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APPELLATE DIVISION.

First Divisional Court. January 18th, 1921.

BATTLE v. QUILLINAN.

Easement—Right of Way over Strip of Land—Unlimited Right Created by Grant—Obstruction of Way by Building—Mandatory Injunction to Compel Removal—Discretion—Costs—Appeal—Extension of Time for Removal.

An appeal by the defendant from the judgment of Latchford, J., 18 O.W.N. 375.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A.

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

T. D. Cowper and T. F. Battle, for the plaintiff, respondent.

The Court dismissed the appeal with costs, but allowed the defendant an extension for one year of the time for the removal of the obstruction.

First Divisional Court. January 20th, 1921.

*ROTMAN v. PENNETT.

Damages—Breach of Agreement for Lease of Premises—Infirmity of Title of Lessor—Bona Fides—Measure of Damages—Proper and Necessary Legal Expenses—Costs.

Appeal by the plaintiffs from the judgment of Lennox, J., 47 O.L.R. 433, 18 O.W.N. 177.

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

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

G. H. Kilmer, K.C., for the appellants.

I. F. Hellmuth K.C., and H. A. O'Donnell, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JANUARY 21ST, 1921.

LAUGHLIN v. PORTEOUS.

Mortgage—Conveyance of two Parcels of Land Subject to—Covenant—Assignment—Judgment—Indemnity—Foreclosure—Ability to Reconvey one Parcel only—Inability of Covenantor Originally Liable to Meet Obligation—Effect of—Depreciated Condition of one Parcel.

Appeal by the defendants from the judgment of LATCHFORD, J., ante 184.

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

G. F. Henderson, K.C., for the appellants.

John R. Osborne, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs

HIGH COURT DIVISION.

KELLY, J. JANUARY 17TH, 1921.

CANADIAN BANK OF COMMERCE v. PATRICIA SYNDICATE AND ROSS.

Trial—Application by Defendant for Postponement—Grounds for—Evidence—Absence—Delay—Rights of Plaintiffs—Refusal of Motion.

Motion by the defendant Ross to postpone the trial of this action until June, 1921, on the allegation that he was unable to attend the trial sooner.

The motion was heard by KELLY, J., at a sittings for the trial of actions in Toronto.

H. S. White and H. P. Hill, for the applicant.

R. C. H. Cassels, for the plaintiffs.

KELLY, J., in a written judgment, said that the action was commenced on the 6th November, 1919, to recover the sum of about $43,000. Judgment was entered on the 8th December, 1919, against the defendant Patricia Syndicate, in default of appearance. On the same date, the action was set down for trial against the defendant Ross, and notice of trial was served on the 9th December, 1919. Then began a long series of attempts by the plaintiffs to procure the attendance of the defendant Ross for examination for discovery and to have the case brought down for trial. Early in September, 1920, the plaintiffs' solicitors requested the defendant Ross's solicitors to name a suitable date for the trial. This was without result. Following their request of the 7th October, 1920, to have the case placed on the peremptory list for trial, the plaintiffs were served, on the 12th October, with notice of a motion for an order postponing the trial. The motion was heard on the 14th October, and an order was made postponing the trial until the sittings of the Court in the present month of January, but on condition that the solicitors for the defendant Ross should make every reasonable effort to take his evidence on commission, so that it might be available for the trial at this sittings of the Court unless he could attend it to give evidence.

On the 7th January, 1921, notice of the present motion was served.

There was an absolute absence of evidence that any effort was made since the order of the 14th October, 1920, to have this defendant's evidence taken on commission, though it appeared from his own affidavit of the 3rd December, 1920, that he was in Scotland and England during the three preceding months. His affidavit offered no explanation of the failure to have his evidence taken on commission, beyond the statement that he believed that his personal attendance for examination was necessary for the fair and proper conduct of the trial, and that he was desirous of attending the trial personally as a witness; and he said that he would not be able to attend until about June, 1921. He had not, however, satisfactorily explained his neglect or failure to accede to the plaintiffs' desire and efforts to have the trial take place during 1920, nor had he shewn any substantial reason for delaying the hearing until June. The sole reason assigned for his non-attendance at the present time was that he was about to start for East Africa on important business, the nature of which he did not disclose beyond mention of the conduct, in conjunction with

others, of what he termed "a scientific expedition in Africa for the purpose of obtaining photographic records of the fauna and flora there."

The affidavit appeared to have been designed to create an impression that this so-called expedition was more than a purely personal affair, whereas it was solely a personal matter and really a pleasure-trip or one for personal profit.

