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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 6TH, 1919.

BLACKLOCK v. SHEARER.

Ditches and Watercourses—Negligent Construction of Drain—Flooding Land—Damages—Injunction—Appeal—Costs.

Appeals by the several defendants from the judgment of the County Court of the County of Bruce.

The action was for damages for injury to the plaintiff's land from flooding alleged to have been caused by the negligence of the defendants in the construction of a drain, and for an injunction.

The County Court Judge awarded the plaintiff $232 damages and an injunction.

The appeals were heard by MACLAREN, J.A., BRITTON, RIDDELL, and LATCHFORD, JJ.

G. W. Mason, for the appellants.

David Robertson, K.C., for the plaintiff, respondent.

THE COURT gave judgment as follows:—

1. The appeal of the defendant McDonald is allowed and the action dismissed as against him without costs.

2. The appeal of the defendant Charles Hayes is allowed, so far as damages are concerned, and the action against him pro tanto dismissed without costs.

3. The appeal of the other defendants as to damages is dismissed.

4. The injunction (including that against Charles Hayes) to be limited to the land of each defendant or that over which he has control.

5. No costs of appeal to any party.

SECOND DIVISIONAL COURT. FEBRUARY 6TH, 1919.

RYND v. TOWNSHIP OF BLANSHARD.

Municipal Corporations—Deepening of Ditch—Creation of Outlet—Injury to Plaintiff's Land by Overflow of Water—Negligence—Award under Ditches and Watercourses Act, R.S.O. 1914 ch. 260—Application of sec. 23—Damages for Injury to Crops—Assessment of—Injunction—Leave to Apply if Cause of Complaint not Removed—Costs.

Appeal by the defendants from the judgment of ROSE, J., ante 150.

The appeal was heard by BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. C. Makin, K.C., for the appellants.

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

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. FEBRUARY 6TH, 1919.

TOWN OF OSHAWA v. ONTARIO ASPHALT BLOCK PAVING CO.

Contract—Municipal Corporation—Construction of Pavements—Guarantee-bond—Defective Work and Materials—Action on Bond—Recovery of Amount of Bond less Sum Expended in Repairs—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., ante 11.

The appeal was heard by BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. H. Rodd, for the appellants.

R. T. Harding, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. FEBRUARY 6TH, 1919.

MILLER v. TORONTO R.W. CO.

Appeal—Notice of Appeal Given after Expiry of Time for Giving—Death of Plaintiff after Abortive Notice Given—No Steps Taken in Meantime—Revivor of Action in Name of Executrix—Motion to Extend Time—Refusal—Merits.

Action to recover damages for injury to the plaintiff by being struck by a car of the defendants, owing to the negligence of the defendants' servants, as the plaintiff alleged.

The action was tried (28th November, 1918) before LENNOX, J., and a jury; there was a verdict for the plaintiff for $12,500, and judgment was pronounced by the Judge for that sum less certain sums advanced by the defendants.

The defendants intended to appeal from the judgment; but, apparently by reason of a misunderstanding, they did not give notice of appeal within the time limited by the Rules. The notice was given on the 28th December, 1918; and, on the same day, the appeal was set down for hearing, upon leave given subject to the right of the plaintiff to object when the appeal should come on to be heard.

On the 4th January, 1919, the plaintiff died; letters probate of his will were granted to his executrix on the 29th January, 1919; and the action was revived in her name as plaintiff.

The defendants applied to extend the time for giving notice of appeal and for leave to appeal.

The appeal and motion came on for hearing before a Divisional Court composed of BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

D. L. McCarthy, K.C., for the defendants.

William Mulock, for the plaintiff by revivor.

THE COURT directed that the motion should be argued with the appeal on the merits.

After argument, the Court held that leave to appeal should not be granted, as the plaintiff had died after the time for appealing had expired, and no step had been taken in the meantime.

The Court were also against the defendants on the merits.

Motion dismissed; the defendants to pay the costs of the motion and appeal.

SECOND DIVISIONAL COURT. FEBRUARY 7TH, 1919.

WILEY v. WILEY.

