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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 8TH, 1919.

KRUG v. TOWNSHIP OF ALBEMARLE.

Municipal Corporations—Issue by Township Council of Debenture to Raise Money for Public School Purposes—By-Law—Rate of Interest—Computation of Amount of Principal and Interest Lumped together—Reformation of By-law and Debenture—Action by Executors of Purchaser of Debenture.

Appeal by the defendants from the judgment of LENNOX, J., 16 O.W.N. 194.

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

David Robertson, K.C., for the appellants.

McGregor Young, K.C., and J. C. Moore, for the plaintiffs, respondents.

THE COURT allowed the appeal with costs and dismissed the action with costs, being of opinion that no case was made for reformation, if the by-law or debenture was susceptible of reformation.

FIRST DIVISIONAL COURT. OCTOBER 10TH, 1918

*JEWHURST v. UNITED CIGAR STORES LIMITED.

Malicious Prosecution—Functions of Judge and Jury Respectively—Reasonable and Probable Cause—Judicature Act, sec. 62—Finding of Trial Judge—Findings of Jury—Malice—Damages—Judge's Charge—Misdirection—No Miscarriage of Justice.

Appeal by the defendants from the judgment of BRITTON, J., in favour of the plaintiffs, upon the verdict of a jury, in an action for malicious prosecution. The jury assessed the plaintiffs' damages at $1,700, and for that sum and costs judgment was directed to be entered.

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

W. A. Henderson, for the appellants.

George Lynch-Staunton, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., in a written judgment, said that the plaintiff was the manager of a cigar-store of the defendants at Dunnville. The defendants charged him with the theft of $423.11. The charge was dismissed by a magistrate. The information was laid by one Tilston, the defendants' secretary-treasurer.

At the trial of this action there was evidence which, if believed, warranted a finding that the plaintiff was always ready and willing to pay what on a proper accounting was owing to the defendants. He contended all along that the shortage, if any existed, was not due to any fault of his, and said that he was unable to understand how there could be such a shortage as was alleged to exist. All this was known to the defendants' agents.

Mr. McArrell, the County Crown Attorney, who was examined as a witness at the trial, testified that if the facts as they appeared in the prosecutor's case before the magistrate had been disclosed to him he would not have advised the laying of an information.

Tilston frankly admitted, in answer to a question by the defendants' counsel, that his object in taking criminal proceedings was to collect the debt which the plaintiff owed to the defendants.

The trial Judge ruled that the plaintiff had established want of reasonable and probable cause, and no objection was made to the Judge's charge to the jury.

To constitute the crime of theft, in such a case as this, there must be a fraudulent and without colour of right conversion of

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

the property of another; and the evidence fully warranted the trial Judge in ruling that there was an absence of reasonable and probable cause for the criminal proceedings taken against the plaintiff.

The plaintiff was liable to pay for the shortage, but that was a different thing from his being liable to the charge of theft because the shortage existed or because he could not or would not pay for it.

The finding of the trial Judge as to reasonable and probable cause could not be disturbed.

According to the provisions of sec. 62 of the Judicature Act, the question of reasonable and probable cause is to be determined for all the purposes of the trial by the Judge, and the jury cannot disregard that finding, but must give effect to it when determining the question of malice.

That being so, the functions of the jury, in such a case as this, are to determine the following matters and these only:—

1. Whether the defendant prosecuted the criminal charge against the plaintiff as alleged before a tribunal into whose proceedings the civil courts are competent to inquire.

2. Whether the proceedings complained of terminated in the plaintiff's favour.

3. Whether the defendant instituted or carried on the proceedings maliciously.

4. The damages sustained by the plaintiff.

In determining the third question, the jury may but are not bound to imply malice from the want of reasonable and probable cause.

In this case, the jury must have found malice, and there was not only the implication from the absence of a reasonable and probable cause, but express evidence that the prosecution was instituted from an indirect or improper motive, viz., for the collection of the alleged debt, to support the finding.

It was argued that the defendants had laid all the facts fully and fairly before the Crown Attorney, and had acted on his advice in laying the information. The view of the trial Judge was that the defendants had not done this, but had withheld from the Crown Attorney material facts which, had they been disclosed, would have led him to advise against laying an information; and with that view the learned Chief Justice agreed.

Upon the issues which the jury were to decide there was no misdirection. That the defendants had instituted the prosecution and that it had terminated in favour of the plaintiff was not disputed; and in the direction as to malice there was nothing to complain of.

Although no objection has been taken to the charge, if it

appears that misdirection has resulted in a miscarriage of justice, a new trial will be granted. If there was misdirection in this case, there was no miscarriage of justice.

The damages were large, but not so excessive as to warrant the Court's interference.

The appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A., agreed in the result, for reasons briefly stated in writing.

FERGUSON J.A., read a dissenting judgment. He was of opinion that there had been a mistrial, and that there should be a new trial.

Appeal dismissed (FERGUSON, J.A., *dissenting*).

FIRST DIVISIONAL COURT. OCTOBER 10TH, 1919.

RE RANTON.