The arrangements for this expedition were made in April, 1920. His matured plans having included his absence at the time fixed for the trial, why did he not do what was reasonable and facilitate the trial, or the taking of his evidence on commission before his departure? He had acted with evident disregard of the plaintiffs' right to have the matter in dispute determined at a trial, and as if his desires were paramount to the rights of the plaintiffs and the convenience of Courts and counsel.

The learned Judge finds no reason why there should be any interference with the trial of this action in the usual course of the Court's proceedings, or why the defendant should expect or be accorded consideration greater than is given to other litigants in similar circumstances, or that the plaintiffs should be subjected to further delay.

The application should be dismissed with costs.

MIDDLETON, J. JANUARY 18TH, 1921.

*MILLAR v. THE KING.

Solicitors—Retainer by Crown—Claim for Value of Services—Purchase by Ontario Government of Undertakings of Power Companies—Validating Act, 6 Geo. V. ch. 18—Rendering by Solicitors of Detailed Statement of Services in Searching Titles and Carrying out Purchase—Necessity for Services—Secs. 3 and 8 of Act—Lump-sum Recommended by Counsel Employed by Government—Order in Council Directing Payment out of Particular Fund—Agreement—Necessity for Bill of Costs—Solicitors Act, secs. 48, 56, 66—Acceptance of Statement as Bill—Petition of Right—"Action"—Taxation of Bill—Evidence—Assessment of Value of Services.

A petition of right by a firm of solicitors to recover $24,589.33, claimed as a balance in respect of services rendered in connection with the purchase of the assets, undertakings, lands, plants, etc., of certain power companies, 22 in all, for the price of $8,350,000.

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

W. N. Tilley, K.C., and T. R. Ferguson, K.C., for the petitioners.

Edward Bayly, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the agreement of purchase and sale was printed as a schedule to the statute 6 Geo. V. ch. 18, by which it was validated and confirmed.

The retainer of the solicitors was not denied, and there was no dispute as to the services rendered by them. Several hundred titles of lands purchased were examined, in addition to some 500 agreements for easements. Full reports were made upon the titles examined; and the transaction was carried through to completion. In addition to the ordinary conveyancing, several difficult and important questions had to be considered and dealt with.

On the completion of the transaction, the solicitors made a copy of their docket entries, which shewed no money charges for services rendered, but gave full details of all disbursements, and forwarded it to the Minister of Lands Forests and Mines, in whose name the agreement had been made and who had given the instructions, suggesting that he should submit the copy of the entries to some competent person to settle the fee which should be paid. The Minister acted upon this suggestion, and referred the matter to Mr. K., a King's counsel, who reported that the proper value of the services rendered was $25,900; that the cash disbursements amounted to $5,689.33, and the total fees and disbursements to $31,589.33, on which the solicitors had been paid $7,000, leaving a balance of $24,589.33 due.

By an order in council of the 4th May, 1916, under sec. 7 of the validating Act, the Hydro-Electric Power Commission of Ontario was appointed to administer the undertaking for the benefit of His Majesty; and by an order in council of the 4th November, 1918, the Commission was directed to pay the balance of $24,589.33 to the petitioners, and charge the same against funds belonging to the Central Ontario system.

Nothing was paid, however; on the 29th October, 1919, the Attorney-General granted the petitioners a fiat for the presentation of a petition of right; and this petition was duly filed and served.

At the trial, the rendering of the services charged for was proved; Mr. K. shewed how he arrived at the amount which he recommended as fair remuneration for the services rendered; and two King's counsel of eminence testified that, having gone over the account with care, they found the amount claimed to be reasonable. No evidence was called for the Crown.

It was not intended that the validating Act should vest in the Crown any of the property in such a way as to interfere with the rights of third persons; that was not the effect of the Act; and investigation of the titles was necessary in order to ascertain and deal with all outstanding claims. The work done was necessary, notwithstanding the provisions of secs. 3 and 8 of the Act.

The bill was not rendered in the manner required by the Solicitors Act, because the items were not moneyed out; but, when a defective bill is rendered, it is competent for the client to accept it as a bill and waive strict compliance with the statute. The document was treated by the Government as a bill—it was found adequate to enable the Minister's legal adviser to assess the value of the services rendered. There was no rejection of the bill on the ground now taken, and no request for a further account giving the charges in detail. The transaction was one which called for a lump-charge rather than for elaborate detail; and the custom of conveyancers, as indicated by the various block tariffs of costs adopted by the associations, is to charge a lump-sum in conveyancing matters.

The order in council was an approval of the adjustment of the account and an acknowledgment of a prior valid retainer, and so amounted to an agreement to pay. The designation of the fund out of which the account was to be paid in no way qualified the approval of the adjustment of the account.