Husband and Wife—Alimony—Costs of Unsuccessful Appeal by Wife—Disbursements—Rule 388.

Motion by the plaintiff to vary as to costs the order made by this Court on the 15th January, 1919, dismissing an appeal by the plaintiff in an action for alimony from the judgment at the trial dismissing the action.

The motion was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

W. S. Middlebro, K.C., for the plaintiff.

W. H. Wright, for the defendant.

RIDDELL, J., reading the judgment of the Court, said that the Court, in dismissing the appeal, said nothing as to costs; and the Registrar, quite properly, followed the rule that, where nothing is said about costs, they follow the event, and settled an order dismissing the appeal with costs.

The Court did not doubt its power to award the costs of an appeal against an unsuccessful plaintiff appealing in an alimony action; but the practice had been to award her disbursements according to Rule 388: McIlwain v. McIlwain (1916), 35 O.L.R. 532; Whimbey v. Whimbey (1918), 14 O.W.N. 128, 158.

There was not sufficient in the present case to justify the Court in departing from this rule.

The order should be varied accordingly; no costs of this motion.

SECOND DIVISIONAL COURT. FEBRUARY 7TH, 1919.

SNITZLER ADVERTISING CO. v. DUPUIS.

Account—Open Contract—Settled Account—Opening up—Absence of Fraud or Mistake—Scope of Reference—Construction of Judgment—Appeal from Master's Certificate.

Appeal by the defendant from the order of MIDDLETON, J., 14 O.W.N. 78, allowing an appeal from the certificate of the Local Master at Sandwich of his ruling or direction that the plaintiffs should bring in and file certain details of accounts.

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

J. H. Rodd, for the appellant.

T. Mercer Morton and H. S. White, for the plaintiffs, respondents.

FERGUSON, J.A., read the judgment of the Court. After setting out the facts, he said that it was urged by counsel for the appellant that, because old accounts had been rendered on the basis of card-index rates, the payment thereof should not stand or be construed as a settlement or adjustment thereof, but the defendant was entitled as of right to have these accounts, although already paid, investigated and readjusted in the Master's office. Such a result did not follow, the learned Judge said, from the finding by the trial Judge that there was no agreement governing the rates of the plaintiffs' remuneration. Card-index rates might be the proper basis of an allowance for the work done; and the accounts rendered on that basis, and already paid by the defendant, must, in the absence of mistake or fraud, remain and be accepted as prima facie correct, and as settled.

This was the true intent and meaning of the judgment of reference, para. 2 of which read:—

"This Court doth order and adjudge that this action be referred to the Local Master of this Court at Sandwich to take an account and determine the state of the account between the plaintiffs and the defendant upon the basis of an open contract between the plaintiffs and the Dennison Pharmacal Company, and in taking such account the said Master is to have regard to any settled account, which is not to be opened unless the defendant shall first make a sufficient case for so doing."

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRAURY 7TH, 1919.

*SERCOMBE v. TOWNSHIP OF VAUGHAN.

Highway—Bridge Breaking under Weight of Loaded Motor-truck—Excessive Width of Vehicle—Load of Vehicles Act, 1916, sec. 6—Vehicle Unlawfully on Highway—Dismissal of Action for Damages for Injury to Vehicle—Counterclaim for Damages for Injury to Bridge Allowed.

Appeal by the defendants from the judgment of COATSWORTH, Jun. Co. C.J., in favour of the plaintiff for the recovery of $338.82 damages in an action in the County Court of the County of York, and dismissing the defendants' counterclaim.

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

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

H. A. A. Newman, for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that the plaintiff, the owner of a motor-truck of dead weight 11,100 lbs., was running it on a public highway in the township of Vaughan, well within 8 miles an hour, when it broke through a bridge in the highway. The truck was loaded with merchandise weighing about 8,000 lbs. The plaintiff sued for damages for the injury caused to his truck and merchandise, and the defendants counterclaimed damages for the injury to the bridge.

