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APPELLATE DIVISION.

First Divisional Court. February 22nd, 1917.

*Re TOWNSHIP OF MALAHIDE AND COUNTY OF ELGIN.

Municipal Corporations—Bridge Proposed to be Erected in Lieu of Township Bridge Destroyed—Proposed Length more than 300 Feet—Liability of County Corporation for Proportion of Cost of Erection, Maintenance, and Repair—"County Bridge"—Municipal Act, R.S.O. 1914 ch. 192, sec. 449—Application to Bridge on Paper—"Maintain."

Appeal by the Corporation of the County of Elgin from an order of the Judge of the County Court of the County of Elgin declaring a proposed bridge, known as Statler's bridge, intended to be placed upon the road allowance between the 1st and 2nd concessions of the township of Malahide, a county bridge, and apportioning between the county and township corporations the cost of erecting, maintaining, and repairing it.

The appeal was heard by Garrow, Maclaren, and Magee, JJ.A., and Masten, J.

C. St. Clair Leitch, for the appellants.

J. M. McEvoy and E. A. Miller, for the Corporation of the Township of Malahide, respondents.

Masten, J., in a written judgment, said that the order was made in pursuance of the authority and duty imposed on the Judge of the County Court by sec. 449 of the Municipal Act, R.S.O. 1914 ch. 192; and the appeal was under sub-sec. 7 of that section.

The question was, whether, upon the admitted facts, the pro-

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

posed bridge fell within the words of sec. 449; for, if it did not, there was no jurisdiction to make the order.

Before the date of the application to the Judge, there had been a bridge at the place indicated. The length of this bridge, including the approaches, was less than 300 feet. Owing to erosion in the banks, it fell down, and at the date of the application no bridge existed. It was proposed to erect in its stead a new bridge having a length, exclusive of approaches, of 303 or 304 feet.

The sole question was one of jurisdiction, depending on the interpretation of sec. 449. The other requirements of the section were met; the only question was whether sec. 449 applied to a case where there was not and never had been a bridge 300 feet long—"A bridge of a greater length than 300 feet . . . in a township may . . . be declared to be a county bridge." The section does not cover the case of a proposed bridge, a bridge on a plan; and there was no jurisdiction to make the order.

If there had been a bridge more than 300 feet long in actual existence, and if, after having been declared a county bridge, it had fallen, the word "maintain" in the section would be sufficient to impose on the county corporation a duty to rebuild or to share in the cost of rebuilding; and to such a situation the words of Patterson, J.A., in Re Townships of Moulton and Canborough and County of Haldimand (1885), 12 A.R. 503, at p. 536, apply; but the term "maintain" cannot be applied where at the date of the order there is no bridge. The section predicates an actual physical structure of greater length than 300 feet as the basis of everything.

The appeal should be allowed and the order below vacated with costs.

MACLAREN and MAGEE, JJ.A., concurred.

GARROW, J.A., died while the appeal was standing for judgment.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 22ND, 1917.

SCHMIDT v. SCHMIDT.

Husband and Wife—Separation—Agreement for Custody of Children—Action to Set aside—Undue Influence—Misrepresentation—Concealment of Facts—Public Policy—Alimony—Adultery—Condonation.

Appeals by Christine Schmidt, the plaintiff in two actions, one for alimony and the other to set aside an agreement, and the applicant in an application for the custody of her two infant children, from judgments of LATCHFORD, J., dismissing the actions and the application.

The appeals were heard by GARROW, MACLAREN, and MAGEE, JJ.A., and MASTEN, J.

Peter White, K.C., and A. Bicknell, for the appellant.

George Wilkie, for Frederick Schmidt, the defendant and respondent.

MACLAREN, J.A., in a written judgment, set forth the facts in regard to the differences between the plaintiff and defendant, who were husband and wife. Negotiations between solicitors for both parties culminated in an agreement of the 12th May, 1914, providing, inter alia, that the custody of the children up to the 31st December, 1918, should be determined by each of them severally, after spending separately a week with their mother, during which time neither parent was to attempt to prejudice them against the other parent. At the close of these experiments, each of the children expressed a desire to live with the father. This agreement the plaintiff now sought to set aside, on the grounds of undue influence, misrepresentation, concealment of facts, etc., and as being contrary to public policy. The trial Judge, before whom the plaintiff was examined at great length, found that she had wholly failed to make out a case of undue influence, and pointed out the great length of time over which the negotiations extended, and the fact that throughout she had had independent legal advice. The misrepresentation and concealment of facts were at the argument narrowed down to the complaint that it was concealed from her that the affection of the children had been completely estranged from her, and that, if the defendant had disclosed this, as it was his duty to do, she

would not have accepted the agreement. Effect was not given to this contention, and properly so.