It was said that nothing short of actual payment was sufficient to relieve the solicitors from the statutory obligation to deliver a bill. By secs. 48 et seq. of the Solicitors Act, the solicitor and the client have the right to agree not only as to remuneration for conveyancing, but also as to remuneration for services in respect of business done in the Courts; and an agreement renders the delivery of a bill unnecessary: sec. 66.

Section 56 provides that no action shall be brought upon such an agreement, but that it shall be enforced upon a summary application. But a petition of right is not an action: Rustomjee v. The Queen (1876), 1 Q.B.D. 487.

Ray v. Newton, [1913] 1 K.B. 249, distinguished.

The effect of the introduction of the English Solicitors Act, 1870, by the Ontario Law Reform Act, 1909, was not to take away from the solicitor and his client the power of contracting which they always had, but to give a new power, the right of agreement upon an amount in such a way as to preclude taxation, save in a case where the Court sets aside the agreement as unfair.

In ordinary cases a reference to taxation may be the convenient way of determining the quantum of a bill. In this case there was a valid agreement; but, if there had not been such an agreement, the learned Judge would have himself assessed the

amount payable at the same sum as that recommended by Mr. K. and approved by the witnesses called. In cases such as this the opinion of other solicitors is a proper guide.

There should be a judgment declaring that the petitioners are entitled to be paid the amount mentioned in the order in council and interest from its date, at the rate of 5 per cent. per annum, with costs.

ORDE, J., IN CHAMBERS. JANUARY 19TH, 1921.

*ATTORNEY-GENERAL FOR ONTARIO v. RUSSELL.

Pleading—Action by Attorney-General for Cancellation of Crown Patents for Lands and for Damages for Cutting Timber on Lands—Pleading Filed by Defendant in Answer—Defence—Set-off—Counterclaim against Crown for Tortious Acts—Embarrassment—Motion to Strike out Portions of Pleading—Status of Attorney-General—Necessity for Formal Statement that Action Brought "on Behalf of His Majesty"—Rule 5 (2)—Application of Rule 5 (1)—Right to Maintain Counterclaim against Crown—Declaratory Relief—Remedy by Petition of Right—Necessity for Fiat of Attorney-General.

An appeal by the plaintiff from an order of the Master in Chambers dismissing a motion made by the plaintiff for an order striking out or for particulars of paras. 14, 15, 16, 18, 19, and 20 of the defendants' pleading, called "Statement of Defence, Set-off, and Counterclaim," and also para. (b) of the prayer of the pleading, upon the ground that they tend to prejudice, embarrass, and delay the fair trial of the action, and that the alleged claim of the defendants against the plaintiff is the subject of a counterclaim and cannot be pleaded as a set-off, and that the defendants have not obtained a fiat enabling them to set up any counterclaim.

The action was brought for the cancellation of certain patents for Crown lands alleged to have been issued upon false and fraudulent representations made or caused to be made by the defendants, and for damages for the unlawful cutting and removal of pulpwood and logs from the lands covered by the patents and from other lands of the Crown, and for an account, an injunction, and a declaration.

The paragraphs of the pleading attacked set out that the plaintiff had been making use of the claim against the defendants for ulterior purposes and had been hampering and impeding the

defendants in the carrying on of their business; that the proper parties were not before the Court; that the defendants had suffered damages by reason of the conduct of the plaintiff, which should be set off against any amount which should be found due to the plaintiff, and that the defendants should have judgment for the balance in their favour. Paragraph (b) of the prayer was: "The defendants further seek to claim and obtain, if necessary, a fiat to counterclaim for $100,000 damages for the unjust and wrongful acts of the plaintiff against the defendants."

H. S. White, for the plaintiff.
W. Lawr, for the defendants.

Orde, J., in a written judgment, pointed out that a set-off is not to be pleaded except as a defence, while a counterclaim is a cross-action. He then said that the learned Master had ruled that, as the plaintiff had not complied with the provisions of Rule 5 (2) by bringing the action "on behalf of His Majesty the King," all defences were open to the defendants, and the motion must be dismissed; and he was also of opinion that, as the action was at present constituted, the defendants had the right to counterclaim without obtaining a fiat, and therefore the words "to claim and obtain, if necessary, a fiat," in para. (b) of the prayer of the defendants' pleading, should be struck out.