Will—Construction—Bequest to "any Daughter Unmarried"—Application to Widowed Daughter.

Appeal by Lucie Ranton Herdle from the judgment of MIDDLETON, J., 16 O.W.N. 158.

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

J. Gilchrist and G. T. Walsh, for the appellant.

H. R. Frost, for the administrators with the will annexed of the estate of A. H. Ranton, deceased.

A. R. Hassard, for Jennie Partridge and her six daughters.

J. W. Payne, for M. Ranton.

E. C. Cattanach, for the Official Guardian, representing the infant Jean Ranton.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant contended that Middleton, J., came to a wrong conclusion in determining that she was not entitled to a share in the testator's residuary estate.

The residuary clause was as follows:—

"If my estate is sufficient to pay more than the bequests named above, I direct my trustees to divide the residue equally amongst my brother, my sister, her daughters, my daughter, and any daughter unmarried (at my death) of my brother W. J. Ranton."

The appellant was a daughter of the testator's brother W. J. Ranton, and was, to the knowledge of the testator, at the time of the making of the will and of his death, a widow.

For the appellant it was argued that "unmarried" was not to be read in its primary sense, i.e., "not having been married," and that this was shewn: (1) by the testator's reference, in a previous provision of the will, to the appellant as "Lucie Ranton;" (2) by the use of the word "any" before the words "daughter unmarried;" (3) by the use of the words "at my death."

It was contended that the testator by referring to the appellant by her maiden name treated her as unmarried.

W. J. Ranton had five daughters, all of whom, except the appellant and one daughter who was a spinster, had husbands living; and the testator must, therefore, it was contended, have treated the appellant as unmarried.

This contention overlooked the fact that it was within the bounds of possibility that W. J. Ranton might in the future have other children, and it might be that the testator had that in view and desired to provide for any afterborn children of W. J. Ranton who should be unmarried at his (the testator's) death.

If one were permitted to conjecture, it might not be difficult to reach the conclusion that the testator intended to provide for the appellant as an unmarried daughter. The Court, however, could not act on mere conjecture, but must give to the word "unmarried" its primary meaning unless it was clear from the terms of the will that the testator did not use the word in that sense.

In re Collyer (1907), 24 Times L.R. 117, referred to.

The appellant had not satisfied the onus that rested upon her of shewing that the testator intended to use the word "unmarried" "in a secondary and less proper sense:" Low v. Smith (1856), 2 Jur. N.S. 344.

The appeal should be dismissed, and the costs of all parties should be paid out of the residuary estate.

Appeal dismissed.

FIRST DIVISIONAL COURT. OCTOBER 10TH, 1919.

DAWSON v. QUINLAN & ROBERTSON LIMITED.

Contract—Purchase by Defendants of Shares and Assets of Manufacturing Company—Employment of Plaintiff as Superintendent of Works—Agreement to Assume and Pay Claim of Plaintiff against Company — Misrepresentations — Honest Belief — Failure of Claim for Deceit—Claim for Rescission on Ground of Innocent Misrepresentations—Impossibility of Restoring Parties to Former Position—Claim for Salary and Bonus—Construction of Agreement—Time for Payment of Monthly Bonus Postponed.

Appeal by the defendants from the judgment of LATCHFORD, J., 15 O.W.N. 352.

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

W. N. Tilley, K.C., for the appellants.

Daniel O'Connell and G. N. Gordon, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the trial Judge directed that the plaintiff recover against the defendants $24,353.61 and dismissed the defendants' counterclaim for damages for deceit and for rescission of the contract sued upon. The amount awarded was made up of $22,353.61, the amount of a claim which the plaintiff had against the Dickson Bridge Works Company and which the defendants contracted to assume and pay, and $2,000 salary and bonus.

Counsel for the appellants urged that the contract sued upon was induced by the statement that the Dickson company's plant, for the purchase of which the appellants were negotiating, and of which company the plaintiff had been vice-president and superintendent of the works, could and would turn out, each working day, 300 six-inch shells, and that the shells could and would be manufactured under his superintendence at a cost not exceeding $3.58 per shell, and with some additional plant the cost could and would be reduced to $3.50 per shell.

The evidence was that the plaintiff's representations influenced the defendants in making the contract to purchase and the contract sued upon; that the plant did not, either while the plaintiff was superintending its operation or subsequently, turn out anything like 300 shells per day; that the cost of the shells manufactured was more than $9 per shell; and that the defendants consequently suffered a great loss.

The trial Judge found that the defendants' allegations were substantially true; but found also that the plaintiff, on reasonable grounds, honestly believed his representations to be true.

His representations were not the result of wicked indifference and recklessness. The most that could be said against him was, that he did not investigate, check up, and verify the information that he had received in the way that a prudent, careful man ought to do before undertaking to make representations such as those complained of. The Court could not, on the evidence, interfere with the finding of honesty made by the trial Judge; and that finding, on the authorities, defeated the appellants' claim: LeLievre v. Gould, [1893] 1 Q.B. 491, 500; Derry v. Peek (1889), 14 App. Cas. 337.