No authority was cited to shew that such an agreement as this, between parents living apart, that one of them should have the custody of children during their tender years, the other having reasonable access to them, was against public policy.

It was urged that, by giving up her right to the custody of the children, the plaintiff would, in case of the death of the defendant, be held to have given up all her rights to their control, and that this was contrary to public policy; but it was only in favour of the father that she gave up her rights, and in case of his death all her rights would revive.

The trial Judge rightly held that, in the circumstances and under the authorities, the plaintiff could not, on any of the grounds alleged, have the agreement set aside: Halsbury's Laws of England, vol. 7, p. 359; Pollock on Contracts, 8th ed., p. 617; Addison on Contracts, 10th ed., p. 119.

The plaintiff further contended that she was entitled to alimony, and that the defendant ought not to be entrusted with the custody of the children, because of adultery in 1903, on his own confession. But that was expressly condoned by the wife in 1904; and, if the husband had conducted himself properly for the past 13 years, he could not be held to have forever forfeited his right to the custody of his children.

Other questions raised were decided adversely to the plaintiff by the trial Judge, and rightly so.

The appeals should be dismissed.

MAGEE, J.A., and MASTEN, J., concurred.

GARROW, J.A., died while the appeals were standing for judgment.

Appeals dismissed.

FIRST DIVISIONAL COURT. FEBRUARY 23RD, 1917.

REX v. BLYTH.

Criminal Law—Carnal Knowledge of Child—Evidence—Confession —Insufficiency to Support Conviction.

Case stated by the Judge of the County Court of the County of Lambton, after the trial and conviction before him of the pri-

soner on a charge, under sec. 301 of the Criminal Code, of having carnally known Madeline Cundick, a girl under 14 years of age, not being his wife.

The only question presented for consideration was, whether the confession of the prisoner, made to his father and others on the 1st October, 1916, and the evidence of Bert Stanley Cundick, Lottie McGee, and Mrs. Shirley Cundick, after excluding all evidence of the statements made by the child Madeline to each of them with reference to what the prisoner did to her, were sufficient evidence to sustain the conviction of the accused.

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

J. R. Cartwright, K.C., for the Crown.

No one appeared for the prisoner.

MEREDITH, C.J.O., read the judgment of the Court. He said that, assuming that the confession of the prisoner was rightly admitted in evidence, it was not an admission that he had committed the offence of which he had been convicted. He was not challenged with an accusation of that nature. According to the testimony of the witness Campbell, the father of the girl asked the prisoner "what he had been doing to the little girl last night;" the prisoner replied that he had not been doing anything; the girl's father then said, "Don't you lie like that or I will knock you down;" Edward Cundick, who had come to where the others were, then said, "Don't do that—leave that for his father to do." Then the prisoner's father said: "Now, Charlie, what did you do to Mr. Cundick's little girl? If you have done anything to her, just tell the truth; it will be better for you; and ask his forgiveness." Whereupon the prisoner said, "Forgive me, Bert, for what I done to your girl," and went to shake hands with him.

There was also an entire absence of evidence that the prisoner knew what he was charged with having done. All that his statement amounted to was an admission that he had done something to the little girl for which he should ask her father's forgiveness—and that fell far short of being an admission that he had committed the offence of which he had been convicted.

The question should be answered in the negative.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 19TH, 1917.

*PEARSON v. HANCOCK.

Arrest—Ex Parte Order for—Fraudulent Debtors Arrest Act, R.S.O. 1914 ch. 83, sec. 3—Affidavits—Failure to Shew Cause of Action for $100—Application to Vacate Order—Rule 217—Failure to Shew Intention to Abscond—Non-disclosure of Material Facts—Ex Parte Order Set aside—Protection to Sheriff—Costs.

Motion by the defendant for an order setting aside an order made on the 9th February by the Judge of the County Court of the County of Halton, under the Fraudulent Debtors Arrest Act, R.S.O. 1914 ch. 83, directing the arrest of the defendant and that he be held to bail in $1,500, and, in the alternative, for the discharge of the defendant, under sec. 25 of the Act.

