The
# Ontario Weekly Notes

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## APPELLATE DIVISION.

JUNE 21ST, 1915.

### SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

*Company—Managing Director—Breaches of Trust—Account—Compensation — Interest — Compound Interest—Credits—Claims for Commission — Expenses and Disbursements—Master's Report—Appeal.*

Appeal by the defendant from the order of KELLY, J., 7 O.W.N. 684, dismissing an appeal from the report of the Master in Ordinary.

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

A. J. Russell Snow, K.C., and H. E. Rose, K.C., for the appellant.

A. B. Cunningham, for the plaintiffs, respondents.

THE COURT allowed the appeal as to interest on the sums of $1,271.37 and $1,071.66, and reduced the interest from compound to simple interest; and dismissed the appeal as to other matters. No costs.

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JUNE 21ST, 1915.

### SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

*Judgment—Correction—Power of Court where Judgment as Issued does not Conform to Judgment as Pronounced—Judgment of Trial Judge—Affirmance with Variation on Appeal.*

Appeal by the plaintiffs from the order of KELLY, J., ante 458, refusing the plaintiffs' motion to amend the judgment given after the trial, 5 O.W.N. 183.

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

A. B. Cunningham, for the appellants.

A. J. Russell Snow, K.C., for the defendant, respondent.

THE COURT dismissed the appeal with costs.

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JUNE 22ND, 1915.

## MARSHALL v. DOMINION MANUFACTURERS LIMITED.

*Company—Title to Shares—Amalgamation — Contract — Novation—Failure of Consideration—Evidence.*

Appeal by the plaintiff from the judgment of MIDDLETON, J., 7 O.W.N. 808.

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

The appellant, in person.

I. F. Hellmuth, K.C., and C. H. Ivey, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

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JUNE 23RD, 1915.

## PEPPIATT v. REEDER.

*Costs—Scale of—Taxation—Rent—Damages—Set-off—Appeal.*

Appeal by the defendant from the order of SUTHERLAND, J., ante 517.

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

J. J. Gray, for the appellant.

E. Meek, K.C., for the plaintiff, respondent.

THE COURT made an order directing that, if the appellant had any claim for rent, and established his claim before the Master on the reference, the amount thereof should be deducted from the plaintiff's damages; and, subject to that direction, dismissed the appeal with costs to the respondent, fixed at $15.

HIGH COURT DIVISION.

MIDDLETON, J. JUNE 21ST, 1915.

## *BRYMER v. THOMPSON.

*Landlord and Tenant — Lease of Flat in Building — Implied Stipulation to Furnish Heat—Collateral Contract—Statute of Frauds—Damages for Inadequate Heating.*

The defendant, the owner of a building, placed it in her husband's hands for management. As her attorney, he leased the basement and ground-floor to one McArthur, who covenanted to heat the whole building—the defendant to pay for one-third of the fuel consumed. The defendant then placed the leasing of the remaining floors in the hands of an agent, who listed the property as "steam-heated flats." The system of heating provided was adequate for the contemplated purpose. The plaintiff rented the top-flat of the building from the agent as a steam-heated flat; but the lease signed by the plaintiff made no mention of heating. During the currency of this lease, the defendant, or McArthur for her, supplied steam-heat, but the supply was inadequate—not from any defect in the heating-plant, but from inefficient operation.

This action was brought for damages for the defendant's failure to heat the top-flat adequately.

The action was trial without a jury at Toronto.

G. N. Shaver, for the plaintiff.

J. W. Bain, K.C., and J. M. Forgie, for the defendant.

MIDDLETON, J., delivering a considered judgment, referred to the rule stated by Lord Esher in Hamlyn & Co. v. Wood & Co., [1891] 2 K.B. 488, that there is the right to imply a stipulation in a written contract where, "on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." Reference was also made to Ex p. Ford (1885), 16 Q.B.D. 305, and Lamb v. Evans, [1893] 1 Ch. 218.

There was here an implied promise and contract on the part of the landlord that the premises leased should be adequately and sufficiently heated; and there was nothing in the fact that

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

the case was one between landlord and tenant to render the law upon which I am acting inapplicable: De Lassalle v. Guildford, [1901] 2 K.B. 215.

Nor would the Statute of Frauds, if pleaded, afford any answer: where there are two distinct agreements, one of which is and the other is not within the statute, the promise which is not required to be in writing to be within the statute may be enforced, even though it is not evidenced by a writing: Halsbury's Laws of England, vol. 7, p. 383.

Damages assessed at $750, and judgment for the plaintiff for that sum, with costs.

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MIDDLETON, J., IN CHAMBERS. JUNE 22ND, 1915.