For these reasons, the counterclaim for damages for deceit failed.

As to the alternative claim for rescission on the ground of innocent misrepresentation: the plaintiff accepted the defendants' agreement to pay $22,353.61 in substitution for the liability of the Dickson company therefor. When entering into the contract, the plaintiff held the promissory note of the Dickson company for the amount claimed. The note was endorsed by the National Manufacturing Company. This note the plaintiff delivered to the defendants, and they in turn delivered it to the National Manufacturing Company, in pursuance of an agreement. It was conceded that the note could not now be returned to the plaintiff.

The defendants had put it out of their power to restore the plaintiff to the position he occupied when the contract was entered into, and were thus unable to fulfill one of the well-established conditions on which relief by way of rescission may be granted: Halsbury's Laws of England, vol. 20, p. 750, para. 1768.

Representations expressed in the form of hope and expectation may in some circumstances become representations as to existing facts: Aaron's Reefs Limited v. Twist, [1896] A.C. 275, 284.

In regard to the $2,000 awarded to the plaintiff as salary and bonus: by the contract between the parties the plaintiff agreed to work for the defendants for such time as his services were required by the defendants, not to exceed 12 months, and the defendants agreed to pay him as salary $250 each month during such time as they required his services, and also agreed to pay him an additional sum of $250 per month for every month during which he remained in their employment, by way of bonus, and to become payable upon the termination of his employment. The plaintiff did not serve the full term of 12 months—owing to ill-health he was unable to continue after early in September, 1917. The $2,000 was made up of arrears of salary and bonus. It was

urged that so much of it as consisted of bonus should be disallowed, on the theory that none of the bonus was earned unless the plaintiff served for the full 12 months or till such time as the defendants dispensed with his services. If that was the intention, it was not expressed in the writing signed by the parties—it was only the payment that was postponed until the termination of the employment.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. OCTOBER 10TH, 1919.

PATTERSON v. R. BIGLEY MANUFACTURING CO.

Contract—Sale of Goods—Shipment after Time Fixed—Refusal to Accept—Justification—Findings of Jury—Reasonable Time—Appeal—Costs.

Appeal by the defendants from the judgment of the County Court of the County of Welland in favour of the plaintiff, upon the findings of a jury, for the recovery of $194.40 and costs, in an action for the price of a car-load of sand alleged to have been ordered by the defendants from the plaintiff and shipped on the 9th December, 1918, which the defendants refused to accept; and there was also a claim for demurrage and unloading charges.

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

William Davidson, K.C., for the appellants.

W. M. German, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that on the 17th June, 1918, the defendants gave the plaintiff a written order for two car-loads of moulding sand, one to be shipped on the 1st August following and the other on the following 1st October. There was no written acceptance by the plaintiff of the order, but on the 21st August, 1918, the plaintiff shipped to the defendants one car of the sand, and it was accepted and paid for. The second car-load was not shipped on the 1st October, and nothing appeared to have been done about it until December, except that on the 27th September the defendants wrote a letter to the plaintiff cancelling the order for it. The second car-load was shipped to the defendants on the 9th December. The defendants refused to accept it, saying that the order for it had been cancelled, that it had not been shipped in due time, and that the sand was not No. 2 moulding sand.

The jury found, in answer to questions submitted to them: (1) that the letter of the 27th September cancelling the order was not posted; (2) that this letter was not received by the plaintiff; and (3) that the sand was shipped "within a reasonable time after the time agreed upon and that the sand was No. 2 moulding sand."

The plaintiff's claim was for $49.44 price of the sand and $202 paid for demurrage.

The jury assessed the damages at $194.50, but how that sum was arrived at it was impossible to say.

It was argued for the defendants that there was no acceptance of the order as to the second car-load, and therefore no binding contract as to it, and that, as the car-load was not shipped until long after the 1st October, the defendants were justified in refusing to accept.

The defendants were entitled to succeed upon the second ground. It was clearly the duty of the plaintiff to have made the shipment by the 1st October, and there was no warrant for importing into the transaction the question as to reasonable time which was submitted to the jury. In order that he should succeed it was incumbent upon the plaintiff to prove that shipment had been made in accordance with the terms of the contract. The plaintiff was not in a position to do that, and so his action failed and should have been dismissed. See White v. Greer (1916), 36 O.L.R. 306, at pp. 316 et seq.

The appeal should be allowed and the action dismissed with costs. There should be no costs of the appeal to either party. They were both responsbile for the trial Judge treating the case as one in which the plaintiff was entitled to a reasonable time after the 1st October to make this shipment.

Appeal allowed.

FIRST DIVISIONAL COURT. OCTOBER 10TH, 1919.

*BELL v. CHARTERED TRUST CO.

*CHARTERED TRUST CO. v. BELL AND BUISSEY.

Landlord and Tenant—Oral Agreement for Lease—Lease Prepared but not Executed—Part Performance—Possession—Payment of Rent—Assignment by Lessee for Benefit of Creditors—Attempted Surrender of Lease—Invalidity as against Creditors—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5—Right of Assignee to Enforce Performance of Agreement for Lease—Personal Covenants by Assignee—Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38 (2)—Notice.

