breach of the condition as if it was a breach of warranty.

The plaintiffs were entitled to recover from the defendants the full purchase-price, $1,100, with interest. If, however, the de-

fendants were willing to return the notes to the plaintiffs, the amount of the note or notes so returned should be credited upon the amount of the damages assessed. The defendants should have 15 days within which to elect to return or not return the notes.

Inasmuch as the plaintiffs made express charges of fraud, not proven, and did not in the original statement of claim seek to recover upon the ground upon which they eventually succeeded, there should be no order as to costs.

CLUTE, J. APRIL 9TH, 1919.

*JOHNSTON v. BRANDON.

Partnership—Solicitors—Misappropriation by Solicitor of Funds of Client—Liability of Ostensible Partner—Holding out—Client not Dealing or Relying upon Credit of Ostensible Partner—Costs.

Action to recover $5,332.23, moneys alleged to have been collected by the firm of Ogilvie & Brandon, solicitors, on account of the plaintiff.

Brandon, who alone was sued, denied that he was in fact a partner of Ogilvie, although his name appeared in the firm.

The action was tried without a jury at Hamilton.

T. R. J. Wray, for the plaintiff.

W. S. MacBrayne, for the defendant.

CLUTE, J., in a written judgment, after stating the facts, said that the plaintiff had the utmost confidence in Ogilvie and trusted entirely to him in regard to her business, and not to Brandon. The plaintiff was a widow, and Ogilvie was her confidential adviser both before and after Brandon's name appeared in the firm. Whatever holding out there may have been by Brandon to the public that he was a member of the firm, the plaintiff never acted upon such holding out, and was not affected by it. It was not suggested that Brandon had anything to do with the transactions which resulted in a loss to the plaintiff or that he in any way misappropriated any part of the funds which the plaintiff placed in the hands of Ogilvie for investment or otherwise. Brandon was in fact Ogilvie's salaried manager or managing clerk. The business was Ogilvie's, carried on in the name of Ogilvie & Brandon, that name appearing upon the sign at the offices where the business was carried on and on the letter-heads used at the office.

The authorities principally relied on by the plaintiff were: Blair v. Bromley (1846), 5 Hare 542; and Thompson v. Robinson (1889), 16 A.R. 175. The learned Judge referred to these cases, distinguishing them, and cited other authorities.

His conclusion was as follows:—

"I am of opinion that the defendant is not liable for the loss suffered by the plaintiff. I think it clear from the evidence—and not in fact disputed—that the defendant was not a partner; that he had no control over the moneys received by Ogilvie from the plaintiff; that it does not appear that the moneys so deposited were intended for any special investment; but that the same were obtained by Ogilvie for such investment as he might decide upon; that the defendant did not hold himself out as a partner, otherwise than as allowing his name to be used; and, if that be considered a holding out to the public, the plaintiff was not induced to act or part with her funds by reason of such holding out, and did not in fact suffer loss thereby.

"Although, in my opinion, the defendant is not liable, the fact that his name appeared in the firm justified the action of the plaintiff in investigating his real position in regard to the firm. For this reason, I think there should be no order as to costs."

Action dismissed without costs.

MASTEN, J. APRIL 10TH, 1919.

JOHNSTON v. STEACY.

Patent for Land—Action to Set aside Crown Patent—Question whether Land Covered by Prior Patent—Description—Boundaries—Squatters' Rights—Applicant for Patent Failing to Inform Crown Lands Department of Occupation—Patent Issued by Mistake—Jurisdiction of Court—Locus Standi of Plaintiffs—Limitation of Relief—Costs.

Action to set aside letters patent issued by the Crown, dated the 1st March, 1918, granting to the defendant an island in Charleston lake, in the township of Lansdowne.

The action was tried without a jury at Brockville.