## *RE WINDATT AND GEORGIAN BAY AND SEABORD R.W. CO.

*Railway—Expropriation of Land—Award of Compensation Set aside — Railway Company in Possession — Compensation-money Paid into Court—Refusal of Land-owner to Take out —No Further Proceedings Taken—Application by Company for Appointment to Tax Costs—Railway Act, secs.* 199, 204.

Motion by the railway company, upon notice to the land-owner, for an appointment for the taxation of the company's costs of an arbitration under the Dominion Railway Act, R.S.C. 1906 ch. 37, to fix compensation for land taken for the railway.

The company offered $1,100 for the land. An award was made on the 20th June, 1912, fixing the compensation at $1,300. The award was set aside on the 25th November, 1912: Re Windatt and Georgian Bay and Seabord R.W. Co., 4 O.W.N. 395. It was then held that the Court had no jurisdiction to deal with the costs of the arbitration. The railway company had taken possession of the lands and paid the amount offered into Court. Nothing had since been done.

J. D. Spence, for the railway company.
No one appeared for the land-owner.

MIDDLETON, J., said that neither sec. 199 nor sec. 204 of the Railway Act applied; and he must decline to give the appointment sought.

There did not appear to be any remedy, so long as the owner refused to take the money out of Court or to co-operate in any way with the company.

MIDDLETON, J. JUNE 22ND, 1915.

## *LOWERY AND GORING v. BOOTH.

*Water—Rights of Lumbermen Floating Logs in River—Injury to Dam—"Unnecessary Damage"—Rivers and Streams Act, R.S.O.* 1914 *ch.* 130, *sec.* 4—*Negligence.*

The plaintiffs sued to recover damages arising from the destruction of a certain cofferdam built in the bed of the Montreal river—destroyed, it was said, during the passage of the defendant's logs down the stream in May, 1911.

The action was tried without a jury at North Bay.

R. McKay, K.C., and H. F. Upper, for the plaintiffs.

G. F. Shepley, K.C., and Wentworth Greene, for the defendant.

MIDDLETON, J., reviewed the evidence in a considered judgment; he found that the destruction of the dam was brought about by the defendant's logs.

By the Rivers and Streams Act, R.S.O. 1914 ch. 130, sec. 3, a right is given, subject to the provisions of the Act, during spring freshets, to float and transmit timber down all rivers; and by sub-sec. 3 it is provided that, where necessary to remove any obstruction from the river to facilitate the transmission of timber, the obstruction may be removed, "doing no unnecessary damage to the river or its banks." Section 4 provides that, where there is a convenient opening in any dam, no person using the river for floating timber shall "injure or destroy such dam . . . or do any unnecessary damage to it or the banks of the river."

The learned Judge was of opinion that sec. 4 applied to this case, and that there was no liability unless it could be shewn that what was done could be described as "unnecessary damage" to the dam—that is, damage which could be avoided by the exercise of reasonable care and caution; and he was unable to find anything which would justify a holding that there had been such disregard of the plaintiffs' right as to constitute what the Legislature meant by "unnecessary damage."

Reference to Thompson v. Hill (1870), L.R. 5 C.P. 564; McCulloch v. State of Maryland (1819), 4 Wheat. 316, 413; Mobile and Girard R.R. Co. v. Alabama Midland R.W. Co. (1888), 87 Ala. 501; Purdy v. Lynch (1895), 145 N.Y. 462; St. Louis and San Francisco R. Co. v. Franklin (1909), 123 S.W. Repr. 1150; In re Gasquoine, [1894] 1 Ch. 470.

By this statute the Legislature intended to confer upon lumbermen the right to use streams for flotation of timber with immunity from damage for injury done to the property of others, unless it can be found affirmatively that the operations were conducted negligently and with reckless disregard of the rights of others; and in this case negligence had not been established.

*Action dismissed with costs.*

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BRITTON, J. JUNE 23RD, 1915.

## SHENANGO STEAMSHIP CO. v. SOO DREDGING AND CONSTRUCTION CO. LIMITED.

*Negligence—Allowing Boulder Placed in Stream to Remain Unmarked without Warning to Navigators—Injury to Vessel—Navigable Waters' Protection Act, R.S.C.* 1906 *ch.* 115, *sec.* 14—*Evidence—Findings of Fact of Trial Judge.*

Action for damages for the defendants' negligence in placing a large boulder in a dredged navigable channel of the St. Mary's river on the Canadian side of the international boundary, whereby the plaintiffs' ship the "W. P. Snyder" was damaged. The plaintiffs complained that the defendants negligently allowed the boulder to remain in the channel without marking it by a stake or buoy or giving a warning signal of any kind.

The action was tried without a jury at Sault Ste. Marie.

Gideon Grant, for the plaintiffs.

A. C. Boyce, K.C., for the defendants.

BRITTON, J., reviewing the evidence in a considered judgment, said that there was no doubt that the vessel struck a boulder or rock; but the identity of that which it struck with a boulder placed by the defendants had not been established beyond reasonable doubt.