Appeal by Bell and Buissey from the judgment of LOGIE, J., ante 24, in the two actions (consolidated).

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

J. M. Ferguson, for the appellants.

W. Lawr, for the Chartered Trust Company, respondents.

THE COURT allowed the appeal with costs, directed judgment to be entered for the plaintiff in the first action for possession with costs, and judgment dismissing the second action with costs.

HIGH COURT DIVISION.

MIDDLETON, J. OCTOBER 6TH, 1919.

RE CLARK.

Will—Construction—Bequest to Sister "Absolutely"—Expression of Wish that Sister Shall Give Part to Brother—No Definite Benefit Given to Brother—Absolute Bequest Free from Trust in Favour of Brother—"Precatory Trust."

Motion by Adam Clark for an order determining a question arising upon the will of Samuel James Clark, deceased.

The motion was heard in the Weekly Court, Toronto.

D. O. Cameron, for the applicant.

W. K. Fraser, for Mary Ann Watson.

MIDDLETON, J., in a written judgment, said that the testator died in 1912, leaving a will by which he gave his sister, Mary Ann Watson, all his property "absolutely and forever, but it is my wish and desire that my said sister shall from time to time give such proportion or proportions of my said estate as she in her judgment may think proper to my brother Adam Clark."

Adam Clark was an incapable man, 52 years old. Mary Ann Watson was, at the time of the application, 73 years old. The estate, originally over $4,000, now amounted to only $2,000, and Mary Ann Watson said that she needed this for her own maintenance, and thought that her brother, who had worked for a living hitherto, could continue to do so for some time. She intended to aid him in the case of illness or real necessity, and had paid some small amounts.

Adam took the position that the money was held in trust for him, and must be used for his maintenance, and that his sister ought to be maintained by her children, who were said to be well off.

The law as to "precatory trusts" has developed in recent years. The term has been called by Lord Justice Rigby awkward and incorrect and a "misleading nickname." The trust, if established, is a real trust, and has all the incidents of a trust, and is no vague creation based upon some supposed equitable considerations. In the more recent cases the doctrine has been placed upon a firm foundation. Where there is an absolute gift, it is not to be cut down to a mere trust unless it is clearly shewn to be the testator's intention. The earlier cases had gone too far in implying a trust form the use of particular words or from expressions merely assigning a motive for a gift intended to be absolute.

Reference to Lambe v. Eames (1871), L.R. 6 Ch. 597, 599.

Here there was an absolute gift and not enough to cut it down. The use of the word "absolutely" was of importance, but it was not conclusive. What was of greater importance was the fact that there was no definite benefit given to Adam or contemplated by the testator. He was to have such maintenance as his sister in her judgment thought fit and proper. If a trust in favour of Adam was to be inferred, what was the subject of the trust? Counsel for Adam said that the whole fund was the subject; but the testator had said nothing to indicate that. Even under the earlier cases this would have been fatal.

In re Hamilton, [1895] 2 Ch. 370, and In re Williams, [1897] 2 Ch. 12, may be regarded as indicating the starting point for the consideration of these cases, and earlier cases must be read in the light of what is there said.

See In re Hanbury, [1904] 1 Ch. 415; In re Oldfield, [1904] 1 Ch. 549; In re Conolly, [1910] 1 Ch. 219. The reversal of In

re Hanbury in the Lords, sub nom. Comiskey v. Bowring-Hanbury, [1905] A.C. 84, leaves untouched the principle of these cases.

There should be a declaration that the property in question belongs to the sister absolutely; no costs.

KELLY, J. OCTOBER 6TH, 1919

SUPERIOR COPPER CO. LIMITED v. PERRY AND SUTTON.

Company—Shares—Action for Amount of Call Made by Directors—Validity—7 Edw. VII. ch. 117 (O.)—8 Geo. V. ch. 20, sec. 30 (O.)—Ontario Companies Act, sec. 15 (6), (7)—Jurisdiction of Ontario Court—Defendant Resident in Foreign State—Assignee in Bankruptcy—Assessment of Shareholders—Bona Fides—Defences to Action—By-law of Directors—Confirmation by Shareholders—Service out of the Jurisdiction—Determination of Right in Former Action—Res Adjudicata.

The plaintiff company alleged that there were standing in the name of the defendant Perry on the books of the company 16,206 shares of the company's capital stock, of the par value of $10 each, and in the name of the defendant Sutton, as trustee in bankruptcy for Perry, 17,792 of such shares; that these shares were not paid in full; that only $1.38 per share had been paid thereon; that they now were and always had been subject to further call and were assessable by the company; that on the 18th October, 1917, the company made a call of 7 cents per share on these shares; and that the defendants had refused and still refused to pay the assessment. The plaintiffs claimed: (1) a declaration that the shares were not fully paid and were assessable and subject to call, that the call made was valid, and that they were entitled to sell the shares; and (2) an order for the sale of the shares under the direction of the Court.