J. A. Hutcheson, K.C., and J. A. Jackson, for the plaintiffs.

W. B. Carroll, K.C., and J. E. Jones, for the defendant.

MASTEN, J., in a written judgment, said that the plaintiffs put forward two distinct claims. They claimed under a patent from

the Crown to Thomas Kedd, dated the 28th August, 1829, granting to him the front part of lot 15 in the 7th concession of Lansdowne, under a description which (as the plaintiffs alleged) included the island in question; and alleged that, by various mesne conveyances, the land patented to Kedd had devolved upon and was vested in them; consequently, that the assumed grant to the defendant was nugatory, because the Crown could not derogate from its former grant.

The plaintiffs' second contention was, that for more than 30 years they and their predecessors had been occupiers and users of the island; and that the defendant, by denying knowledge of the plaintiffs' claim and occupation, in affidavits filed in the Crown Lands Department, had misled the Crown, and that the patent to the defendant was granted in mistake.

The learned Judge, after stating the evidence, found as follows: (1) a patent was issued to the defendant on the 1st March, 1918, for the island in question; (2) the joint affidavit of Robert and George Steacy, filed in support of the defendant's application for a patent, was inaccurate and incorrect; (3) the defendant was unaware of the plaintiffs' claim and had not been guilty of any fraud in connection with the application; (4) the Department issued the patent in ignorance of the plaintiffs' claim, and, had it been aware of the plaintiffs' claim, would not have issued the patent without investigating and passing upon that claim; (5) by mistake and improvidence the plaintiffs had been prevented from presenting their claims to the Crown.

The learned Judge was against the plaintiffs on the first branch of the case. Upon the facts, he was of opinion that the island was not included in the grant from the Crown in 1829.

Speaking of the second claim, the learned Judge said that the Court had jurisdiction in such a case if a proper claim was made out: Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited (1909), 18 O.L.R. 275, at p. 284. But it was necessary to determine more than that the Court had jurisdiction and that a mistake had occurred. It was necessary to establish the plaintiffs' locus standi.

Reference to Farmer v. Livingstone (1883), 8 Can. S.C.R. 140, 146, 147, 158; Martyn v. Kennedy (1853), 4 Gr. 61; Proctor v. Grant (1862), 9 Gr. 26; Lawrence v. Pomeroy (1863), 9 Gr. 474, 476; Stevens v. Cook (1864), 10 Gr. 410, 414; Mutchmore v. Davis (1868), 14 Gr. 346, 356; Cosgrove v. Corbett (1868), 14 Gr. 617, 620; the Florence case, 18 O.L.R. at p. 284.

A careful consideration of these cases had led the learned Judge to the conclusion that as early as 1853 the Court of Chancery in Upper Canada recognised the locus standi of complainants whose bill of complaint rested upon facts similar to those shewn in

the present case. The jurisdiction is founded upon the deprivation of a right to present a claim to the Crown Lands Department where the plaintiff makes a prima facie case shewing himself entitled to the benefit of the established custom in that Department of giving a preferential right to squatters. While this equity may perhaps be somewhat anomalous, it has been exercised for so long a time in this Province that it has become a part of the law of the Province.

The plaintiffs had brought themselves within this principle; they had a locus standi; the patent had been issued by mistake and without consideration of the plaintiffs' claim, and must be declared void; the relief to be limited to that declaration, "leaving the parties to stand to one another as if the patent had never issued, their final rights in respect of the land being left to be determined and settled by the Crown, to which the lands are restored by the avoidance of the patent:" the Florence case, 18 O.L.R. at p. 284.

No costs to either party.

LENNOX, J. APRIL 12TH, 1919.

JEANNETTE v. MICHIGAN CENTRAL R.R. CO.

Judgment—Action for Malicious Prosecution—Verdict of Jury in Favour of Plaintiff—Judgment Entered for Plaintiff and Affirmed by Appellate Division—Further Appeal to Supreme Court of Canada—Discovery of Fresh Evidence after Entry of Case—Judgment Alleged to have been Obtained by Fraud, Conspiracy, and Perjury—Dismissal of Appeal without Prejudice to Motion for New Trial in Supreme Court of Ontario—Motion Made under Rule 523—Forum—High Court Division (Weekly Court)—Due Diligence—Conclusiveness of New Evidence—Order for New Trial—Costs.