The Load of Vehicles Act, 1916, 6 Geo. V. ch. 49 (O.), provides, by sec. 6, that "no vehicle shall have a greater width than 90 inches except traction engines." "Vehicle," by sec. 2 (*b*), includes a motor-vehicle such as the plaintiff's. It was proved that this vehicle, not being a traction engine, was almost 96 inches wide. The plaintiff had no right to have such a vehicle on the highway at all, and in respect thereof he was a mere trespasser. The defendants owed him no duty except to refrain from setting traps for him and from maliciously injuring him—he must take the road as he finds it.

Reference to Goodison Thresher Co. v. Township of McNab (1910), 44 Can. S.C.R. 187; Etter v. City of Saskatoon (1917), 39 D.L.R. 1; Roe v. Township of Wellesley (1918), 43 O.L.R. 214.

That the extra width had or might have had nothing to do with causing the accident had no significance—the truck should not have been there at all.

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

The plaintiff smashed the defendants' bridge unlawfully, and should pay for it. It was of no importance that the same thing might have happened had the plaintiff used a lawful instrument—the fact was that he did not.

The appeal should be allowed with costs, the action dismissed with costs, and the defendants should recover on the counterclaim the sum necessary to replace the bridge, to be agreed upon by the parties, or, in the absence of an agreement, on a reference.

The defendants should have their costs throughout on the County Court scale.

Appeal allowed.

SECOND DIVISIONAL COURT. FEBRUARY 7TH, 1919.

*STRAUS LAND CORPORATION LIMITED v. INTERNATIONAL HOTEL WINDSOR LIMITED.

Landlord and Tenant—Action by Landlord for Forfeiture of Lease, for Rent, and for other Relief—Waiver of Forfeiture by Claiming Rent—Breach of Covenant to Repair—Alteration in Premises—Damages—Breach of Covenant not to Assign or Sublet—Nominal Damages—Abandonment on Hearing of Appeal of Claim for Rent—Reinstatement as Indulgence—Costs—Reference.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., ante 10, dismissing the action with costs.

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

D. L. McCarthy, K.C., for the appellants.

E. S. Wigle, K.C., for the defendants, respondents.

RIDDELL, J., read a judgment in which he said that the plaintiffs' claim for forfeiture could be shortly disposed of by the consideration that in this action a claim was made for rent due on the 1st March, 1918, after all the acts upon which forfeiture was posited had been committed. A forfeiture does not act ipso facto, but may be waived; and an unequivocal act which shews a claim by the landlord of the existence of a tenancy after the act complained of operates as such a waiver—at least if such act be done before an unequivocal claim of forfeiture: McMullen v. Vannatto (1894), 24 O.R. 625. Action brought for rent accruing due after

the noxious acts is such an unequivocal act operating as a waiver: Dendy v. Nicholl (1858), 4 C.B.N.S. 376; Penton v. Barnett, [1898] 1 Q.B. 276.

Whether when, in the same action for rent, forfeiture is also claimed, the action will operate as a waiver has been doubted. But Bevan v. Barnett (1897), 13 Times L.R. 310, decides in the affirmative. That case has been distinguished—e.g., in Penton v. Barnett, supra—but not questioned, much less overruled; it recommends itself on principle and should be followed. At least such a proceeding is evidence of a waiver, and in the present case should be held to be a waiver.

The acts alleged as justifying forfeiture are not continuing acts so as to let in the exception. This action is itself a waiver, and bars forfeiture.

It was said that the claim for rent was abandoned at the trial; but, even if that were so, the forfeiture had already been waived and could not be reinstated: Bevan v. Barnett, supra. What was abandoned at the trial was not the claim for rent but (if anything) a claim for forfeiture on the ground of non-payment of rent.

Counsel for the appellants did, on the argument of the appeal, abandon the claim for rent; that was of no avail, and the plaintiffs should not be held to that position.

The claim for damages seemed to be well-founded. The changes made, it was admitted, could not lawfully have been made without the consent of the plaintiffs. The plaintiffs did consent to a certain defined change, but not to the change actually made. The defendants, then, were wrongdoers, and were not helped by the fact (if a fact) that the building was better as changed than it was before. The plaintiffs should have damages for the wrong done by the changes. The damages should be fixed at $200, subject to the right of either the plaintiffs or defendants to take a reference at their own risk as to costs.