The defendant Perry did not appear, and the pleadings were noted closed as against him.

The defendant Sutton was permitted to enter a conditional appearance. He disputed the jurisdiction of the Court over him, and on many grounds contested the plaintiffs' claims.

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

R. McKay, K.C., and A. W. Langmuir, for the plaintiffs.

M. L. Gordon, for the defendant Sutton.

The defendant Perry was not represented.

KELLY, J., in a written judgment, said that the defendant Sutton disputed the jurisdiction on the ground that he resided in the State of Michigan, and was appointed trustee in bankruptcy of the estate of his co-defendant by order of a Court of the United States of America, and that, under Acts of Congress of the United States, no action could be brought against him as such trustee without the consent of the Courts of the State of Michigan, and such consent had not been obtained. He contended also that in a prior action by the plaintiffs against the defendants the same relief was claimed as in this action, and it was declared that the Courts of this Province had no jurisdiction to issue a writ of summons for service upon the defendants in connection with the matters then in issue, and that consequently the question of jurisdiction was res adjudicata; that the Act of the Legislature of Ontario 8 Geo. V. ch. 20, sec. 30, amending sec. 151 of the Companies Act, R.S.O. 1914 ch. 178, did not apply to the plaintiff company and did not give that company jurisdiction to serve him. He also set up that the shares were fully paid up and non-assessable, and that the assessment made in 1917 was not made bona fide and in the interests of the plaintiffs, but at the instigation of a banking company to which certain of the shares were pledged, and that the assessments should therefore be set aside and cancelled. By amendment made at the trial, the defendant Sutton also alleged that the by-law authorising the call of October, 1917, was invalid because it had not been confirmed by the shareholders, and it did not provide for the equal assessment of all shares of the company, and the company could not forfeit the shares; that on the 10th March, 1909, the company purported to sell the defendants' shares for failure to pay a call amounting to 20 cents a share to the said banking company, and the shares so sold thereupon became fully paid-up and non-assessable, and the shares held by the defendants were part of the shares so sold, and were transferred to the defendants by the said banking company.

The learned Judge referred to Superior Copper Co. Limited v. Perry (1918), 42 O.L.R. 45; sub-secs. 6 and 7 of sec. 15 of the Ontario Companies Act, added by 8 Geo. V. ch. 20, sec. 30; to the order made by Rose, J., in this action: Superior Copper Co. Limited v. Perry and Sutton (1918), 44 O.L.R. 24; to the Ontario Act (1907) 7 Edw. VII. ch. 117; and to sub-secs. 4 and 5 of sec. 5 of the Ontario Mining Companies Incorporation Act, R.S.O. 1897 ch. 195; and other cases and statutes; and, after a close examination of the evidence bearing upon each of the defences set up, concluded that none of them availed the defendant Sutton as an answer to the action.

There should be judgment for the plaintiffs as asked in their statement of claim, with costs to be paid out of the proceeds of the sale—no costs personally against the defendants.

MIDDLETON, J., IN CHAMBERS. OCTOBER 8TH, 1919.

*RE WILEY AND WILEY.

Husband and Wife—Proceedings under Deserted Wives' Maintenance Act, R.S.O. 1914 ch. 152—Order of Justices for Payment by Husband of Alimentary Allowance Weekly—Default—Action Brought for Alimony—Dismissal upon Trial—Subsequent Order by Justices for Payment of Arrears under First Order and for Distress and Imprisonment—Abandonment of Order when Action Brought—Resumption of Cohabitation—Effect of.

Motion by William Thomas Wiley for an order prohibiting three Justices of the Peace for the County of Bruce and a constable of the same county from enforcing a certain order dated the 2nd August, 1917, made by the Justices, and a certain order dated the 18th September, 1919, made by two of the Justices, and a seizure made by the constable on the 20th September, 1919, in proceedings under the Deserted Wives' Maintenance Act, R.S.O. 1914 ch. 152, on the ground of want of jurisdiction.

H. S. White, for the applicant.
C. S. Cameron, for Nancy Wiley, the wife of the applicant.

MIDDLETON, J., in a written judgment, said that the wife, deeming herself to have been deserted by the husband within the meaning of the Act, took proceedings before the Justices, which resulted in the order of the 2nd August, 1917, requiring the husband to pay to his wife $8 per week for the support of herself and family, and the costs of the proceedings. Pursuant to this order (which was affirmed on appeal), the husband paid an alimentary allowance to his wife for a considerable time, but eventually made default.

The wife, instead of taking proceedings under the Act for the enforcement of her rights, brought an action in the Supreme Court of Ontario to recover alimony. That action was tried and dismissed, and the dismissal was affirmed on appeal.

On the 18th September, 1919, the wife took proceedings before the same Justices, alleging that the sum of $720 was due to her under the order of 1917; and the Justices then made an order directing payment forthwith of the sum mentioned, together with $235 for costs, and directing that the same should be levied by distress and sale of the goods and chattels of the husband, and adjudging that, in default of sufficient distress, the husband be imprisoned for three months.