Motion by the defendants, under Rule 523, for an order reversing the judgment pronounced at the trial, entered up, and affirmed, and for a new trial.

The motion was heard in the Weekly Court, Toronto.

D. W. Saunders, K.C., for the defendants.

J. M. Ferguson, for the plaintiff.

LENNOX, J., in a written judgment, said that the action was for malicious prosecution, false arrest, and wrongful search of the

plaintiff's premises. A charge of theft from a railway car made against the plaintiff was dismissed by a magistrate. In the plaintiff's action, the jury found for him with $1,200 damages, for which sum judgment was entered with costs. The defendants appealed, and their appeal was dismissed by the Appellate Division; they then appealed to the Supreme Court of Canada. After the appeal case and the factums had been filed, the defendants, as they alleged, discovered evidence, which by due diligence they could not have discovered in time for the trial or before the filing of the case and factums, shewing that the judgment was obtained by fraud, conspiracy, and perjury on the part of the plaintiff and some of his witnesses. The defendants, when their appeal came on for hearing, asked the Supreme Court of Canada for an order directing a re-trial of the action, upon affidavits setting out the new evidence which they had discovered. The Supreme Court of Canada dismissed the appeal without prejudice to a motion to the Supreme Court of Ontario for a new trial.

This motion was accordingly made in the Weekly Court; the jurisdiction of the High Court Division to entertain the motion was not questioned; and the learned Judge was of opinion that the motion was properly made in that forum.

Reference to Boswell v. Coaks (1894), 6 R. 176.

The next question was whether the defendants could, by the exercise of reasonable diligence, have, before the trial, discovered the evidence they now relied on. This question should, upon a consideration of all the circumstances and the difficulties which a company has in obtaining evidence, be answered in favour of the defendants.

In cases of fraud, it is not necessary to shew that the fresh evidence will be conclusive: Hip Foong Hong v. N. Neotia & Co., [1918] A.C. 888, 894; Anderson v. Titmas (1877), 36 L.T.R. 711; Young v. Kershaw (1899), 81 L.T.R. 531, 532.

The learned Judge said that he had no doubt of the sufficiency of the material or the justice of a new trial.

There should be an order for a new trial, and the costs of the application should be reserved to be disposed of by the Judge at the trial.

ROSE, J. APRIL 12TH, 1919.

CANADIAN FREEHOLD SECURITIES CO. LIMITED v. McDONALD.

Company—Incorporation in Manitoba—Carrying on Business in Ontario without License under Extra Provincial Corporations Act—Assignment to Company of Contract of Person Resident in Ontario to Purchase Land in Saskatchewan—Procuring Execution by Purchaser of Assignment and Acknowledgment of Notice—Secs. 7 and 16 of Act—Action Brought by Company in Ontario—Capacity of Company—Letters Patent of Incorporation Purporting to Confer Capacity to Exercise Powers in any Part of the World—British North America Act, sec. 92—Defence Based on Misrepresentation—Failure to Establish—Judgment for Specific Performance.

Action by the above named company (incorporated in Manitoba) as assignees of one Mountain, the vendor, against the purchaser of certain lands in Saskatchewan, to recover the balance of the purchase-price. The defendant lived in Ontario, and, at the instance of a solicitor in Ontario, acting on behalf of the plaintiffs, executed the assignment, to which he was made a party, and an acknowledgment that he had received notice of the assignment.

The action was tried without a jury at London.

W. T. McMullen, for the plaintiffs.

T. G. Meredith, K.C., for the defendant.

ROSE, J., in a written judgment, after stating the facts, said that two defences had to be considered: (1) that the defendant was induced to enter into the original contract by misrepresentations made by Mountain's agent, one Marsden, and that his execution of the assignment and acknowledgment were procured also by misrepresentation; and (2) that at the time of the assignment to the plaintiffs they "had no power to enter into the same in the Province of Ontario or to carry on business in the said Province."