As to subletting without leave, the damages, if the plaintiffs were entitled to any, would be purely nominal.

As to the claim for rent, the plaintiffs were in strictness barred; but it would be unjust to hold them to that position; and they should now be allowed to appeal on the ground that they were entitled to rent, and should have judgment for the two instalments of rent due before the commencement of the action, $730.

There should be no costs to either party down to and inclusive of the judgment at the trial. The plaintiffs should have the costs of the appeal if they were willing to accept a judgment barring them of the right to rent due before the action; but, if they desired judgment for the rent, they should as a term pay the defendants' costs of the appeal.

Assuming the acceptance of a judgment for the rent, the money paid into Court should be paid out to the plaintiffs, less the costs of the defendants of the appeal, which should be paid to the defendants. If neither party desired a reference, the plaintiffs should have judgment also for $200 in full of all damages for breach of covenant, without costs; if a reference be had, the costs will be in the discretion of the Master, and judgment entered accordingly.

LATCHFORD, J., and FERGUSON, J.A., agreed with RIDDELL, J.

ROSE, J., agreed in the result, for reasons stated in writing.

Appeal allowed in part.

HIGH COURT DIVISION.

LENNOX, J. FEBRUARY 3RD, 1919.

ONTARIO HUGHES-OWENS LIMITED v. OTTAWA ELECTRIC R. W. CO.

Negligence—Street Railway—Collision of Street-car with Automobile—Negligence of Motorman—Negligence of Chauffeur—Findings of Jury—Evidence—Contributory Negligence—Ultimate Negligence.

Action for damages for injury to the plaintiff company's automobile in a collision with a street-car of the defendant company, in a highway, by reason of the negligence of the defendant company's motorman, as the plaintiff company alleged.

The action was first tried by SUTHERLAND, J., and a jury; at that trial there was a judgment for the plaintiff company, upon the jury's findings, for $754.23; but that judgment was set aside and a new trial ordered, by a Divisional Court of the Appellate Division: Ontario Hughes-Owens Limited v. Ottawa Electric R.W. Co. (1917), 40 O.L.R. 614, 13 O.W.N. 156.

The second trial was before LENNOX, J., and a jury, in Ottawa.

The questions put to the jury and their answers were as follows:—

(1) Were the injuries complained of caused by the negligence of one of the parties? A. Yes.

(2) Were both parties guilty of negligence causing or contributing to the accident? A. No.

(3) If you say "Yes" to question 2, then (*a*) in what way did the defendant's motorman contribute to the accident by negligence, if in any way? A. By not taking proper precautions and by not having his car under control. (*b*) In what way did the plaintiff's driver contribute to the accident by negligence, if in any way? A. Not in any way.

(4) If both the defendant's motorman and the plaintiff's driver were guilty of negligence, could the defendant's motorman then have done anything which would have prevented the accident? A. Yes.

(5) If you say "Yes" in answer to question 4, what could the motorman have done that he did not do? A. Stopped his car before striking the automobile.

(6) In the end, what, in your opinion, was the actual cause of the injury or accident complained of? A. The accident was caused by motorman on electric car not stopping his car in time, causing electric car to crash into rear of automobile and divert it from its course.

(7) Assuming that the defendant's motorman was guilty of negligence, could the driver of the plaintiff's motor-car, notwithstanding this, still have avoided the collision by the exercise of reasonable care? A. No.

(8) If your answer to question 7 is "Yes," then in what way did the plaintiff's motor-driver fail to exercise reasonable care? (Not answered.)

A. E. Fripp, K.C., for the plaintiff company.
Taylor McVeity, for the defendant company.

LENNOX, J., in a written judgment, said that counsel agreed that, if the plaintiff company was entitled to recover, judgment should be entered for $704.25.

A former judgment for $754.23 was set aside and a new trial directed, upon the ground, speaking generally, that there was no evidence to support the jury's findings.