Upon this application for prohibition the wife filed an affidavit in which she stated that in July, 1919, she went with her children to her husband's house and lived with him for more than a month; that her husband then so misconducted himself as to justify her in leaving him; and that thereupon she left him.

The husband contended that, the wife having resorted to this Court for the purpose of having her rights determined, and it having been adjudged that she was not entitled to alimony, the proceedings before the Justices must be deemed to have been abandoned or to be superseded, and that the Justices had no jurisdiction to make the order for the issue of the distress warrant and the committal of the husband to goal.

The contention of the husband must prevail.

Reference to Craxton v. Craxton (1907), 23 Times L.R. 527.

The wife, having chosen to submit her status and rights to the determination of this Court, must be taken to have abandoned any rights that she had acquired under the earlier order of the Justices; and, when once this Court was seised of the matter, the Justices had no right to interfere in any way.

The wife, according to her own statement, returned to her husband in July, 1919. This put an end to the earlier order made by the Justices. If she was justified by the husband's misconduct in leaving him in July, 1919, there might be a foundation for new proceedings before the Justices or in this Court, but the earlier proceedings had ceased to have any operative effect: Haddon v. Haddon (1887), 18 Q.B.D. 778.

Order made for prohibition as asked; no costs.

MIDDLETON, J. OCTOBER 10TH, 1919.

*MALCOLM v. MALCOLM.

Husband and Wife—Alimony—Report of Master Fixing Amount of Permanent Allowance—Ascertainment of Income of Husband—Interest in Industrial Company as Principal Shareholder—Salary as Manager—Earnings of Company—Absence of Fixed Rule as to Proportion of Income to be Allowed as Alimony—Circumstances of Case—Discretion.

Appeal by the defendant from a report of the Master at Guelph fixing the amount payable to the plaintiff for alimony at $1,080 per annum.

The appeal was heard in the Weekly Court, Toronto.

C. L. Dunbar, for the defendant.

R. T. Harding, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the Master had arrived at $1,080 by taking the defendant's income as $1,500 salary, $1,200 as net income from realty, and $600 bonus from business—$3,300 in all—and allowing the plaintiff approximately one-third of this sum. The salary, $1,500, was admitted. The gross income derived from real estate, $1,781.36, was admitted, but the defendant contended that from this should be deducted $720 representing an estimated expenditure for repairs, dilapidations, and upkeep, leaving the net income from this source $1,060. The Master thought, and the learned Judge agreed with him, that this was too great a deduction—the amount found by the Master, $1,200, was approximately right.

The $600 allowed as a bonus could not be supported. The defendant was the owner of four-fifths of the stock of an incorporated company, Stephenson and Malcolm Limited, a concern carrying on a substantial plumbing business in Guelph, the remaining one-fifth of the stock being held by clerks and employees of the company. The defendant was employed by this company as its business manager, and received from it the salary of $1,500. He had habitually overdrawn his account to the extent of about $600 annually, and so, according to the books of the company, owed it between $3,000 and $4,000. The Master took the view that this overdraft must be regarded as an annual bonus of $600, and assumed that the $1,500 salary would be augmented by a similar amount in years to come. The defendant contended that his income ought not to be regarded as the whole $1,500, but that this should be reduced by sums which he ought to repay on account of the overdraft, or at any rate by interest on the amount overdrawn.

The learned Judge was unable to agree with either view. The salary paid was not an adequate measure of the defendant's actual earnings. The $1,500 was probably the amount which he set as that which he was content to draw as remuneration for his management—his earnings in excess of this going to augment the value of his stock-holdings.

The capital of the company was said to be $25,000; the defendant's four-fifths would represent a capital investment of $20,000; and the earning value of this might well be taken at between 10 and 15 per cent. The lower figure would justify the allowance made by the Master.

The Master, however, was wrong in assuming that the amount to be paid to the wife was to be determined by any arbitrary rule by which he should allow to her one-third of her husband's income.

The true principle is indicated in Leslie v. Leslie, [1911] P. 203, 205: the husband's obligation is to provide for the wife's main-

tenance, "in proportion to his ability so to do . . . The amount of the alimony . . . is of discretion in the Court, a discretion to be exercised judicially according to established principles of law, and upon an equitable view of all the circumstances of the particular case." See 7 Edw. VII. ch. 12, sec. 1 (Imp.)

Having regard to the whole circumstances of the parties, as disclosed by the evidence taken before the Master, the amount allowed for alimony could not be deemed excessive.

Appeal dismissed with costs.

MIDDLETON, J. OCTOBER 10TH, 1919.

DOMINION SUGAR CO. LIMITED v. NORTHERN PIPE LINE CO. LIMITED.

Contempt of Court—Disobedience of Judgment—Supply of Natural Gas—Right to Cut off—Contract—Orders of Commissioner of Natural Gas—Natural Gas Act, 1918, 8 Geo. V. ch. 12—Natural Gas Act, 1919, 9 Geo. V. ch. 13—Motion to Commit—Obedience to Judgment since Launching of Motion—Costs—Leave to Apply.