Assuming that the boulder had been identified, negligence on the part of the defendants must be shewn.

The plaintiffs relied upon sec. 14 of the Navigable Waters' Protection Act, R.S.C. 1906 ch. 115. It was doubtful if that section applied to this case. The defendants did not have charge of the boulder. But, even if the section did apply, the

non-compliance with it at any particular time would only be evidence of negligence, and would not itself create a liability.

The learned Judge accepted the evidence that a buoy was placed to mark the existence of a boulder; that the buoy was moved without any fault of the defendants; and that the defendants were about to replace the buoy by another in a reasonable time from the time they knew of its absence; and the defendants were not guilty of negligence in not replacing it before the grounding of the vessel.

*Action dismissed with costs.*

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MIDDLETON, J. JUNE 23RD, 1915.

## FOSTER v. TRUSTS AND GUARANTEE CO.

*Assignments and Preferences—Conveyance of Land in Trust for Erection of Buildings and Payment of Creditors—Expenditure by Trustee in Excess of Sums Received from Property—Mortgage by Trustee to Secure Personal Creditor—Appointment of New Trustee—Action against, for Foreclosure—Trust not within Assignments and Preferences Act—Judgment—Immediate Foreclosure—Costs.*

Action to recover payment of the amount due upon a mortgage of land, and, in default of payment, for foreclosure.

One Esther Ellenson by deed conveyed land to one Lobb upon trust to complete certain houses in the course of erection, and for the purpose of borrowing upon the security of the land and selling it and certain personal property and collecting certain debts, and thereout to pay his own remuneration, all preferential claims, and the claims of ordinary creditors of the assignor, with an ultimate trust in her favour. The only conveyance in the deed was of the land, although the trust was for the realisation of personal property as well. The deed recited the financial embarrassment of the assignor and that she was assigning all her property to procure the payment of her debts in full.

According to Lobb's statement, he disbursed $110,410, and received $67,943.

Lobb was a solicitor; the plaintiff was one of his clients; Lobb received for the plaintiff a sum of $5,848.88, which he used for his own purposes, and possibly to some extent for the purposes of the trust. When the plaintiff demanded his money, Lobb

said that he had used it in erecting houses upon the trust property; and the plaintiff accepted, as security for his claim, a mortgage made by Lobb upon a portion of the trust property. This was the mortgage now sought to be enforced.

Lobb left the Province; and an order was made, under the Trustee Act, R.S.O. 1914 ch. 121, appointing the defendants trustees under the trust deed, in place of Lobb.

The action was tried without a jury at Toronto.

W. E. Raney, K.C., for the plaintiff.

John Jennings, for the defendants.

MIDDLETON, J., in a considered judgment, held that the assignment to Lobb was not an assignment under the Assignments and Preferences Act, R.S.O. 1914 ch. 134—the powers which it conferred upon the assignee were totally different. The creditors of the assignor had not attacked the assignment; the defendants were now the trustees under it, and could not seek to defeat their own title. Nor could the assignment be read as embodying all the terms of the Act.

In the second place, it was held that, upon the evidence, Lobb had put more money into the trust property than he had received, and was entitled, under the terms of the trust, to borrow to recoup himself; and what he did was to borrow from the plaintiff for that purpose. The fact that the money was taken from the plaintiff in the first instance without his consent was something that concerned the plaintiff and Lobb alone, so long as there was more due to Lobb than the amount of the mortgage. It was conceded that there was but little margin in the property covered by the mortgage over and above the amount of prior incumbrances, including mechanics' liens.

Judgment for foreclosure. If the defendants were ready to consent to an immediate foreclosure, the plaintiff taking the property for his debt, the question of costs need not be considered; in the absence of such consent, there should be foreclosure according to the ordinary practice; and the defendants, having contested the plaintiff's right, should be ordered to pay the costs to the hearing.

LENNOX, J., IN CHAMBERS. JUNE 23RD, 1915.

## REX v. MANZI.

*Criminal Law—Attempt to Commit Rape—Conviction by Police Magistrate Quashed for Want of Jurisdiction—Detention of Prisoner pending Preliminary Hearing by Magistrate—Procedure—Place of Detention.*

Motion to quash the conviction of the defendant by a Police Magistrate for an attempt to commit rape.

E. F. Macdonald, for the defendant.
J. R. Cartwright, K.C., for the Crown.

LENNOX, J., said that the magistrate had jurisdiction to hold a preliminary inquiry, and—the prisoner pleading guilty to one of the charges at least—to send him for trial; but the magistrate had no jurisdiction to try the prisoner upon the charge of the indictable offence of attempt to commit rape. The conviction should, therefore, be quashed, and the money paid into Court as security be paid out. There should be no order as to costs.