As the action might again be brought into the appellate Court, it was not desirable that the trial Judge should volunteer an opinion as to the legitimate effect of the evidence put in upon the trial, although, as a matter of fact, he did entertain a very decided opinion as to who was initially and ultimately responsible for what happened. The combined effect of the jury's answers to questions 1, 2, 3, 4, 5, and 7 was to exonerate the driver of the motor-car from negligence of any kind and throw the entire blame for the disaster upon the defendant company; and, although the reasons assigned in the answer to question 6 were meaningless upon their face, and the answer to question 5 was also obviously mean-

ingless—and more emphatically so having regard to the evidence—they were of no aid to the defendant company, unless it were, in conjunction with the answers to questions 2 and 7, to shew the attitude of the jury in considering the evidence. The findings as they stood entitled the plaintiff company to judgment against the defendant company for $704.25 with costs.

ROSE, J. FEBRUARY 5TH, 1919.

CENTRAL CONTRACTING CO. LIMITED v. RUSSELL TIMBER CO. LIMITED.

Water—Floatable Stream—Intermixing of Logs of Plaintiffs and Defendants—Claim and Counterclaim for Services Rendered by each Party to the other—Remedy under Saw Logs Driving Act, R.S.O. 1914 ch. 131, secs. 9, 10, 11, 16—Jurisdiction of Court Taken away—Conversion of Booms—Tolls—Obstruction of Flow of Water—Dam—Refusal to Release Stored Water—Dismissal of Action—Recovery on Part of Counterclaim—Costs.

Action against the above named company and another company called "Pulp Wood Company" to recover $8,000 damages for obstructing the flow of the water in Trout Creek, and also a sum of nearly $3,000 for services rendered to the defendants Pulp Wood Company; and counterclaim by the defendants Pulp Wood Company for the negligent and unnecessary blocking of the stream, and for rent of booms, the value of booms not returned by the plaintiffs, and compensation for services.

The action and counterclaim were tried without a jury at Port Arthur.

D. R. Byers, for the plaintiffs.

F. H. Keefer, K.C., for the defendants Pulp Wood Company.

Hugh Keefer, for the other defendants.

ROSE, J., in a written judgment, said that during the spring and summer of 1918 the plaintiffs and defendants were engaged in floating their respective logs down Trout creek into Nipigon bay, and the claims and counterclaims arose out of what then occurred. The plaintiffs took the position that many of the claims asserted by Pulp Wood Company were not properly the subject of an action, but must be dealt with in an arbitration under the Saw Logs Driving Act, R.S.O. 1914 ch. 131; and Pulp Wood Company took the same position as regards the plaintiffs' claim, set out in

para. 7 of the statement of claim, for work done in connection with Pulp Wood Company's logs. At the trial, the plaintiffs withdrew, without prejudice to their rights in an arbitration, items (f) to (o) of para. 7. Subject to Pulp Wood Company's objection, evidence was given in support of items (a) to (e), and judgment was reserved upon the question whether these claims could properly be presented in an arbitration. The conclusion had been reached that they could be so presented; and, therefore, that the jurisdiction of the Court in respect of them was taken away by sec. 16 of the Act. These items were for the services of tugs separating the plaintiffs' logs from those of Pulp Wood Company and putting the logs of the latter by themselves in booms in a safe place. Reference to secs. 9, 10, and 11 of the Act.

Paragraphs 1, 2, and 3 of the prayer of Pulp Wood Company's counterclaim were for various items of damage resulting from the plaintiffs' delay in driving their logs out of the creek during the spring freshets. It was admitted that these were claims arising under the Act. By para. 4, rent was claimed for certain booms lent to the plaintiffs. There was no leasing of these booms, and no intention on the part of either party that anything should be paid for the use of them. This claim failed. By para. 5, a claim was made for damages for the failure to return certain of the booms. Pulp Wood Company were entitled to $396 on this score. By para. 6, a claim was made for driving, sorting, and rafting some of the plaintiffs' logs in the creek. This was admitted to be a claim arising under the Act. A claim for tolls was made by para. 7. Counsel agreed that there were 696 cords of wood in respect of which tolls were payable, at 7 cents per cord. Pulp Wood Company were entitled to $48.72.