H. S. White, for the defendant.
J. A. E. Braden, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the material on which the order was granted consisted of an affidavit and an affidavit of his solicitor. In the plaintiff's affidavit he stated that he had brought an action for $10,000 damages, and the writ of summons was made an exhibit, but in the endorsement no amount of damages was mentioned. The second clause was: "I instructed my solicitor to claim $10,000 damages against the defendant" for inducing his (the plaintiff's) wife to leave him and for harbouring her and refusing to deliver her up. The statement of claim was then made an exhibit. That was all that the plaintiff said as to the cause of action. The solicitor in his affidavit, after setting out certain facts as to the issue of the writ of summons and service of the statement of claim and a search in the registry office and information as to the defendant's intention to leave Ontario, stated his belief that the defendant would, unless apprehended, leave Ontario, "and thereby defeat the plaintiff in the prosecution of his claim, which in my opinion is a just one."

What the statute (sec. 3) requires, before an order for arrest can be made, is, in the first place, that the plaintiff shall by affidavit shew, to the satisfaction of a Judge, that he has a cause of action against a person liable to arrest, to the amount of not less

than $100; and this statutory provision must be most strictly complied with: Handley v. Franchi (1866), L.R. 2 Ex. 34; Bennett v. Dawson (1828), 4 Bing. 609; Hughes v. Brett (1829), 6 Bing. 239; Townsend v. Burns (1832), 2 Cr. & J. 468; Archbold, 14th ed., p. 1465; Bullock v. Jenkins (1850), 20 L.J.Q.B. 90.

On this branch of the case, the plaintiff had failed to comply with the requirements of the statute. He had not sworn to anything which shewed the cause of action. He simply stated his instructions to his solicitor to sue for $10,000, and exhibited the writ and statement of claim. The amount of damage sustained was not shewn, and no facts were given upon which the Judge could form any opinion. Upon this ground, the order must be vacated as having been made improvidently and contrary to the statute.

Rule 217 gives a Judge power to rescind any ex parte order. Daner v. Busby (1871), 5 P.R. 356, must be read in the light of the practice introduced by this Rule in 1888. See McNabb v. Oppenheimer (1885), 11 P.R. 214.

The order in question was also liable to attack upon the defective nature of the material in so far as it attempted to shew an intention to abscond.

All ex parte motions call for the fullest disclosure upon the part of the applicant. A number of material facts were not disclosed to the Judge when he made the order.

The order should, therefore, be vacated and all proceedings under it set aside. The Sheriff should be protected as to all things done by him, as the order was valid on its face. Costs to the defendant in any event.

KELLY, J. FEBRUARY 19TH, 1917.

NEVEREN v. WRIGHT.

Mortgage—Covenant for Payment—Exchange of Properties—Agreement—Liability for Proportionate Part of Prior Mortgage—Covenant of Mortgagees to Protect Mortgagor—Separate and Distinct Covenants—Assignment of Mortgage—Notice of—Sufficiency— Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 49—Assignment by Plaintiff and Reassignment pendente Lite—Rule 300—Abatement.

Action to recover the amount which the defendant covenanted to pay, by a covenant contained in a mortgage-deed executed by him on the 15th October, 1913.

The action was tried without a jury at Toronto.

J. M. Ferguson, for the plaintiff.

W. J. Elliott, for the defendant.

Kelly, J., in a written judgment, said that W. and C., the owners of the equity of redemption in lands having a frontage of 246 feet, entered into a contract with the defendant in September, 1913, to exchange the westerly 100 feet for property of the defendant. At this time, there was upon the whole 246 feet a mortgage to one Lett. The agreement for exchange provided for a conveyance to the defendant of the 100 feet subject to a mortgage of $7,332.60. This referred to the Lett mortgage, which was for a much larger sum. From the agreement it appeared that in the adjustment there was in W. and C.'s favour a balance of $267.40 (difference in the value of the equities), and that, as it was part of the agreement that W. and C., were to pay the defendant $3,000 in cash, the defendant would give them a mortgage (subject to the Lett mortgage) on the 100 feet for $3,267.40—the difference in the value of the equities plus the $3,000 advanced by W. and C. This mortgage was executed by the defendant in favour of W. and C., and it was upon the covenant for payment contained in it that the action was brought. The conveyance by W. and C. to the defendant was made subject to the assumption by the grantee of $7,332.60, being a proportionate part of the amount unpaid on the Lett mortgage. On the 29th October, 1915, the plaintiff became assignee of the mortgage made by the defendant, but did not claim to be in any better position than W. and C., the original mortgagees. Default having been made by the defendant, this action was commenced on the 13th December, 1915. On the 22nd September, 1915, the defendant conveyed the 100 feet to a third person, subject to a proportion of the Lett mortgage and also to the mortgage now sued upon; in the conveyance it was expressly declared that the purchaser did not assume these mortgages. The defendant made payments upon the portion of the Lett mortgage which he had assumed; but, when he found that the holder of that mortgage refused to apply further payments exclusively upon that portion, he discontinued his payments. W. and C. had covenanted to protect the defendant against liability upon the Lett mortgage beyond the portion assumed.