The motion was as to the conviction only; the prisoner was not brought up on habeas corpus; his discharge was not asked for; and it would not be proper to discharge him, if it were. But it was proper to direct what should be done. The procedure was governed by Rex v. Frejd (1910), 22 O.L.R. 566—the circumstances differing in this respect only, that, the prisoner being in gaol, there was no occasion for a remand.

It was suggested that the North Bay gaol was not the gaol to which the prisoner should be sent, the offence having been committed in the district of Temiskaming. But this need not occasion any difficulty, as counsel for the Crown undertook to see that the custody should be proper in this respect.

Order that the prisoner be detained in close custody until he can be brought up for hearing, and that a preliminary hearing of the charge according to law shall be had as speedily as may be, and that peace officers and others concerned shall govern themselves accordingly.

SUTHERLAND, J., IN CHAMBERS. JUNE 25TH, 1915.

## RE REID AND GOODERHAM.

*Land Titles Act—Registration of Agreement Extending Time for Payment of Moneys Secured by Charge—Necessity for Execution by Owners of Charge—R.S.O.* 1914 *ch.* 126, *sec.* 138, *Rules* 27, 28, 29, 30, 33.

Appeal by the executors of George Gooderham, deceased, from the refusal of the Master of Titles to record a document in the Land Titles office at Toronto.

The appellants were the owners of a charge upon land, and the document in question purported to be an agreement between Harriet M. Reid, the owner of the lands subject to the charge, and the appellants, whereby the time for payment under the charge was extended. The document was executed by Harriet M. Reid, but not by the appellants; and registration was refused because of such non-execution.

M. R. Gooderham, for the appellants.

J. R. Cartwright, K.C., for the Master of Titles.

SUTHERLAND, J., said that by reference to Rules 27, 28, 29, 30, and 33, passed and approved under the authority of sec. 138 of the Act (Land Titles Act, R.S.O. 1914 ch. 126), and particularly Rule 29, the principle on which the Master should act on entering in the register variations of the terms of a charge to which a title is subject, could be ascertained. In the learned Judge's opinion, the Master properly took the position that, before he could be called upon to register the document in question, it should contain the consent, evidenced by their execution of the document, of the persons in whose favour the charge existed, to the alteration in the terms of the original document.

*Appeal dismissed with costs.*

MIDDLETON, J. JUNE 25TH, 1915.

## *BROWN v. COLEMAN DEVELOPMENT CO.

*Statute of Frauds—Moneys Advanced to Company—Oral Promise of President of Company to Repay — Contract of Suretyship—Evidence.*

Appeal by the defendant Gillies from the report of Mr. J. A. C. Cameron, Official Referee, whereby he found the plaintiff entitled to recover from the appellant $7,000 and interest from the 17th April, 1908.

The appellant sold a mining property to the defendant company in consideration of the allotment to him of the great bulk of the shares of the capital stock of the company. He was the president of the company, and the plaintiff was the secretary. The appellant made advances to the company to enable it to meet its liabilities. The plaintiff also advanced money, as he alleged, upon the promise of the appellant to repay it; the appellant denied the promise; but the Referee found that it had been made. The action was brought against both defendants to recover a large sum for salary and moneys advanced.

The appeal was heard in the Weekly Court at Toronto.

H. S. White, for the appellant.

H. E. Rose, K.C., for the liquidator of the defendant company.

W. M. Douglas, K.C., and S. W. McKeown, for the plaintiff, respondent.

MIDDLETON, J., said that, upon the evidence, he could not interfere with the finding of fact of the Referee. The learned Judge was of opinion, however, that the promise made by the appellant was in truth a promise to answer for the debt of the company, and that the Statute of Frauds afforded a defence: there being a principal debtor liable, the contract of the appellant was one of suretyship.

Reference was made to Forth v. Stanton (1869), 1 Wms. Saund. 220, 233; Birkmyr v. Darnell (1704), 1 Salk. 27, Sm. L.C., 11th ed., vol. 1, p. 299; Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, 24; James v. Balfour (1882), 7 A.R. 461; Sutton & Co. v. Grey, [1894] 1 Q.B. 285; Harburg India Rubber Comb Co. v. Martin, [1902] 1 K.B. 778; Davys v. Buswell, [1913] 2 K.B. 47.

The appeal should be allowed, with costs here and below; and, unless there was to be a further appeal, the action should, as against the appellant, be dismissed with costs.

The plaintiff should have the right to rank against the assets of the defendant company in liquidation for the amount found due to him by the report, subject to the right of the liquidator to claim against him with respect to any other matters which he might be advised to set up in the course of the liquidation. As between the plaintiff and the liquidator there should be no costs.

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LENNOX, J., IN CHAMBERS. JUNE 26TH, 1915.