Upon a review of the evidence, the learned Judge was of opinion that the first-mentioned defence was not maintainable against the plaintiffs.

As to the second defence, the plaintiff company had not in 1913, when the assignment was made, nor at the time of the trial, any license to carry on business in Ontario. The question of the effect of the Extra Provincial Corporations Act, R.S.O. 1914 ch.

179, appeared to be determined by the decision of a Divisional Court in Securities Development Corporation of New York v. Brethour (1911), 3 O.W.N. 250. It could scarcely be argued, in the face of that decision, that the plaintiffs in this case carried on any of their business in Ontario by causing a solicitor in Ontario to procure the defendant's execution of the acknowledgment and assignment; and, if what the solicitor did was not a carrying on of any of the company's business in Ontario (sec. 7), no license was required to enable the company to maintain the action (sec. 16).

The defendant, however, raised a broader issue—that the plaintiff company had not capacity to enter into the contract or carry on business in Ontario.

The learned Judge, after referring to the decision of Masten, J., in Weyburn Townsite Co. Limited v. Honsburger (1918), 43 O.L.R. 451, and that of the Appellate Division in the same case (1919), 15 O.W.N. 428, and Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566, said that there was nothing which bound him to hold that sec. 92 of the British North America Act did not authorise a Province to confer upon a company incorporated by it power to do, as incidental to the provincial objects for which it was incorporated, everything that this company had done in this case, viz., instruct a solicitor in another Province to procure the execution of documents such as those referred to and maintain an action such as this. The letters patent incorporating the company professed to confer upon it capacity to exercise its powers in any part of the world; and, in the absence of anything compelling the learned Judge to do so, he was not prepared to hold that it had done, or, in maintaining this action, was doing, anything which the Province of Manitoba could not or did not confer capacity to do.

There should be judgment for the plaintiffs, in the usual form, for specific performance, with costs; reference to the Local Master at London to take the account.

LENNOX, J., IN CHAMBERS. APRIL 14TH, 1919.

MACKLIN v. IMPERIAL WAREHOUSE CO. AND WALCOTT.

Writ of Summons—Service on Foreign Company-defendant—Service on Manager while Temporarily in Ontario—Company not Carrying on Business in Ontario—Rule 23—Issue of Writ without Leave—Order Setting aside Service on Company.

Motion by the defendant company to set aside the service of the writ of summons upon the defendant Walcott for the company.

The motion was heard as in Chambers at the London Weekly Court.

P. H. Bartlett, for the defendant company.

G. S. Gibbons, for the plaintiff.

LENNOX, J., in a written judgment, said that the Ontario Spring Bed and Mattress Company made an assignment for the benefit of creditors to the plaintiff (residing in London, Ontario) about two years ago. The defendant company, a foreign corporation, and the defendant Walcott, the manager of the company—both defendants were described in the writ as "of the City of Wichita in the State of Kansas"—became dissatisfied in regard to the realisation of the assets of the Ontario company, of which the defendant company was a creditor. The defendant Walcott came to London, framed a scheme purporting to be for the advantage of the unsecured creditors, and issued a circular letter to the creditors asking them to adopt it. The circulars were signed with the name of the defendant company "per H. D. Walcott," and dated at London. The action was brought for libel of the plaintiff by what was contained in the circular. The defendant Walcott was served in London with two copies of the writ, one for himself as a defendant, the other for the company, of which he was the principal officer. The plaintiff contended that the service was good under Rule 23, which provides that "a corporation may be served with a writ of summons by delivering a copy to the . . . clerk or agent of such corporation, or of any branch or agency thereof in Ontario. Any person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof."

The defendant Walcott swore that he was a citizen of the United States, and was, at the time the writ was served, only temporarily residing in London for the purpose of adjusting his company's

claim against the insolvent estate, and was then about to return to Wichita; that the head office of the company was in Wichita; and that the company did not carry on business within Ontario or Canada. There was nothing to shew how the company became a creditor of the insolvent company, nor—unless what the defendant Walcott was doing should be so interpreted—was there anything to shew that this company had an office or place of business or transacted or carried on business in Ontario, within the meaning of Rule 23.