The defendant set up that his covenant could not be enforced against him; that it was given as a term of the agreement for exchange; that the covenants in that agreement were mutually

dependent, so that any obligation of his was not enforceable, unless W. and C. or the plaintiff performed their covenant that he was not to be called upon to pay more than the proportion referred to of the Lett mortgage.

The circumstances must be looked at to see whether or not the contract was one coming within the rule of law that the failure of one party to perform one part of it entitles the other party to refuse to perform his part. Reference to Mersey Steel and Iron Co. v. Naylor Benzon & Co. (1884), 9 App. Cas 434. Looking at the circumstances here, the covenants were not interdependent, but separate and distinct. With the exception of the small balance of $267.40, the whole principal secured by the mortgage represented an actual cash advance made at the time by W. and C. to the defendant.

The notice (Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 49) of the assignment of the mortgage to the plaintiff did not recite a mesne assignment to one B.W., who assigned to the plaintiff; but the notice was sufficient: it was not essential, with the knowledge that the defendant then had, that each step by which the plaintiff became assignee should be set out.

After the commencement of this action, the plaintiff assigned the mortgage to one F., who reassigned it to the plaintiff before the trial. The defendant, relying upon Rule 300, contended that, on the assignment by the plaintiff, the action was subject to being dismissed or stayed; but, in the circumstances of the assignment, that was not so: Naiman v. Wright (1915), 8 O.W.N. 492, 9 O.W.N. 165.

Judgment for the plaintiff for $3,142.40 and interest from the 15th October, 1915, in the terms of the mortgage, with costs.

MIDDLETON, J. FEBRUARY 20TH, 1917.

*CROMARTY v. CROMARTY.

Husband and Wife—Alimony—Interim Allowance—Permanent Allowance—Time of Commencement—"Costs as between Solicitor and Client"—Obligation of Husband to Pay Wife's Costs—Indemnity of Solicitor for Wife.

Motion by the plaintiff to vary the minutes of the judgment in an action for alimony: see ante 342.

M. L. Gordon, for the plaintiff.
R. T. Harding, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff claimed permanent alimony from the date of the writ of summons, less any sum paid for interim alimony; but there was nothing to justify the claim. Where interim alimony has been ordered, permanent alimony runs from the date of the judgment only—following the English practice, which is set out in a Rule.

The learned Judge awarded the plaintiff "costs as between solicitor and client," and in his reasons for judgment expressed the hope that the plaintiff's costs might be liberally taxed so as to afford the plaintiff as near an approach to indemnity for costs properly incurred as was practicable. The learned Judge was now asked to embody in the formal judgment some provision going beyond the expression "costs as between solicitor and client." He could find no authority for so doing, and he did not think that he should in any way interfere with the responsible duty of the Taxing Officer in determining what costs were reasonably and properly incurred.

The obligation of the husband to pay his wife's costs rests upon his matrimonial obligation. She cannot impose upon him an obligation beyond what is reasonably necessary for the assertion of her rights; but the Taxing Officer ought to consider what has been done, in the endeavour to assert her rights, sympathetically rather than critically, and in the light of the fact that there is no other way in which the plaintiff's solicitor can secure payment, unless the wife encroaches on her alimentary allowance or her friends come to the rescue.

An endeavour must be made to afford the wife protection, but no undue burden must be cast upon the husband by any costs incurred through overcaution or extravagance upon the part of the wife.

BRITTON, J. FEBRUARY 21ST, 1917.

*BEURY v. CANADA NATIONAL FIRE INSURANCE CO.

Insurance—Fire Insurance—Proofs of Loss—Waiver by Denying Existence of Insurance—"Insurance Contract"—Interim Receipt—Difference in Contract from that Applied for—Failure to Point out Difference—Insurance Act, R.S.O. 1914 ch. 183, sec. 2 (14), sec. 194, Condition 8—Fire Taking Place after Expiry of Period Named in Interim Receipt—Rate of Insurance, when Fixed—Non-payment of Premium—Notice of Cancellation—Estoppel—Counterclaim—Payment of Amount of Premium into Court—Costs.

Action to recover the amount of the plaintiffs' loss by fire upon property alleged to be covered by an insurance contract made with the defendants. Counterclaim for amount of premium.