## RE CORDINGLEY v. WILLIAMSON.

*Division Courts—Jurisdiction — Jury Trial — Irregularity — Waiver—Claim for Damages for Conversion of Goods — Amount in Excess of Jurisdiction in Actions for Tort—Claim actually Based on Contract—Amendment—Prohibition.*

Motion by the defendant for an order of prohibition to the First and Second Division Courts in the County of Peel to prevent the plaintiff and the Judge and the clerk of the Second Division Court from further proceeding in the action, in which judgment was given for the plaintiff.

The plaintiff's claim was to recover $68.75 made up of $5 in small items—matters of account—and $63.75 for 8½ tons of straw said to have been converted by the defendant to his own use.

The defendant filed a dispute-note in the Second Division Court, wherein the action was commenced, and counterclaimed for $150, and demanded a jury; but did not deposit the fee for a jury. The case came on for trial in the Second Division Court, at Cooksville. The defendant asked for an adjournment, and to have the trial at Brampton before a jury. As an indulgence to the defendant, the Judge adjourned the hearing to Brampton, at Chambers—the defendant undertaking to pay the costs of the day and waive all irregularities. The case came on for trial at Brampton, and a jury was convened—in an irregular manner—but the defendant again waived all objections; and both parties stated that there were no objections when the jurymen were sworn. The case was not transferred to the First Division Court. The trial proceeded, and there was a verdict for the plaintiff.

The defendant, upon the motion for prohibition, raised several objections to the jurisdiction of the Division Court.

J. B. Mackenzie, for the defendant.
W. H. McFadden, K.C., for the plaintiff.

LENNOX, J., in a considered judgment, said that the irregularity in summoning the jury was, in the circumstances, no ground for prohibition. There was no such absolute right to a prohibition as would enable a party to trifle with the Court after he found the tribunal of his own selection deciding against him. Mere acquiescence does not give jurisdiction; but an irregularity in procedure may be the subject of waiver or acquiescence so as to preclude the grant of prohibition after judgment. Reference to Richardson v. Shaw (1876), 6 P.R. 296; London Corporation v. Cox (1867), L.R. 2 H.L. 239, 282; Broad v. Perkins (1888), 21 Q.B.D. 533; Mouflet v. Washburn (1886), 54 L.T.R. 16.

The other principal objection was that the amount of the claim for damages for conversion, $63.75, was beyond the jurisdiction of a Division Court. As to this, the learned Judge said that the claim was not really for conversion, but for the value of the straw as upon a contract for the sale of it, and the particulars should have been amended at the trial to shew this, and would, no doubt, have been amended if the objection had been taken at the trial. There was no merit in the application. The defendant had a fair trial, upon indulgent terms of his own making; he expressly waived irregularities; and, in the opinion of the trial Judge, the result was fair to both parties. Reference to the Admiralty Case (1610), 12 Co. Rep. 78.

*Motion dismissed without costs.*

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SUTHERLAND, J. JUNE 26TH, 1915.

## ROBINSON v. CAMPBELL.

*Highway—Sand-heap Left in Front of House in Course of Erection—Injury to Vehicle Running into it—Obstruction — Nuisance—Liability of Sub-contractors for Building—Non-liability of Principal Contractor — Other Defendants — Costs.*

Action for damages for injury to the plaintiff's taxicab by running into a pile of sand left upon the roadway in front of a

house in course of construction upon the land of the defendant Campbell, in the city of Windsor.

The accident occurred between one and two o'clock on the morning of the 9th May, 1914. The plaintiff's vehicle was driven by a competent chauffeur; according to the plaintiff's contention, no light was displayed to indicate the presence on the travelled roadway of the heap of sand.

The action was begun on the 4th June, 1914, the original defendants being Campbell and the Municipal Corporation of the City of Windsor. Galloway, the general contractor engaged in the construction of the house, Evans and Oram, the sub-contractors for the masonry work, and the Cadwell Sand and Gravel Company Limited, who supplied the sand to Evans and Oram and left it upon the roadway, were added as defendants by order.

On the 27th April, 1915, the plaintiff discontinued as against Campbell; on the 6th May, 1915, the plaintiff discontinued as against the Cadwell company; and at the opening of the trial it was announced that no evidence would be offered as against the defendant city corporation.

The action was tried without a jury at Sandwich.

T. Mercer Morton, for the plaintiff.

J. H. Rodd, for the defendant Campbell.

F. D. Davis, for the defendant city corporation.

O. E. Fleming, K.C., for the defendants Evans and Oram and the defendant the Cadwell company.

T. G. McHugh, for the defendant Galloway.

SUTHERLAND, J., in a considered judgment, found that the taxicab was, at the time of the accident, being driven at a lawful rate of speed, upon the proper side of the street; that the head-lamps of the car were not lighted, but the front side-lamps were; that there was a pile of sand stretching out from the kerb a distance of from 5 to 10 feet and of sufficient depth to constitute an unlawful and dangerous obstruction; that it was by the car running into the heap that the taxicab was damaged; that no lantern or light was upon the pile of sand at the time of the accident; that no permit for the placing of the sand on the road-way was granted by the city corporation; that the lighting of the two side-lamps (white) and keeping them lighted at the time of the accident was a sufficient compliance with a by-law of the city regulating the operation of motor vehicles.