The learned Judge could not think that an effort to realise a dividend upon the company's claim was in any sense "carrying on business."

Reference to Standard Ideal Co. v. Standard Sanitary Manufacturing Co., [1911] A.C. 78; Allison v. Independent Press Cable Association of Australasia Limited (1911), 28 Times L.R. 128; Woodbridge & Sons v. Bellamy, [1911] 1 Ch. 326; Murphy v. Phœnix Bridge Co. (1899), 18 P.R. 406; Wilson v. Detroit and Milwaukee R.W. Co. (1860), 3 P.R. 37.

The learned Judge said that it was unnecessary to consider whether the plaintiff had a right without leave to issue a writ for service upon foreign defendants.

The whole question is subject to the rules of international law as declared by the Privy Council in Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670.

Order setting aside the service as regards the defendant company, with costs.

MASTEN, J., IN CHAMBERS. APRIL 15TH, 1919.

*REX v. SPENCE.

Prohibition—Police Magistrate—Jurisdiction—Information Laid under Order in Council Made pursuant to War Measures Act, 1914, 5 Geo. V. ch. 2, secs. 6, 10—Alternative Methods of Trial—Summary Proceedings under Part XV. of Criminal Code or by Indictment—Election of Crown to Proceed before Magistrate—Second Application for Prohibition—Refusal—Discretion.

Motion by the defendant for an order prohibiting one of the Police Magistrates for the City of Toronto from trying the defendant summarily upon an information for publishing a book called "The Parasite" containing objectionable matter, and from convicting and imposing a penalty, upon the ground that the magistrate had no jurisdiction under the War Measures Act,

or the orders in council respecting censorship, to try the defendant upon the information—the defendant's contention being that he was entitled to a trial by jury.

R. McKay, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

MASTEN, J., in a written judgment, said that this was a second motion for prohibition in respect of the same proceeding. The first motion was refused by Sutherland, J. (ante 9), and his order was affirmed by a Divisional Court (ante 55).

It was argued that successive applications are allowable, and that the present application was upon a ground not brought forward upon the former.

Successive applications, the learned Judge said, are sometimes allowed, but largely in cases where the first application has failed because of the lack of some formality in the proceedings.

After a careful perusal of all the material, the learned Judge was unable to see that the situation had in any way altered since the former application.

The grounds upon which the present application was made—that the magistrate had no jurisdiction to try the defendant, and that the defendant was entitled to a trial by jury—were open and available to the defendant at the time of the former motion.

The second objection appeared to be fully covered by Rex v. West (1915), 34 O.L.R. 368, 35 O.L.R. 95.

The order in council, order 3, para. 3 (2), directs that the penalty may be recovered or enforced either by indictment or by summary proceedings, and conviction, under the provisions of Part XV. of the Criminal Code. These proceedings are taken under Part XV. of the Code, and, as shewn by Rex v. West, the choice of tribunal rests entirely with the prosecutor.

The first objection was based upon the argument that, while admittedly sec. 6 of the War Measures Act, standing alone, would have authorised the passing of the order in council under which the information was laid, yet that sec. 6 is modified by sec. 10; that sec. 10 gives authority to the Governor in Council to impose penalties and to prescribe whether a penalty is to be imposed upon summary conviction or upon indictment; that only one method of prosecution can be prescribed by the order in council; that the power given by the order in council is in the alternative; and that the order in council thus exceeds and transcends the statute by providing that the prosecution may be conducted either upon summary proceedings or upon indictment.

Without expressing any final conclusion upon this argument, the learned Judge was definitely of opinion that the lack of juris-

diction asserted did not appear with sufficient clearness to warrant the issue of an order of prohibition, and, therefore, in the exercise of discretion in such circumstances, the order should be refused.