The action and counterclaim were tried without a jury at Toronto.

Gideon Grant, for the plaintiffs.

A. C. Heighington, for the defendants.

BRITTON, J., in a written judgment, said that it seemed that the defendants did not dispute the ownership by the plaintiffs of the property intended to be covered by insurance, or that the property was destroyed by fire.

The plaintiffs put in formal proofs of their loss, in substantial compliance with the statutory condition in regard to proofs; and, even without formal proofs, it was not open to the defendants to put forward the non-delivery of proofs as a defence, because they disputed their liability for the loss and denied that they had insured the property.

If the plaintiffs had any right to recover it was solely on the interpretation to be put upon statutory condition 8 (sec. 194 of the Insurance Act, R.S.O. 1914 ch. 183): "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application."

There was an application for insurance, accepted by the defendants, and it only remained for them to deliver the policy in accordance with the application. Instead of that, they delivered

what was called an interim receipt, by which the term of the risk was only 30 days from the date of the receipt, instead of 12 months from the date of the application. With the interim receipt the defendants did not point out in writing the particulars wherein the interim receipt differed from the policy applied for. By sec. 2, clause 14, of the Insurance Act, an interim receipt is a "contract of insurance."

The complaint of the plaintiffs was, that the instrument sent differed from the policy applied for, and the defendants did not state in writing that there was a difference and specify the difference; and, therefore, whatever was sued upon as coming from the defendants as a policy was to be deemed a policy in accordance with the application.

The property was destroyed by fire on the 31st May, 1915; the interim receipt was issued and dated on the 30th April, 1915; and the defendants contended that the insurance was at an end on the 30th May, 1915.

The interim receipt was not applied for in lieu of or in substitution for the policy asked for by the plaintiffs.

The plaintiffs contended that the rate of insurance was fixed on the 16th May, while the defendants said that it was not fixed till the 25th or 26th May. But the rate *was* fixed, and for 12 months—not for 30 days only. There having been, at this stage, no objection to the application, and as it was held over only for the purpose of fixing a rate, and as the rate was afterwards fixed, the plaintiffs were entitled to succeed.

No particular stress was placed upon the fact that the premium was not paid before the fire. Credit was given for the payment of the premium. The plaintiffs were always ready and willing to pay it as soon as the rate was fixed, and they had brought the money into Court.

The defendants were estopped from contending that the insurance was not in force at the time of the fire, they having, before then and while the receipt, according to their own contention, was in force, notified the plaintiffs that the insurance would be cancelled at a date later than the date of the fire.

Judgment for the plaintiffs for $1,897.44, with interest from the 6th October, 1915, at 5 per cent. per annum till judgment, with costs.

Judgment for the defendants on their counterclaim for $105.20, the amount of the premium for a year's insurance, with costs to the time of payment into Court and the costs of taking the money out of Court.

BRITTON, J. FEBRUARY 21ST, 1917.

RE ANDERSON.

Will—Construction—Devise to Wife—"Should my Wife Cease to be my Widow"—Devise over to Children—Estate of Wife Terminable at Death or Remarriage.

Motion by the widow of John C. Anderson, deceased, for an order determining questions arising as to the construction of his will, which was as follows:—

"After all my just debts funeral and testamentary expenses have been paid I give devise and bequeath to my wife Eva Anderson all my property both real and personal of any kind of which I may die possessed.

"It is my desire and wish that my said wife shall have the privilege of selling any or all of my said real property with the consent and approval of my executors at any time she may desire to do so. Should any or all of my property be sold I direct my executors to retain in trust the proceeds thereof and to invest the same as they may deem advisable in the best interests of my estate.

"Should my wife cease to be my widow then I direct my executors to divide my real and personal property or the proceeds thereof (should the same have been sold) equally among my children share and share alike."

The motion was heard in the Weekly Court at Toronto.

Daniel O'Connell, for the widow.

G. N. Gordon, for the executors.

F. W. Harcourt, K.C., for the children of the testator, infants.

BRITTON, J., in a written judgment, said that it seemed clear, upon reading the whole will, that the intention of the testator was, that his wife should have a life estate in all the property unless she married again: Re Lacasse (1913), 4 O.W.N. 986.

The widow takes an estate for life, subject to that estate being divested if she should marry again.

The widow is entitled to the income of the real and personal property during her life and while the property remains unsold, subject to divestment upon her remarriage.

If the property or any part should be sold and the proceeds invested, the widow is entitled to receive payment annually of the interest.