After making these findings of fact, the learned Judge expressed the opinion that the sand-heap constituted, as regards persons lawfully using the roadway, a dangerous nuisance, and that the defendants who placed it and left it there were liable for the injury to the plaintiff's vehicle. It was not obligatory on the plaintiff to have his head-lights operating at the time. If they had been lighted, the accident might not have occurred; but the undoubted occasion of the accident was the negligence of the defendants in placing the unlawful obstruction on the highway.

It was the defendants Evans and Oram who caused the sand to be placed on the highway and who allowed it to remain there, and they were liable.

The defendant Galloway, the principal contractor, was not liable, for he had no control over the sub-contractors, and the work of depositing the sand was only of a casual and collateral character. Upon this point, reference was made to Ballentine v. Ontario Pipe Line Co. (1908), 16 O.L.R. 654; Longmore v. J. D. McArthur Co. (1910), 43 S.C.R. 640; Waller v. Town of Sarnia (1913), 4 O.W.N. 890, and other cases there cited.

Action dismissed as against all the defendants except Evans and Oram.

As against those defendants, the plaintiff's damages were assessed at $400, and judgment was given for the plaintiff for that sum, with costs on the County Court scale.

Costs of the defendant city corporation, fixed at $20, to be paid by the plaintiff.

Costs of the defendants Campbell and the Cadwell company, fixed at $25 for each defendant, to be paid by the plaintiff.

Costs of the defendant Galloway, fixed at $60, to be paid by the plaintiff.

The defendants Oram and Evans to be entitled to deduct from the costs payable by them to the plaintiff the sum of $50 for their additional costs occasioned by being brought into the Supreme Court.

SUTHERLAND, J. JUNE 26TH, 1915.

## RE DEVINS.

*Will—Construction—Devises to Sons—Misdescription of Lands—General Intention—Falsa Demonstratio—Lands actually Owned by Testator Passing to Devisees—Residuary Clause—Annuity to Widow—Charge on Lands Devised—Bequests in Lieu of Dower.*

Motion by the executors of James W. Devins, deceased, for an order determining questions arising upon the terms of the will of the deceased, in the course of the administration of his estate.

The testator devised to his son Freeman Clarence Devins the north half of the east half of lot 2 in the 6th concession of Vaughan, subject to a legacy of $1,000 to be paid to the testator's daughter Armenia Elizabeth Devins; to his son William James Devins, the south half of the east half of lot 2, subject to a legacy of $1,000 to be paid to another daughter; he also directed his sons, Freeman Clarence, William James, and George John, to pay to his (the testator's) wife $60 each per year during her lifetime, "in lieu of her dower in my estate or so long as she remains my widow;" the residue of his estate he devised and bequeathed to his three sons in equal shares. He also devised to his son George John part of lot 1 in the 6th concession, subject to a legacy of $1,000 to a daughter. Other clauses gave the wife a house and lot, the proceeds of an insurance policy, and household goods. The testator did not own the east half of lot 2, but did own the west half.

The motion was heard in the Weekly Court at Toronto.

A. G. Browning, for the executors.

J. Gilchrist, for the widow.

A. J. Anderson, for Freeman Clarence Devins.

J. R. Meredith, for the infants.

SUTHERLAND, J., in a considered judgment, said that it was plain from the language of the will generally, that the testator intended to devise his real estate, apart from the house and lot devised to his wife, among his three sons in such a way that each would receive one parcel, subject to a legacy in favour of a named daughter, and that it was also plain that it was the part of the north half of lot 2 which he owned that he intended to devise to Freeman, and the part of the south half which he owned that he intended to devise to William; the words "the east half" should

be rejected as falsa demonstratio; and the portions of the north and south halves owned by the testator should be held to pass to the two sons.

The fact of there being a residuary clause in the will could not be considered as altering the effect of this construction, as is sometimes the case.

Reference was made to Re Fletcher (1914), 31 O.L.R. 633, and to a number of other cases, most of which are cited in the report of that case.

The legacy of $60 a year to be paid by each son to the widow not being limited to any particular fund, and the bequests to the widow being followed by the general clause making them in lieu of dower, and as dower would otherwise be out of all of the land, the $60 a year is a charge on each of the parcels devised to Freeman and William.

Costs of all parties out of the estate.