The learned Judge referred to Attorney-General of Ontario v. Hargrave (1906), 11 O.L.R. 530; Dyson v. Attorney-General, [1911] 1 K.B. 450; Electrical Development Co. v. Attorney-General, [1919] A.C. 687; and said that an action brought in the name of "The Attorney-General for Ontario" must of necessity be brought in his official capacity; and that Rule 5 (2), which came into force on the 1st September, 1913, was intended to simplify the procedure in actions brought by or on behalf of the Crown. He had not found any case in this Province which required that the Attorney-General should say in so many words that he was suing on behalf of his Majesty. The provision of Rule 5 (1) that the writ of summons shall shew the character in which the parties sue and are sued was not intended to apply to actions brought on behalf of the Crown; and Rule 5 (2) is in reality merely declaratory of a right which the Crown already possessed. That being the case, Rule 5 (2) could not have been intended to restrict the rights of the Attorney-General or to require that, in coming into Court for relief on behalf of the Crown, he should make use of any particular form of words, either in the style of cause or in the pleadings, to indicate that he is suing on behalf of His Majesty. The learned Judge, therefore, does not agree with the view that the Attorney-General, by not formally stating that he sues "on behalf of His Majesty," has not complied with Rule 5 (2).

Once it is clear that His Majesty is to all intents and purposes the plaintiff, it follows that no counterclaim, either for a money demand or for damages for breach of contract or for damages for tort, can be set up. A counterclaim is merely a cross-action, and cannot be pleaded against the Crown as of right: Attorney-General of Ontario v. Hargrave, supra.

That the Attorney-General may be made a party defendant in certain actions of an equitable or declaratory nature is well established by many cases, of which Dyson v. Attorney-General, supra, is one of the latest. But no case has gone the length of establishing that in every instance in which relief is sought against the Crown the ordinary procedure by way of petition of right and fiat can be avoided by commencing a declaratory action; and in no case has it been held that, by suing the Attorney-General, a direct judgment against the Crown can be obtained.

The only course for the defendants to pursue is to seek relief by way of petition of right. In effect, by their pleading they seek, by way of counterclaim, to have it declared that they are entitled to damages against the Crown, the alleged causes of action being of a tortious nature.

It is clear that no declaration can properly be made against the Attorney-General upon the allegations contained in the paragraphs objected to by the plaintiff; and, following the decision in Attorney-General of Ontario v. Hargrave, supra, they should be struck out.

The appeal from the order of the Master should therefore be allowed with costs, and the plaintiff's motion should be granted with costs.

MIDDLETON, J. JANUARY 22ND, 1921.

PETERSON v. DOMINION TOBACCO CO.

STEVENSON v. FOSTER TOBACCO CO.

VAMPARYS v. DOMINION TOBACCO CO.

Contract—Purchase of Tobacco from Growers—Purchasing Agent—Breach of Duty—Evidence—Authority of Agent—Holding out—Liability of Principal for Price of Tobacco Purchased—Limitation as to Quantity not Disclosed—Apparent Scope of Agency—Relief over against Person Procuring Agent to Buy beyond Quantity Required—Indemnity—Refusal to Accept Delivery—Damages—Measure of—Interest—Expenses of Resale—Evidence—Findings of Trial Judge.

These actions were brought by tobacco-growers in the counties of Essex and Kent, to recover damages for the defendants' failure to accept delivery of tobacco under several contracts.

The first action was brought against the Dominion Tobacco Company, a partnership having its head office in Montreal; Jasperson, a dealer in tobacco, carrying on business in a large way at Kingsville; and W. C. MacDonald Registered, an incorporated company having its head office in Montreal.

The second action was brought against the Foster Tobacco Company, an incorporated company having its head office at Leamington, and also against Jasperson and W. C. MacDonald Registered.

The third action was against the Dominion Tobacco Company, Jasperson, and Deacon, a man formerly employed by Jasperson, more recently by the Foster Tobacco Company, and, at the time of the occurrences in question in the actions, the purchasing agent of the Dominion Tobacco Company.

In the first and third actions there were third party proceedings by the Dominion Tobacco Company against Jasperson.

The actions and third party claims were tried without a jury at Sandwich and Toronto.

O. L. Lewis, K.C., and J. M. McEvoy, for the plaintiffs Peterson and Stevenson.

J. S. Fraser, K.C., for the plaintiff Vamparys.

W. N. Tilley, K.C., R. L. Brackin, and W. A. Smith, for the Dominion Tobacco Company.

R. L. Brackin, for the Foster Tobacco Company.

I. F. Hellmuth, K.C., and J. H. Rodd, for Jasperson.

R. McKay, K.C., for W. C. MacDonald Registered.

G. T. Walsh, for Deacon.

Middleton, J., in a written judgment, said that in the tobacco-growing districts of the counties of Essex and Kent in the year 1913, during the earlier part of the season, it was thought that the crop would be short, and would not meet the demands of the buyers. It was then estimated at approximately 10,000,000 lbs. During the latter part of the season the conditions became more favourable, and as a result the crop ran up to 16,000,000 lbs.