The widow is not entitled to any part of the corpus.

Upon the remarriage of the widow or at her death, the children take the whole corpus.

Order declaring accordingly; costs of all the parties out of the estate.

MASTEN, J., IN CHAMBERS. FEBRUARY 22ND, 1917.

*REX v. BOILEAU.

Ontario Temperance Act—Conviction for Keeping Liquor on Premises — Single Justice of the Peace—Jurisdiction — 6 Geo. V. ch. 50, secs. 2 (e), 3-6, 61 (3), 146—"Licensee"—Keeper of Standard Hotel.

Motion by the defendant to quash a conviction, dated the 4th January, 1917, made by D. M. Viau, one of His Majesty's Justices of the Peace in and for the United Counties of Prescott and Russell.

T. N. Phelan, for the defendant.
J. R. Cartwright, K.C., for the Crown.

MASTEN, J., in a written judgment, said that the conviction was under the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, and the motion to quash was based on the fact that the conviction was made by a single Justice of the Peace, sitting alone, which was alleged to be contrary to the provisions of sec. 61 (3) of the Act: "All prosecutions under this Act, whether for the recovery of a penalty or otherwise, shall take place before two or more Justices of the Peace or a Police Magistrate having jurisdiction, except in the case of a licensee or for any offence committed on or with respect to licensed premises, which may be tried by one Justice of the Peace."

The conviction was supported by the Crown on the ground that the defendant was a licensee, within the meaning of the clause just quoted, or, in the alternative, that the offence was committed on or with respect to licensed premises.

It was not disputed that the defendant was the keeper (whether as owner or as tenant, did not appear) of a building licensed under the provisions of the Ontario Temperance Act as a standard hotel; and it was contended by the Crown that he was, in consequence, a licensee within the meaning of sec. 61 (3) above quoted.

By sec. 2 (*e*) of the Act in question, "'Licensee' shall mean a person holding a license under this Act, and 'Vendor' shall have the same meaning." Two kinds of licenses are mentioned in the Act: first, a license for the sale of liquor, the issue of which is governed by secs. 3 to 6 of the Act; second, a license of a "standard hotel," the issue and character of which are governed by sec. 146 of the Act. The first is a license of a person, the second a license in rem of certain premises, but not of the keeper personally. The only statutory authority is an authority to license the premises; and, even if there is authority to license the keeper, there was here no evidence of a personal license to the defendant.

It was not suggested that the defendant was the holder of the first kind of license; and, as the keeper of a standard hotel, he was not a licensee within the meaning of sec. 61. He might be the employee or the lessee of the person to whom the license issued. Considering the definition of "licensee" above quoted, whereby "licensee" is made the equivalent of "vendor," "Licensee" in sec. 61 is confined to a person holding a license as a vendor of liquor. A perusal of secs. 3, 5, 7, 13, 33, 61, 81, 92, 115, and 146, confirmed the view expressed.

There was no evidence that the offence complained of was committed on or with respect to licensed premises. The liquor, the having of which was complained of, was stored in a barn unconnected with the hotel, and distant more than a quarter of a mile therefrom.

Even if the defendant, as the keeper of a standard hotel, was a licensee within the meaning of the Act, the offence here complained of was not committed by him in that quality or capacity, but rather in his quality or capacity as a private individual.

Therefore, the Justice who made the conviction sitting alone exceeded his jurisdiction, and the conviction must be quashed.

No costs. Usual order for protection of the magistrate.

MIDDLETON, J. FEBRUARY 22ND, 1917.

RE FIERHELLER.

Will—Construction—Devise to three Daughters—Executory Devise upon Death of one without Issue—Absolute Estates of Survivors—Costs of Motion for Construction.

Motion by the executors of one Fierheller, deceased, for an order declaring the true construction of his will in respect of certain questions arising as to the distribution of his estate.

The motion was heard in the Weekly Court at Toronto.

F. A. H. Campbell, for the executors.

J. G. Holmes, for the two surviving daughters of the testator.

MIDDLETON, J., in a written judgment, said that the will contained a gift to the testator's three daughters in fee, subject to an executory devise in these words: "In the event of the decease of any of my said daughters without issue, the legacy or devise of such deceased daughter shall be equally divided between the surviving daughters share and share alike."

One of the daughters died without issue; her share then became divisible between the two survivors. Their shares of this share they take absolutely.

One surviving sister has no issue, and probably never will have; the other has issue. The executory devise contemplates the survivorship of two sisters, and cannot be applied upon the death of either sister now living; and so the absolute gift to them cannot hereafter be cut down—each is entitled to her share free from any contingency.