Motion by the plaintiffs to commit the defendant James and for sequestration against the defendant company for breach of the injunction granted by FALCONBRIDGE, C.J.K.B., on the 22nd May, 1919 (16 O.W.N. 249), by which the defendants were perpetually restrained from shutting off the supply of natural gas to the plaintiffs' factory and plant at Wallaceburg, under the contract mentioned in the statement of claim.

The motion was heard in the Weekly Court, Toronto.

Wallace Nesbitt, K.C., and A. W. Langmuir, for the plaintiffs.

J. G. Kerr, for the defendants.

MIDDLETON, J., in a written judgment, said that an appeal was pending from the judgment of the Chief Justice, but the operation of the injunction pending the appeal had not been stayed.

The contention of the defendants was that their action giving rise to litigation was justified by reason of orders or directions given by the Commissioner of Natural Gas, under the authority of the Natural Gas Act of 1918. The holding of the trial Judge

was that the provisions of this Act were not such as to interfere with the rights of the plaintiffs under their contract made before the passing of that Act.

The Act was amended in 1919, and apparently the officers of the defendant company took the position that, notwithstanding the judgment, the requirements of the amending Act applied, and that the gas could not be supplied to the plaintiffs without the defendants first obtaining a permit from the Commissioner under the provisions of the amending Act and its regulations. This was the position taken, in general terms, by the Commissioner. It was not clear that he intended his instructions to apply to gas supplied under this contract.

Probably the instructions of the Commissioner were the real basis of the failure to supply gas which caused the bringing of this motion. It was argued that there was a right to cut off for the purpose of repair under the terms of the contract. If so, the injunction might be too wide in its terms, as it did not restrain the defendants from shutting off the gas "save when authorised by the terms of the contract," but perpetually restrained the shutting off of the supply of gas under the contract. However, this was not the real foundation for the refusal to supply—it was now being set up rather as an excuse, and in extenuation, and not as a justification.

Since this motion had been pending, gas had been supplied, and there was no necessity for the making of any order save one determining the question of costs. An order should issue reciting that "it now appearing that gas is being supplied in obedience to the judgment of the 22nd May, 1919, this Court doth not see fit to make any order save that the defendants do pay the plaintiffs' costs of this application," liberty being reserved to the plaintiffs to apply for further relief if the circumstances in the future are deemed to warrant such application.

JOBIN-MARRIN CO. v. QUALITY CANNERS CO.—MIDDLETON, J., IN CHAMBERS.—OCT. 8.

Pleading — Statement of Claim — Particulars — Inspection.]—Appeal by the plaintiffs from an order of the Master in Chambers requiring the plaintiffs to give particulars of the allegations made in the statement of claim and allowing the defendants to make an inspection before pleading. MIDDLETON, J., in a written judgment, said that the plaintiffs should give particulars of the matters in which it was alleged that the goods complained of did not correspond with the sample. The plaintiffs were not bound to shew why the goods had become unfit for food, or to

point out the particular defect in preparation. The defect in the result, and not its cause, must be given. The words "not fit for human food" and "not merchantable" required no amplification—so the words "and . . . merchantable" at the end of clause 2 of the Master's order should be struck out. The remaining provisions of the order might stand. It was not unreasonable to allow inspection before pleading. If the defendants should find the product as bad as the plaintiffs said, the defendants might want to make amends and pay money into Court. The mode of inspection provided was not complained of. Order of the Master varied accordingly. Costs in the cause. A. W. Langmuir, for the plaintiffs. M. L. Gordon, for the defendants.

LEMBKE v. UMBACH—MASTEN, J.—OCT. 9.

Vendor and Purchaser—Agreement for Sale of Land—Authority of Agent of Vendor—Revocation before Agreement Executed—Finding of Fact of Trial Judge.]—Action by the purchaser for specific performance of an alleged agreement for the purchase and sale of land. The action was tried without a jury at Kitchener. MASTEN, J., in a written judgment, said that at the trial he allowed the defendant to make certain amendments to his defence; and, this having been done, three principal defences emerged in the course of the trial: first, a technical defence that the action was prematurely brought on the 24th June, 1919, while the date for completion of the contract by the defendant was the 1st July, and that no clear refusal of performance by the defendant before the 24th June, and no tender by the plaintiff and refusal by the defendant, were shewn; second, that the defendant never agreed personally to sell to the plaintiff, and that he never conferred on the agent Rosenbusch authority to enter on his behalf into a binding contract of sale; third, that, if the agent Rosenbusch had authority to execute a binding contract on behalf of the defendant, such authority was cancelled and annulled prior to the execution of the contract sued on. There was no doubt that the authority of the agent Rosenbusch was revoked on the morning of Saturday the 21st June. The contract in question purported to be executed on the 20th June, and the plaintiff and the real estate agent Rosenbusch (a brother-in-law of the plaintiff) said that the agreement was made on that date. Having regard to their demeanour in the witness-box, to the discrepancies in their statements, to the inherent probabilities, and particularly to the conversation of Rosenbusch with Mrs. Henry Umbach (to whose testimony full credit should be given) on the morning of the 20th June, the

learned Judge did not believe the plaintiff and Rosenbusch on this point, and found as a fact that the agreement sued on was in fact made after the authority of the agent Rosenbusch had been revoked. This finding sufficed to dispose of the action and rendered it unnecessary to discuss the other defences raised. The plaintiff's action should be dismissed with costs. J. A. Scellen, for the plaintiff. E. W. Clement, for the defendant.