Upon these grounds, as well as upon the ground that a second motion for prohibition does not lie in the existing circumstances, the motion is dismissed with costs.

CARSON v. MIDDLESEX MILLS CO.—FALCONBRIDGE, C.J.K.B.—APRIL 12.

Injunction—Interim Order—Terms.]—Motion by the plaintiff for an interim injunction restraining the defendants from selling mortgaged lands. The motion was heard at the London Weekly Court. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, in addition to the usual terms of an injunction order, on the plaintiff undertaking to keep the mill running until the trial of this action, at his own expense, the injunction should be granted until the trial, and leave should be reserved to the defendants to move to dissolve in case of default on the part of the plaintiff. Costs of the motion to be costs in the cause unless the Judge at the trial should otherwise order. P. H. Bartlett, for the plaintiff. J. B. McKillop, for the defendants.

ASH v. ASH—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 14.

Parties—Joinder of Parties and Causes of Action—Several Claims—Unity.]—Action by Hester Ash against William R. Ash, William J. Ash, and Samuel J. Ash, to set aside, as fraudulent and void as against the plaintiff, a conveyance of lands made by the defendant William R. Ash to the defendant William J. Ash, and a conveyance of lands made by the defendant William R. Ash to the defendant Samuel J. Ash; for a declaration that the plaintiff was entitled to an inchoate right of dower in the said lands; in the alternative for damages; and also against the defendant William R. Ash for alimony. Upon the application of the defendants William J. Ash and Samuel J. Ash, the Local Judge at Sandwich made an order staying proceedings in the action until the plaintiff should elect which of the causes of action she would proceed with. The plaintiff appealed. The appeal was heard by the learned Chief Justice, who, in a written judgment, said that he thought there was enough unity of action and of parties to justify the maintenance of the action as it was launched. Appeal allowed—costs here and below to the plaintiff in any event. A. C. Heighington, for the plaintiff. A. W. Langmuir, for the defendants.

NUGENT v. GUNN—ROSE, J.—APRIL 15.

Negligence—Collision in Highway of Bicycle and Automobile—Injury to Bicyclist—Evidence—Onus—Motor Vehicles Act, sec. 23—Automobile Turning without Giving Visible or Audible Warning—Findings of Fact of Trial Judge—Damages.]—An action for damages for personal injuries. The defendants were father and son, the owner and driver respectively of a motor-car. On the evening of the 2nd August, 1918, the plaintiff was riding north on a bicycle in Cambridge street, in the town of Lindsay. The motor-car came west along Kent street and turned south into Cambridge street to go into the yard of an hotel on the south-east corner of the two streets. The plaintiff, who was some distance south of the entrance to the yard, saw the car turn from Kent street into Cambridge street and come slowly down the west side of Cambridge street. The collision occurred either on the roadway of Cambridge street or on the sidewalk, as the car was crossing over the sidewalk to enter the yard. The plaintiff was thrown from his bicycle and injured. The action was tried without a jury at Lindsay. ROSE, J., in a written judgment, said that, whether the collision occurred on the roadway or on the sidewalk, the loss or damage of which the plaintiff complained was sustained by reason of a motor-vehicle on a highway, and the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the driver of the car was upon the defendants: Motor Vehicles Act, R.S.O. 1914 ch. 207, sec. 23. A by-law of the town required visible or audible warning to be given when a vehicle is about to turn or slow down. It was admitted that no warning was given by the driver of the car before he made the turn into the yard. Warning would be necessary even without the by-law. After discussing the conflicting evidence, the learned Judge said that he accepted the testimony of the witnesses who said that the plaintiff was on the roadway, not on the sidewalk, when the collision occurred. This finding made the defendants' case more difficult than it would have been if the finding had been that the plaintiff was on the sidewalk. The learned Judge did not take the view that, if the plaintiff was on the sidewalk, where a by-law of the town forbade him to be, the defendants were necessarily freed from responsibility. But the driver of the car was not bound to anticipate the presence of a person on the sidewalk approaching the crossing at a greater speed than a pedestrian's. The defendants failed to shew that the plaintiff was negligent. After a careful consideration of all the evidence, the learned Judge was unable to find as a fact that the damage sustained by the plaintiff did not arise through the negligent or improper conduct of the driver of the car. Damages assessed at

$1,100. Judgment for the plaintiff for that sum with costs. A. N. Fulton and J. E. Anderson, for the plaintiff. L. V. O'Connor, for the defendants.