Order declaring accordingly. Each of the surviving sisters must bear half of the costs of this motion—to be taxed.

BRITTON, J., IN CHAMBERS. FEBRUARY 23RD, 1917.

RE WADE AND MAZZA.

Mortgage—Mortgagors and Puchasers Relief Act, 1915—Application for Leave to Sue for Overdue Principal—Agreement for Renewal at Higher Rate of Interest—Costs.

Motion by Osler Wade, assignee of a mortgage made by Angelo Mazza, under the Mortgagors and Purchasers Relief Act, 1915, for an order for leave to take or continue proceedings, by way of foreclosure or sale or otherwise, for the recovery of principal money secured by the mortgage, which was a second mortgage, dated the 15th November, 1911. The principal, $1,675, became due on the 15th November, 1916, and was not paid.

J. M. Bullen, for the applicant.

Norman D. Tytler, for Mazza, the respondent.

BRITTON, J., in a written judgment, said that no special circumstances were given or relied upon. It was simply alleged that,

if the defendant could not pay now, and if he wanted more time, he should pay interest at a higher rate—the current rate being higher than that stipulated for in the mortgage.

It cannot be said that there is any known standard for the rate of interest for second, third, or fourth mortgages.

Complete justice, in all the circumstances of this case, will be done if the rate of interest is raised only to 6½ per cent. per annum. The investment, although by way of a second mortgage, appeared to be absolutely good—the security of the mortgagee was ample.

The respondent may enter into a binding agreement to renew for the three years for the $1,675 remaining due. The terms should be that he pay $200 per year on account of principal, in half-yearly instalments of $100 each, and interest half-yearly at the rate of 6½ per cent. on the whole amount that may from time to time remain unpaid; and, upon such agreement being made, no proceedings should be commenced on the mortgage, unless there should hereafter be default.

The costs of the motion and of the renewal agreement or renewal mortgage should be paid by the respondent, the mortgagor, following the usual rule in mortgage cases. Costs fixed at $15 plus disbursements.

GOLDBLATT v. DOMINION SALVAGE AND WRECKING CO. LIMITED.
SUTHERLAND, J.—FEB. 19.

Receiver—Motion for—Affidavit in Answer.]—Motion by the defendants for an order appointing a receiver of the business known as the Owen Sound Furniture House "to run the business and account for the profits and to pay the judgment herein given for costs to the defendants." The motion was heard in the Weekly Court at Toronto. SUTHERLAND, J., in a brief written judgment, said that, in face of the statements contained in the sffidavit of William Legate filed on behalf of the plaintiff and in opposition to the motion, it would be impossible to make the order asked. Motion dismissed with costs. F. A. A. Campbell, for the defendants. M. Wilkins, for the plaintiff.

TORONTO GENERAL TRUSTS CORPORATION V. GODSON—MASTEN, J. —FEB. 19.

Judgment—Consent Minutes—Reopening—Rehearing by Judge as Arbitrator—Will—Rights of Beneficiaries under—Compromise—Allowance for Maintenance of Widow of Testator—Use of Homestead.]—This action came on for trial before MASTEN, J., at the non-jury sittings at Toronto on the 25th January, 1917, at which time, after a conference between the parties, the terms of a judgment were agreed upon between the counsel in the presence of the parties. Subsequently, some of the parties to the contest, who had not been personally present on that occasion, thinking that further facts could be submitted, desired a rehearing, which was had on the 14th February, 1917. The parties formally agreed, as a preliminary to entering upon a reconsideration of the action, that all questions directly or indirectly arising out of the issues upon the record be left to the learned Judge as an arbitrator with power to him to determine the questions, after hearing the parties, without evidence and without the right of appeal; the finding of the Judge as an arbitrator to be entered as the judgment of the Court. The learned Judge, in a written judgment, said that his consideration was specially directed to the financial position of the estate in question in the action and to the depletion of corpus that might result if the widow of the testator should live for a considerable time. She was now 80 years old, and it was common ground that such depletion of capital would amount to about $1,000 per annum, and that the allowance provided for the widow by the consent minutes would give her about $2,300 per annum net. The widow, considering her great age and need for attendance, could not be comfortably maintained on less than that sum; and no fairer or better adjustment of the matters in dispute could be made than that which was agreed upon on the former occasion, subject to one modification. If the widow finds that she cannot advantageously occupy the homestead, the plaintiffs should have possession; but before this term becomes operative it should be firmly and plainly made manifest that the widow has determined to quit the homestead permanently. In that case the plaintiffs should be entitled to the possession of the premises, paying to the widow $25 per month to assist in providing other quarters for her. In all other respects, the judgment should be as agreed upon on the first occasion. J. E. Robertson, K.C., for the plaintiffs. H. H. Dewart, K.C., and R. T. Harding, for certain beneficiaries under the will. Lionel Godson, in person. A. C. McMaster and J. M. Bullen, for the widow.