Until the year 1918 the MacDonald company, a very large concern, did not purchase in this local market, and the entire crop was generally purchased by comparatively few manufacturers. In 1918 the MacDonald company entered this market in competition with those who theretofore had enjoyed practically a monopoly in this field. For the year 1919 they contemplated large purchases, and erected a drying plant at Kingsville. In that year

their purchases ran to about 4,500,000 lbs. In view of these purchases and what was supposed to be a short crop, the prices were abnormally large.

Deacon was employed by the Dominion Tobacco Company as its agent, by agreement of the 10th June, 1919. He was to be paid a commission of ½ a cent per lb. upon his purchases. He was to purchase such amounts and kinds as he might be instructed to purchase, and he undertook not to act as buyer for any other concern except the Foster Tobacco Company. He advertised his appointment as agent in local and trade newspapers. On the 8th August he was told that the requirements of the Dominion company would be 300,000 to 350,000 lbs. of Burley tobacco. On the 24th October his right to purchase Burley was limited to 300,000 lbs.

Jasperson, the purchasing agent for the MacDonald company, was in daily touch with the company during the purchasing season, and received instructions from time to time as to the amount to be purchased.

Deacon said that he was instructed by Jasperson to purchase for him a large quantity of tobacco, and that he was instructed to purchase this tobacco in the names of the Dominion Tobacco Company and the Foster Tobacco Company, and that he reported purchases made from day to day during the buying season, and that these were all approved of by Jasperson. This was denied absolutely by Jasperson.

In fact, Deacon had purchased in the names of these two companies tobacco amounting to 1,100,000 lbs. The contracts were taken in the names of the Dominion and Foster companies, and he sorted them out and handed over to the Dominion company contracts amounting to 300,000 lbs. as being the tobacco purchased by him for that company, and that company accepted these contracts and took delivery under them. The contracts representing the remaining 800,000 lbs. he proffered to Jasperson, but Jasperson would have nothing to do with them. These contracts were at the buying price of 40 to 45 cents per lb., and upon the repudiation of the contracts the tobacco, where it had been sold at all, had realised only 13 cents, so that there was a net loss to be faced of approximately $250,000. After Jasperson had refused to take over the contracts, Deacon went to Montreal, and saw Mr. Stewart of the MacDonald company. There was a conflict of evidence as to what Deacon then said and as to the position he took.

The learned Judge gives credit to Deacon as against both Jasperson and Stewart.

During the course of the trial, the plaintiffs and the Dominion company and Deacon united in attacking both Jasperson and the

MacDonald company; and Jasperson and the MacDonald company, notwithstanding much evidence going to shew that Jasperson was by no means an ideal agent, presented a united front to the plaintiffs and the Dominion company.

The plaintiffs elected, if they had a choice, to recover directly from the MacDonald company. The plaintiffs' case was this: Deacon, having general authority to purchase, bought in the name of the Dominion company; so far as the contracts in question are concerned, he exceeded his actual authority, but he did this at the instance of Jasperson, and (it was said) of the MacDonald company; the Dominion company, if bound to adopt that which was done by Deacon in its name, adopted it in its entirety, and the plaintiffs had become entitled to say "respondeat superior," and in that way to reach Jasperson and the MacDonald company.

The learned Judge was unable to adopt that reasoning. The true situation was, that the Dominion company was liable for all the contracts entered into in its name, because Deacon was held out as its purchasing agent, and the limitation as to the quantity he must purchase was not in any way disclosed. In his purchases he was acting within the apparent scope of his agency. The plaintiffs were, therefore, entitled to recover against the Dominion company.

The Dominion company had a right to relief over against Jasperson, who procured Deacon to violate his duty towards his employer by taking contracts in the name of the Dominion company.

Upon the evidence, the learned Judge was unable to find any liability, either direct, or indirect by way of obligation to indemnify, against the MacDonald company. None of its officers knew of what was being done by Jasperson; and the purchases made by Jasperson, through Deacon, in the name of the Dominion company, were not for the MacDonald company, but for Jasperson himself.

Stevenson's contract was with the Foster company, but he was told, at the time of making it, that the purchase was for the Dominion company. This was not true—the purchase was for Jasperson; and in this case the plaintiff Stevenson should recover directly against Jasperson.

The amount recovered in each case should be limited to the difference between the contract-price and the selling price, plus interest from the date when delivery was tendered, and in each case $25 to cover the expense and trouble incident to the resale.