WILKINSON v. WESTLAKE—LENNOX, J.—OCT. 10.

Carrier—Breach of Contract—Delay in Delivery of Trunk—Damages—Article Belonging to Brother of Plaintiff Contained in Plaintiff's Trunk—Joinder of Brother as Co-plaintiff—Costs—Scale of.]—Action against a carrier for damages for delay in delivery of a trunk. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, said that the defendant was a carrier of goods for hire, and on the 12th November, 1918, undertook to carry two trunks and other goods from the plaintiff's residence in Toronto to the Union Station and there deliver them to and ship them by the Canadian Express Company to the plaintiff at London, in consideration of the payment of $2 paid to the defendant at the time. One of the trunks was not delivered to the express company to be forwarded until the 2nd April, 1919, although the defendant was in the meantime frequently requested by the plaintiff to carry out his contract. The delay was occasioned by the defendant's breach of contract and the gross negligence and want of care of the defendant and his servants. The plaintiff's evidence as to the terms upon which he delivered the goods to the defendant for carriage and shipment should be accepted. The trunk delayed contained valuable goods and commodities, of which the plaintiff was in immediate need; and, owing to the want of them, he was obliged to purchase other goods at high prices, and was put to other serious inconvenience and loss. A good deal of the plaintiff's damage was not the natural or ordinary consequence of the default of the defendant, and was not within the contemplation of the parties at the time of the contract. For this he was not entitled to recover. As the action was framed, there could be no recovery in respect of the artificial limb belonging to the plaintiff's brother. If, within five days, a consent to be joined should be filed on behalf of this brother, the record should be amended by adding him as a plaintiff. In that event judgment would be entered for the plaintiffs against the defendant for $275 with costs on the County Court scale—$75 for the brother and $200 for the present plaintiff

—and there would be no set-off of costs. If the consent should not be filed there would be judgment for the plaintiff for $200, with costs as stated. G. M. Jarvis, for the plaintiff. E. A. Harris, for the defendant.

FIELDEN v. JACQUES—LENNOX, J.—OCT. 10.

Principal and Agent—Action by Agent for Commission on Sale of Shares—Evidence—Onus—Special Agreement—Release.]—The plaintiff claimed $1,250 as commission at 5 per cent. on the sale of $25,000 worth of stock in the Consumers Heating Company Limited, which, as he alleged, he sold for and on behalf of the defendant, or Jacques Davy & Co., to one Pickford, from whom it had been originally purchased. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, referred to the plaintiff saying that he knew that the stock was held by the firm mentioned, composed of the defendant and one Davy, but he said that he was instructed by the defendant and acted for him; that, when the defendant spoke to him about selling and getting out, the defendant said Pickford was the only likely purchaser; and that it was agreed that, if the plaintiff effected a sale, he was to receive a claim against the company for coal amounting to $1,700. Probably the $1,700 was a claim of the partnership against the company, and it was the partnership stock, as the plaintiff knew that that was to be and was afterwards sold. The plaintiff did not sue for specific performance of the alleged special agreement, but for a commission on a percentage basis, as above stated. If this were the only obstacle in the plaintiff's way, it could be got over. The defendan denied that he made the alleged agreement, or made any agreement to engage the plaintiff in any way, and also denied that the sale made to Pickford was brought about or facilitated by any act of the plaintiff. In this latter contention the defendant's evidence was confirmed by Pickford. It was common ground that Pickford knew that the defendant was dissatisfied and wanted to sell back the partnership holdings; that Pickford and the defendant were exceedingly intimate and friendly; and that Pickford and the defendant were in the habit of meeting and having discussions about the company very frequently if not daily. The onus of proving employment, and that the plaintiff's intervention was at least an element in bringing about a sale, was on the plaintiff. The plaintiff had failed to shew either that the defendant engaged his services or that the sale to Pickford was brought about or in any way effected by any act of the plaintiff. The defendant put in evidence a release, executed by the plaintiff,

of all claims of the defendant against the partnership firm except as to an item of $100, not in question in this action. There were conditions attending the execution of this instrument; and, although it was established that this commission was then discussed, was disclaimed by the plaintiff, and that the release was intended as a bar to any subsequent assertion of it—there was not a release of the individual partners in the firm stated in the document. It was quite unnecessary to consider the legal effect of the release in view of the above findings of fact. It was enough to say that the release and the statements of Mr. Pickford and Mr. Middleton as to what occurred at that time were additional material evidence in favour of the defendant. The action should be dismissed with costs. Erichsen Brown, for the plaintiff. G. Keogh, for the defendant.