REX v. SOO TONG—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 17.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Evidence of Intoxicating Quality of Liquor Sold.]—Motion to quash the conviction of the defendant, by the Police Magistrate for the Town of Orillia, for selling intoxicating liquor contrary to the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, disregarding entirely the analysis of the "extract of lemon" sold to the witnesses who testified before the magistrate, there was abundant evidence of its intoxicating quality. If there was any discrepancy, real or apparent, in the testimony of the witnesses, that was a matter for the magistrate. Motion dismissed with costs. J. M. Ferguson, for the defendant. J. R. Cartwright, K.C., for the Crown.

RE GRAND TRUNK R.W. CO. AND BROOKER—SUTHERLAND, J.—APRIL 17.

Money in Court—Distribution of Fund—Sum Paid by Railway Company as Compensation for Land Expropriated—Equitable Assignments and Orders upon Fund—Notice to Railway Company—Priorities—Reference—Costs.] Upon an expropriation of land in the city of Toronto, an award of compensation was made by an arbitrator, and the compensation-money was paid into Court. There were various claimants of the money; and, as the claims were conflicting, an order was made on the 20th December, 1917, directing a reference to the Master in Chambers to determine which of the claimants were entitled to the money and their priorities. The order directed that the Toronto General Trusts Corporation, one of the claimants, should have the conduct of the reference and should notify all parties represented on the motion for the order, who were to attend at their own risk as to costs; further directions and costs were reserved until after report. The reference proceeded, and the Master made his report on the 29th May, 1918. Thereupon the trusts corporation appealed from certain parts of the report and moved for judgment on further directions. It then appearing that one Arnold, who had obtained and lodged with the Accountant a stop-order in respect of the fund in Court, had not been served with

notice of the proceedings before the Master, and an order was made on the 10th October, 1918, referring the matter back to the Master. The reference again proceeded, and a further report was made on the 15th January, 1919, in which the Master found that the claim of Arnold failed. The trusts corporation then moved to confirm the two reports, except as to paras. 4, 5, 6, and 7 of the first report, and paras. 2 and 4 of the second, from which they appealed. The appeal and motion were heard in the Weekly Court, Toronto. SUTHERLAND, J., in a written judgment, after stating the facts, said that the Master was right in deciding that Robertson Brothers Limited, claimants, were entitled to the sum of $643.81 in priority to the trusts corporation; for, although the order on the fund in favour of the Robertson company was subsequent to the equitable assignment to the trusts corporation, the Robertson company had given earlier notice to the Grand Trunk Railway Company; but that the claim of T. M. Harris was not entitled to priority, because he had not given notice to the railway company. Harris had in fact given notice to the Corporation of the City of Toronto, who, under an order of the Dominion Board of Railway Commissioners, were to pay one-third of the cost of the work in connection with which the expropriation was made; but the award was for payment by the railway company, and Harris should have given the railway company notice of his claim. The appeal should be allowed as to Harris and dismissed in other respects. The report as varied should be confirmed. The costs of the original application and of the reference should be paid out of the fund. Arnold should pay the costs of the reference back to the Master. Neither Arnold nor Harris should have any costs of the present motion, but the costs of all the other parties in respect thereof should be paid out of the fund. The moneys in Court should be paid out accordingly, notwithstanding the stop-order. William Proudfoot, K.C., for the Toronto General Trusts Corporation. G. Cooper, for Pennock Brothers. D. Henderson, for Robertson Brothers Limited. J. A. Macintosh, for T. M. Harris. A. C. Heighington, for James G. Arnold.