As to the main part of the case, the plaintiffs' claim for damages for the obstruction of the flow of the water, the learned Judge said that during the early part of the season the water in the creek was unusually high, and the plaintiffs drove into the bay logs of the defendants' which had been left at the mouth of the creek from the preceding year and some of their own logs; and they drove into the main stream, below the forks, many others of their logs. The plaintiffs had many logs still to be driven when they stopped driving on the 21st June because of low water. There was no complaint that up to this time Pulp Wood Company had held back any water in their dam, the building of which was not completed until the 22nd June; and the evidence was that the Russell Timber Company did not, before or after this time, hold up water with their dam. The case against the Russell Timber Company failed.

Early in July there was a natural freshet, and the plaintiffs drove on some days up to the 11th, utilising some water which they had

stored above dams of their own on the east branch. At this time, Pulp Wood Company's dam on the west branch, completed on the 22nd June, was holding back a large portion of the natural flow of the west branch. The plaintiffs brought a ship and a barge to be loaded in the bay; they arrived on the 13th July. The plaintiffs made a demand on Pulp Wood Company for delivery of water by the 17th July. Pulp Wood Company refused; the dam was not opened; the plaintiffs' logs remained in the creek; and the barge had to go away without a full load. It was for the time lost at Nipigon bay and for the time spent in procuring the completion of the cargo elsewhere that the plaintiffs claimed—attributing that loss of time to the failure of Pulp Wood Company to deliver the water pursuant to the demand.

But the mere facts that Pulp Wood Company had in storage a quantity of water which, if it had been released, would have enabled the plaintiffs to float their logs, and that Pulp Wood Company refused to release it, and that consequently the logs could not be floated, did not make that company liable in damages —it not being shewn that there would have been sufficient water if the company had not built the dam. The plaintiffs' case, therefore, failed.

The action should be dismissed, without prejudice to any claim which the plaintiffs might have against Pulp Wood Company under the statute in respect of the matters set forth in para. 7 of the statement of claim. Pulp Wood Company should have judgment against the plaintiffs for $444.72 in respect of the claims set forth in paras. 5 and 7 of the prayer of the counterclaim; the remainder of the counterclaim should be dismissed, without prejudice to any proceedings under the statute in respect of paras. 1, 2, 3, and 6.

The plaintiffs should pay to both defendants the costs of the action; but there should be no costs of the counterclaim to either party thereto.

SUTHERLAND, J., IN CHAMBERS. FEBRUARY 7TH, 1919.

REX v. WATSON.

Criminal Law—Making Statements Tending to Weaken Effort in Prosecution of War—"Publicly Express"—War Measures Act, 1914—Order in Council of 16th April, 1918—Magistrate's Conviction—Stated Case—Evidence—Statements Made in Factory by Workman to Co-workers.

Case stated by one of the Police Magistrates for the City of Toronto.

The defendant was charged for that he did "publicly express an adverse or unfavourable statement, report, or opinion which may tend to weaken or in any way detract from the united effort of the people of Canada in the prosecution of the war, contrary to the form of the order in council" of the 16th April, 1918, made under the War Measures Act, 1914. The order appears in the Canada Gazette of the 17th April, 1918, and provides (sec. 1 (*d*)) that it shall be an offence "to print, publish, or publicly express any statement, report, or opinion which may tend to weaken" etc. (as in the charge).

The evidence before the magistrate shewed that the defendant, in a factory in which he was working, made certain statements, in the hearing of other workmen, to the effect that the British Parliament was bleeding Canada dry; that King George was just as bad as the Kaiser and did not go any nearer to the battle-front; that people here were foolish to enlist. The remarks were made in conversation and so that only 4 or 5 persons could hear the speaker. He did not speak from a platform or box.

The magistrate (23rd May, 1918) convicted the defendant and imposed a fine of $50 and costs.

After stating the facts and the testimony given, the magistrate asked the question whether he was right in convicting.*

W. A. Skeans, for the defendant.

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

SUTHERLAND, J., in a written judgment, said, after stating the facts, that it was argued on behalf of the defendant that to create an offence under the order in council the words complained of must have been uttered in a speech or address or sermon in some public place, such as a street, a hall, a church, and to persons there assembled.