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GREEN FUEL ECONOMISER CO. v. CITY OF TORONTO—MIDDLETON, J.—JUNE 21.

*Bailment—Destruction of Property by Bailee—Damages.*]—In 1896, the plaintiff company sold a fuel economiser to the defendant corporation. Some dispute arose upon this contract and the plaintiff company's compliance with its requirements. Litigation resulted, ending in a judgment of the 17th February, 1902, subsequently modified in one respect by agreement. Under this judgment as modified, the plaintiff company was called upon to install at the defendant corporation's pumping-station, where the economiser plant had been erected, a fan plant and equipment for the purpose of increasing the chimney draft. A test of the efficiency of the economiser was then to be made, and if, as the result, a saving of 7 per cent. or more resulted, a price was to be paid varying according to the degree of efficiency shewn. If, as the result of the test, a saving of less than 7 per cent. should be shewn, the plaintiff company was to remove the economiser at its own expense, and the defendant corporation was to repay the cost of installing the fan equipment. The test was made, and it was found that the economy resulting from the installation was only a little over 5 per cent. It thereupon became the duty of the plaintiff company to remove its equipment, and it had the right to receive the cost of the fan arrangement. Nothing was done with reference to either of these matters, and the whole equipment was suffered to remain in the waterworks plant until November, 1914, when—the whole station being in

process of reconstruction—the building was pulled down, and this apparatus was reduced to the condition of scrap iron, being entirely broken and smashed to pieces. The defendant corporation, on the 3rd December, notified the plaintiff company that the apparatus had been removed from the building, and requested the company to remove it from the defendant corporation's premises within 10 days. The plaintiff company found the apparatus in the condition of a heap of junk in the waterworks yard. This action was then brought to recover the value of the economiser plant destroyed and $1,370, the amount to be paid for the auxiliary plant and equipment. The defendant corporation paid into Court the amount claimed for the auxiliary plant, less $135 for the cost of removing the fuel economiser. At the trial it appeared that some item had been omitted in making up the cost of the auxiliary plant, and an amendment increasing the amount due in respect of it to $1,480.50, was allowed. The whole question in issue at the trial was the liability of the defendant corporation with regard to the economiser plant. MIDDLETON, J., who tried the action without a jury, said that it appeared to have been assumed by the civic officials that the economiser plant had been abandoned by the company as worthless; but that assumption was unfounded in fact, and there was no right to remove and destroy the apparatus without first giving reasonable notice to the owner. The obligation of the defendant corporation would not be less than that of a gratuitous bailee. The application was to keep, without gross negligence, using such care as an ordinarily prudent man would of his own property. There could be no justification for the active destruction and conversion of the property into scrap metal. On the whole, having regard to all the circumstances, upon this head the plaintiff company should recover $1,250; the scrap resulting from the destruction of the apparatus to become the property of the defendant corporation. Judgment for $1,480.50, the amount due upon the first item, and $1,250 on the second, with costs, and the money in Court will be paid out to the plaintiff company on account of this recovery. J. H. Moss, K.C., for the plaintiff company. C. M. Colquhoun, for the defendant corporation.

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RE MOISSE—LENNOX, J., IN CHAMBERS—JUNE 22.

*Settled Estates Act—Money in Court—Payment out to Executors to be Applied according to Trusts of Will.*]—Motion by the Canada Trust Company, executors of the will of William Moisse, deceased, for payment out of Court of moneys paid in

under the Settled Estates Act. LENNOX, J., said that the practice was as a rule against granting an application for payment out of the moneys in a case of this kind. The rule is, of course, subject to modification; and, as already an order had been made for payment to the applicants of part of the moneys, he could not err if he followed the same course in this instance. The will was not before him, but an extract from it suggested a possibility —but only a possibility—that the time for distribution had not arrived. In view of this, and as the argument did not touch this question, the order should be for payment out to the Canada Trust Company, executors, of the moneys in Court to the credit of the estate, to hold and to be applied by the executors subject to and according to the trusts and provisions of the will, with liberty to the executors to bring before the Court any difficult question as to construction otherwise which might arise. Costs out of the estate—those of the executors between solicitor and client. J. B. McKillop, for the executors. F. W. Harcourt, K.C., for the infant beneficiaries.

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RE SMITH—LENNOX, J.—JUNE 24.