It was said that the effect of Deacon's evidence was merely that he was authorised to use the forms of contract supplied by the Dominion company or the Foster company, and that Jasper-

son, even on Deacon's own shewing, could not be taken as authorising the making of the contracts in the names of these companies. That was not the true effect of the evidence. What was intended by the use of the forms was, that the contracts should be made in the names of these companies.

CAMPEAU V. MAHAFFEY—KELLY, J.—JAN. 17.

Negligence—Collision of Bicycle with Motor Vehicle on Pier—Injury to Bicyclist—Fault of Bicyclist—Rule of Road—Highway—Motor Vehicles Act, sec. 23—Evidence—Onus—Findings of Trial Judge.]—Action for damages for injury to the plaintiff and destruction of his bicycle in a collision with the defendant's motor vehicle, caused, as the plaintiff alleged, by the reckless and negligent driving of the defendant's vehicle. The action was tried without a jury at Welland. KELLY, J., in a written judgment, said that the collision occurred on the concrete pavement of a pier leading to an elevator. The plaintiff, who was a workman in this elevator, was riding northerly on his bicycle on the westerly side of this concrete pavement—the side on which he would reasonably expect to meet any southbound traffic. He said that the most westerly portion of the pavement was used by pedestrians and bicyclists. The defendant was proceeding southerly in his vehicle, on the westerly part of the pavement—following the recognised rule of the road. If the plaintiff and others, pedestrians and bicyclists, used the westerly portion of the pavement when travelling northward, there was nothing to indicate that the defendant knew that there was such a practice or that he had any reason to expect to meet, on that side, north-bound traffic. Travelling northerly was a motor truck carrying several men. The plaintiff was following the truck. The truck was travelling in a direction which necessitated the defendant keeping well over on the westerly side of the pavement. The plaintiff said that he saw the defendant coming when he was about 100 yards distant from him. The defendant, thus pressed by the position of the truck, was suddenly confronted with the plaintiff's approach; he promptly slowed down, and had come to a standstill when the plaintiff's bicycle struck the car. The plaintiff took his chances and was alone responsible for what happened. The defendant made the most of the difficult situation which suddenly confronted him while he was proceeding on the proper side of the pavement. It was argued that the pavement was on a highway within the meaning of the Motor Vehicles Act. There was no evidence of this; but,

even assuming that it was a highway, the onus of proof cast upon the defendant by sec. 23 of the Motor Vehicles Act had been amply satisfied. The action should be dismissed with costs. F. W. Griffiths, for the plaintiff. W. M. German, K.C., for the defendant.

NEILL V. NEILL—KELLY, J.—JAN. 19.

Husband and Wife—Alimony—Cruelty—Adultery—Evidence—Quantum of Allowance.]—An action for alimony, tried without a jury at a Toronto sittings. The defendant did not appear at the trial and was not represented by counsel. KELLY, J., in a written judgment, said that the history of the defendant's conduct towards the plaintiff, extending over a great part of their married life, shewed a condition of things of which the plaintiff had good reason to complain. Blows and other acts of physical violence, threats of shooting etc., and infidelity, figured in the indignities to which she was subjected. More than once settlements were made or attempted in which his past conduct was condoned in the hope of better conditions to come. After the defendant departed for overseas in 1914, the plaintiff also went to England, and there lived with him for a short time, but was forced to return to Canada. On his visits to Canada in 1917 and 1918, his physical maltreatment and abuse of his wife and his acts of infidelity were such as to afford ample ground in law for a judgment for alimony. There was also uncontradicted evidence of acts of infidelity on his part in England. On learning of these acts, the plaintiff refused to have further intercourse with him, and he then left Canada and has not returned. The evidence against him was conclusive. Since early in 1918 he has contributed nothing to the support of the plaintiff and their children. The evidence warranted an allowance of $180 a month, and there should be judgment for payment of that sum each month by the defendant to the plaintiff, and also for payment of the plaintiff's costs of the action. J. Lorn McDougall, for the plaintiff.

NEILL V. NEILL ET AL.—KELLY, J.—JAN. 19.