The learned Judge was of opinion that the magistrate was justified in coming to a different conclusion. The proper means ing to be given to the words "publicly express" is, to expres- openly to others, who are present or within hearing, opinions of the character and tendency referred to in the order in council.

Even in cases of alleged indecent exposure of the person, where the *place* is of importance, and the question whether it is a public place or not a matter for consideration, it has been suggested that the charge may lie if the offence is committed before several persons, even if the place be not public: Regina v. Wellard (1884), 14 Q.B.D. 63.

The conviction was right.

Motion dismissed with costs.

*As to the form of the question, see Rex v. McBrady, ante 369.

LATCHFORD, J. FEBRUARY 8TH, 1919.

RE COTÉ.

Will—Construction—Devise to Children—Devise over in Event of Children Dying without Issue—Children Surviving Mother—Estate in Fee—Wills Act, R.S.O. 1914 ch. 120, sec. 33—54 Vict. ch. 18, sec. 1—56 Vict. ch. 20, sec. 1—Devolution of Estates Act, R.S.O. 1897 ch. 127, sec. 13 (1).

Motion upon originating notice for an order determining certain questions arising under the will of Marie E. Coté, deceased.

The motion was heard in the Weekly Court, Ottawa.

H. St. Jacques, for the applicant.

A. C. T. Lewis, for the Official Guardian, representing the infants interested.

LATCHFORD, J., in a written judgment, said that the testatrix devised and bequeathed all her real and personal estate to the child or children that might be born of her marriage with Joseph Coté. The will further provided that, in the event of her child or children dying without issue, her real and personal estate should pass to her father, mother, brothers, and sisters in equal shares.

The testatrix died in 1896, leaving her surviving her husband, who had since died, and two children. At the time of her death she was the owner in fee simple of land in Ottawa.

The executors of the testatrix did not dispose of or convey her real estate within 12 months after her death, nor did they register a caution, as they were entitled to do by an Act respecting the Sale of Real Estate by Executors and Administrators, 54 Vict. ch. 18, sec. 1, and an Act respecting the time for the Vesting of Estates in Heirs and Devisees, 56 Vict. ch. 20, sec. 1. As the lands were not disposed of within the period fixed by the statute then in force, and as no caution was registered, the interest of the executors in them was at an end, and the lands became vested in the children of the testatrix: Devolution of Estates Act, R.S.O. 1897 ch. 127, sec. 13 (1).

But that interest was subject to be divested should the children die without issue. If there should be a want or failure of issue in the lifetime of the two children of the testatrix or at the time of their deaths (Wills Act, R.S.O. 1914 ch. 120, sec. 33), the gift over would become effective.

The executors, if living, could not sell the lands, which 12 months after the death of the testatrix became vested in the

devisees, and the children could sell only the interest which was vested in them and subject to be divested in the event mentioned.

These conclusions sufficiently answered the several questions submitted.

Costs out of the estate.

RIOPELLE v. RIOPELLE—LENNOX, J.—FEB. 3.

Husband and Wife—Alimony—Cruelty—Findings of Fact of Trial Judge—Rate of Monthly Payments Fixed in Judgment—Leave to Apply.]—An action for alimony, tried without a jury in Ottawa. LENNOX, J., in a written judgment, examined the evidence with care, and found that the defendant had assaulted his wife, the plaintiff, and that she had reasonable ground to fear that she would be assaulted again, that her health would be impaired, and that the defendant might execute his threats if she attempted to live with him again. There was no offer by the defendant to take the plaintiff back since she left him. On the contrary, he charged her with adultery, and at the trial made sweeping imputations and produced evidence which the learned Judge entirely discredited. Judgment for the plaintiff for alimony at the rate of $40 a month, beginning from the date of the commencement of the action, but deducting such sums as had been paid by the defendant, with costs to be taxed on a solicitor and client basis. Either party may apply to have the judgment varied if changed circumstances justify it. J. W. Gauvreau, for the plaintiff. O. A. Sauvé, for the defendant.