*Will—Construction—Legacy—Postponement of Payment—Accumulations of Income.*]—Under the will of Sir Frank Smith, who died on the 17th January, 1901, one of his grandsons, Frank Harrison, was to become entitled to a share of "residue of income" until the time fixed for the distribution of the corpus of the estate. This was to date from the death of the legatee's mother, Frances Harrison, daughter of the testator; she predeceased him; and, by a codicil executed shortly after her death, he declared that the time from which Frank Harrison's income would date would be that of the testator's death. By a codicil made before Mrs. Harrison's death, the testator declared that the income that might accumulate and be unexpended during the minority of any child of his daughter Mrs. Harrison should not "be or become the property of such child except contingently and conditionally upon such child being alive twenty years after my death, and . . . if any such child . . . should die before the expiration of twenty years after my death then the said unexpended accumulations shall form part of the general income of my estate and be distributed under my will as such." By an application made by the trustees of the estate, under the Trustee Act and Rule 600, the Court was asked to declare whether or not Frank Harrison was entitled to be paid

the income on certain moneys in the hands of the trustees, being the accumulations of income unexpended or unused during his minority which may be earned between the date at which he attained majority and the date at which the said accumulations may become his property under the will and codicils or the date of his death, which ever shall first happen. LENNOX, J., holds that Frank Harrison is not presently entitled to the interest accrued or accruing upon the fund in the trustees' hands, and will not be entitled to it during the currency of the twenty years. Order declaring accordingly. Costs of all parties out of the estate—those of the trustees on a solicitor and client basis. A. E. Knox, for the Toronto General Trusts Corporation, the trustees. E. G. Long, for Frank Harrison. F. W. Harcourt, K.C., for the infants.

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BALL v. WABASH R.R. CO.—SUTHERLAND, J.—JUNE 25.

*Trial—Findings of Jury—Negligence—Contributory Negligence — Injury to Servant of Railway Company — Conflicting Findings—New Trial—Rule* 501(1).]—Action by a fireman employed by the defendants to recover damages for personal injuries alleged to have been caused by the negligence of the defendants or their servants. The plaintiff was in the cab of one of the defendants' locomotive engines, engaged in cleaning it, when, as he alleged, the nozzle of the squirt-hose attached to the boiler of the engine flew up from the floor of the cab, by reason of the pressure of steam and hot water from the boiler, and a stream of scalding water therefrom struck him in the face, severely scalding it and destroying the sight of his right eye. The action was tried before SUTHERLAND, J., and a jury. The jury found, in answer to questions, that the injuries of the plaintiff were caused by the negligence of the defendants, and that such negligence consisted in not seeing that the valve was properly closed. The jury, in answer to further questions, found that the plaintiff's injuries were not the result of his own negligence, but that, by the exercise of reasonable care, he might have avoided the accident, and that what he could have done was to have examined the valve before attempting to use the hose. The learned Judge, in a considered judgment, adjudges that the answers of the jury are conflicting, and leaves the case for re-trial: Rule 501(1). Costs to date to be costs in the cause. A. A. Ingram, for the plaintiff. H. E. Rose, K.C., for the defendants.

LIVINGSTON v. CUMMINGS—BRITTON, J.—JUNE 26.

*Contract—Sale of Lands—Principal and Agent—Share of Profits—Commission—Costs.*]—An agreement of the 7th December, 1914, provided that the plaintiff should have the exclusive right of sale of certain lands owned by the defendant for the period of two years from the 1st June, 1912, for the price of $500 an acre, or such other price as might be agreed upon in writing. Under this agreement, having regard to what took place under it, the plaintiff claimed a commission and a share of the profits made by the defendant from the sale of part of the lands, or damages for breach of the agreement. The plaintiff's claim was for $12,700. The action was tried without a jury at Toronto. The questions were entirely questions of fact. The evidence is carefully reviewed by the learned Judge, in a considered judgment; the greater part of the plaintiff's claim is denied; but it is held that he is entitled to commission upon a sale to one Annis, though not to a share of the profits from that sale. Judgment for the plaintiff for $217.50, with costs, and without a set-off of costs in favour of the defendant. C. A. Moss and H. J. Martin, for the plaintiff. M. H. Ludwig, K.C., for the defendant.

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KREAMER v. CLARKSON—SUTHERLAND, J.—JUNE 26.

*Company—Assignment for Benefit of Creditors—Transfer of Assets of Company to New Company—Resolution of Creditors—Dissentient Creditor—Injunction—Delay in Moving.*]—Motion by the plaintiff for an interim injunction restraining the defendant Clarkson, as assignee for the benefit of the creditors of a company called "Motordromes Limited," from transferring to a new company the assets of that company in the manner stated in the minutes of a meeting of creditors of the old company, held on the 30th November, 1914, upon the ground that such transference would give to some of the creditors preferences over others and of the inability of the assignee legally to make the transfer. The plaintiff's claim was for a commission charged the company for building a motordrome and for salary as manager thereof. The notice of motion having been served only on the 21st April, 1915, and it appearing that the resolution had been acted upon and that it was now impossible to restore all parties to the positions they were in when the resolution was passed in November, 1914, SUTHERLAND, J., was unable to see how he could rightly make an order such as was asked. Motion dismissed with costs. W. A. Proudfoot, for the plaintiff. J. T. White, for the defendants.