Husband and Wife—Moneys of Wife Invested by Husband—Evidence—Declaration of Right of Wife to Securities Representing Moneys Invested.]—Action for a declaration of the plaintiff's right to certain moneys invested by her husband, the defendant William J. Neill, in his own name. The action was tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, said that after the opening of the trial an arrangement was come to between the plaintiff and the defendant Anna Neill in respect of some of the assets brought into question in the action; and the only matter left undisposed of was the plaintiff's claim in respect of an investment of $10,000 in Victory bonds. The evidence was clear and uncontradicted that the plaintiff, at the time of her marriage, was entitled to a large sum of money from the estate of her father; that these moneys were transferred from South Africa to Canada, and got into the possession of the defendant William J. Neill; that the plaintiff did not part with the ownership thereof, her husband merely having possession of such of the moneys and assets as came into his possession on an understanding that he would return them as and when required by her. In 1914 the husband went overseas, and about the end of 1917 he invested in the purchase of $10,000 worth (par value) of Victory bonds. There was evidence, not only of the plaintiff, but of a witness who was thoroughly familiar with the defendant William J. Neill and his financial condition from 1914 to 1918, and who had conversed with him, that the moneys out of which these bonds were purchased were moneys of the plaintiff, and there was nothing in contradiction of this evidence. There should be judgment in terms of consent minutes as between the plaintiff and the defendant Anna Neill, and judgment declaring the plaintiff entitled to the Victory bonds. The defendant William J. Neill should pay the plaintiff's costs of the action. J. Lorn McDougall, for the plaintiff. D. Inglis Grant, for the defendant Anna Neill. The other defendants were not represented at the trial.

KINNEY AND COLLIVER CANNING CO. v. WHITTAL CAN CO.—
LENNOX, J.—JAN. 19.

Contract—Sale of Goods—Shortage in Deliveries—Mistake—Overpayments—Recovery—Interest—Breach of Contract—Damages—Reference—Costs.]—Action to recover moneys alleged to have been paid by the plaintiffs to the defendants under a mutual mistake of fact and for damages for breach of a contract. The action was tried without a jury at Picton. LENNOX, J., in a written judgment, said that the plaintiffs were packers or canners of fruit and vegetables in the county of Prince Edward, and the defendants were manufacturers of tin cans, carrying on business in Montreal. The contract was for the purchase by the plaintiffs from the defendants of tin cans to fill the plaintiffs' "requirements," which were to be notified to the defendants. The contract was in writing. The plaintiffs asserted that there were shortages in delivery. After a full review and discussion of the evidence, the learned Judge found that the plaintiffs were entitled to recover the sums of money sued for as overpayments with interest from the date of the writ of summons, and also (with some hesitation) that the plaintiffs were entitled to recover damages for breach of contract. There should be judgment for the plaintiffs for $2,131.72, with interest thereon from the date mentioned, and the costs of the action up to and including this judgment, and directing a reference to the Local Master at Picton to assess damages. If actual damage is established, there will be judgment for the plaintiffs for the sum found, with the costs of the reference. If the plaintiffs fail to establish actual damage, the defendants will have judgment for the costs of the reference, less $5 for nominal damages. McGregor Young, K.C., and E. M. Young, for the plaintiffs. E. G. Porter, K.C., and C. A. Payne, for the defendants.

KING v. GARCIA—ORDE, J.—JAN. 19.

Wages—Money Lent—Action to Recover—Evidence—Findings of Trial Judge.]—Action to recover certain sums alleged to be due to the plaintiff for wages and for money lent. The action was tried without a jury at a Toronto sittings. ORDE, J., in a written judgment, said that the plaintiff's claim for wages was made up of a large number of items spread over a period of 5 years, ending in September, 1919, credit being given for moneys received from the defendant from time to time, and allowances being made to the defendant for board for part of the period. The amount alleged to have been lent was $123. The learned Judge reviewed the evidence, and found that the plaintiff was entitled to recover $1,864.20, including interest from the date of the issue of the writ of summons until the date of this judgment, and directed that judgment should be entered for the plaintiff for that sum and the costs of the action. S. H. Bradford, K.C., and H. E. Manning, for the plaintiff. J. W. McFadden and F. W. Callaghan, for the defendant.

ROBINSON v. TORONTO GENERAL TRUSTS CORPORATION—MASTEN, J.—JAN. 20.

Injunction—Interim Order—Terms.]—Motion by the plaintiffs for an interim injunction restraining the defendants from holding meetings of the shareholders of the Arena Gardens Limited. The motion was heard in the Weekly Court, Toronto. MASTEN, J., in a written judgment, said that certain orders made by other Judges in the action of Toronto General Trusts Corporation v. Arena Gardens Limited did not constitute an adjudication of the question arising on this motion. He was of opinion that, on the usual undertaking, an interim injunction should be granted, in the terms of the notice of motion, to continue until the trial of the action. The plaintiffs must be on terms to deliver their statement of claim forthwith and to speed the action in every way. Costs of this motion to be costs in the cause unless otherwise ordered by the trial Judge. W. R. Smyth, K.C., for the plaintiffs. J. M. Bullen, for the defendants.

RE ADDISON AND BRADBURY—LENNOX, J.—JAN. 22.

Vendor and Purchaser—Agreement for Sale of Land—Title—Objection to—Building Restriction—Covenant—Burden on Land—Declaration on Application under Vendors and Purchasers Act.]—Motion on behalf of the purchaser, under the Vendors and Purchasers Act, to have it declared that the vendor has not shewn a good title to land which he has agreed to convey. The motion was heard in the Weekly Court, Ottawa. LENNOX, J., in a written judgment, said that it was stated that Octavius Sommerville, under whom the vendor claimed, had covenanted with his vendor that he or his assigns would not at any time erect on the land a building to cost less that a certain sum or value. A copy of the deed or covenant was not put in, but counsel appeared to be in agreement as to its terms, and this was the substance of it. The learned Judge was not told whether the covenant in question was a link in the chain of a building scheme, or whether Sommerville's vendor retained land out of which this lot was carved or lots adjoining or in the neighbourhood, or whether other lots in the same locality had been sold on similar covenants. The question being presented in this bald way, the learned Judge could not say that the vendor had shewn a title that ought to be forced upon an unwilling purchaser. The requisition directed to this covenant had not, in the learned Judge's opinion, been answered. A. E. Honeywell, for the purchaser. E. P. Gleeson, for the vendor.

McGLADE V. PASHNITZKY AND MACEY SIGN CO. LIMITED—LENNOX, J.—JAN. 22.

Landlord and Tenant—Lease of Building—Subletting Contrary to Terms of Lease—Weakening Building by Placing Sign-board upon it—Damages—Reduction of Amount if Sign-board Removed and Repairs Made—Third Parties—Indemnity—Provisions of Judgment—Costs.]—Action to compel the defendants to remove a sign-board from a building in the city of Toronto, and for damages. The action and certain claims by the defendants against third parties were tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, said that the lease under which the defendant Pashnitzky held the building expressly prohibited him from assigning, subletting, or altering the property leased by the plaintiffs; and he knew this, and realised that the purpose to which the property was put weakened and endangered the building. He

entered into a dishonest bargain to confer upon the Rotenbergs (third parties) a colourable right to put the property to an unauthorised use, obtained $100 that he was not entitled to, and set up a false story when he found himself in difficulty. The learned Judge found also that a fraudulent agreement was entered into between Pashnitzky and the Rotenbergs. There should be judgment for the plaintiffs against the defendants for $500 damages and the costs of the action. If the sign-board and its supports, braces, and adjuncts of every description (except beams, supports, or braces within the building, and these too if the plaintiffs desire it) are removed, the roof thoroughly repaired, including injured sheeting, and the whole roof re-covered with the same material as it was covered with before the erection of the sign-board, within one month or such further time as may be allowed by reason of adverse weather conditions, the damages will be reduced to $150. There should be judgment for the defendants the Macey Sign Company Limited over against Pashnitzky and Louis Rotenberg and Rotenbergs Limited for indemnity, for the $200 paid with interest from the day of payment, the expense of erecting the sign-board (fixed at $35), expense of removal and repairs and re-roofing ($125), with costs of defence and third party proceedings. The plaintiffs may have an order directing the execution of this work if it is not proceeded with promptly. It is in the interest of the Macey Sign Company Limited that they should be allowed to do this work, and they should give notice of what they intend to do. If this is not done, the other parties interested in securing the reduction of the primary assessment may apply for directions so as to protect themselves. Frank J. Hughes, for the plaintiffs. B. W. Essery and F. G. McKenzie, for the defendant Pashnitzky. Frank Arnoldi, K.C., for the defendants the Macey Sign Company Limited. Gideon Grant, for the Rotenbergs.

SUPREME COURT OF ONTARIO.

RULE OF COURT.

At a meeting of the Judges held on the 3rd December, 1920, Rule 773 (*i*) was passed; to come into force on the 1st February, 1921:—

773 (*i*). In Rule 494 (1), and after the word "down" the words "or within 30 days thereafter."

And add:—

494 (3) The time limited by this Rule may be extended by the order of a Judge of the Appellate Division.

494 (4) In County Court appeals where copies of the evidence and proceedings at the trial are necessary a certificate from the Judge that such copies have been ordered from the stenographer shall be deemed to dispense with including such evidence and proceedings in the papers certified, and the appeal may be set down without such copies upon the appellant's solicitor undertaking to deposit them as soon as they are received from the stenographer.

494 (5) In default of compliance with this Rule the appeal shall be deemed to be abandoned and shall be struck off the list.