MORRISON v. MORRISON—BRITTON, J., IN CHAMBERS—FEB. 20.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Extension of Time for Appealing—Leave to Set Case down—Forum.]—Motion by the defendant Philip Morrison for leave to appeal and to extend the time for appealing from the order of CLUTE, J., in Chambers, ante 294. See also ante 359. BRITTON, J., in a written judgment, said that he had a doubt as to the correctness of the order sought to be appealed against; and the matter appeared to him to be of such importance as to invite the attention of the Appellate Division. Therefore, leave to appeal should be granted under Rule 507, and the time for appealing should be extended for 10 days. To enable the applicant to set the case down on appeal, leave, if necessary, must be obtained from a Judge of the Appellate Division. The delay in appealing was the fault of the applicant; so costs of the application should be costs in the cause to the plaintiff. I. Hilliard, K.C., for the applicant. H. S. White, for the plaintiff.

HENWOOD v. CANADIAN OAK LEATHER CO.—BRITTON, J., IN CHAMBERS—FEB. 20.

Particulars—Statement of Claim—Ex Parte Order—Setting aside—Appeal—Substantive Application—Time for Delivery of Defence—Extension.]—Appeal by the defendants from an order of the Master in Chambers setting aside an ex parte order for particulars of the fraud alleged in the statement of claim. BRITTON, J., in a written judgment, said that the Master was right in setting aside the ex parte order; and the appeal must be dismissed. The time for delivering the statement of defence should be extended for ten days. The defendants to be at liberty to apply upon notice for an order for particulars. Costs to be costs in the cause to the plaintiffs. J. H. Fraser, for the defendants. F. H. Vanstone, for the plaintiffs.

SEVENTH DIVISION COURT OF THE COUNTY OF ESSEX

SMITH, JUN.CO. C.J. JANUARY 31ST, 1917.

RE MINISTER OF INLAND REVENUE AND NAIRN.

Revenue—Special War Revenue Act, 1915, 5 Geo. V. ch. 8, secs. 14, 15 (D.)—Sale of Proprietary or Patent Medicine—Failure to Affix Revenue Stamp—"Selling to a Consumer"—Inland Revenue Inspector—Conviction—Act of Clerk or Servant.

An appeal by the Minister from the decision of the Police Magistrate for the City of Windsor, pronounced on the 25th November, 1916, dismissing the charge of the appellant against the respondent of a violation of sec. 15 of the Special War Revenue Act, 1915, 5 Geo. V. ch. 8 (D.)

Section 15 provides: "Every person selling to a consumer any bottle or package containing (*a*) a proprietary or patent medicine . . . shall, at or before the time of sale, affix to every such bottle or package an adhesive stamp of the requisite value as mentioned in the schedule to this Part."

The appeal was heard by SMITH, Jun. Co. C.J., Essex.
Gerald McHugh, for the appellant.
T. Mercer Morton, for George Nairn, the respondent.

SMITH, Jun. Co. C.J., in a written judgment, said that the respondent carried on business as a grocer in the city of Windsor, and on the 13th October, 1916, Herman J. Dager, an inspector employed by the Department of Inland Revenue, purchased from a clerk in the employ of the respondent a package of health salts, being a package containing a proprietary or patent medicine within the meaning of the Special War Revenue Act, 1915. The clerk making the sale to the inspector did not, either before or at the time of the sale, affix a stamp, as required by sec. 15.

The learned magistrate dismissed the charge against the respondent on the ground that the inspector who made the purchase of the article in question was not a "consumer" within the meaning of sec. 14 of the Act.

Section 14 provides: "In this section and in the remaining sections of this Part, unless the context otherwise requires (i) 'consumer' means a person who uses (*a*) a proprietary or patent

medicine . . . either in serving his own wants or in producing therefrom any other article of value; and 'selling to a consumer' includes selling by retail."

Following the decision of Mr. Justice Cross in the case of Ethier v. Minister of Inland Revenue, tried before him at Montreal, on the 26th September, 1916, not yet reported, the learned Junior Judge holds that the words, "'selling to a consumer' includes selling by retail," in sec. 14 of the Act, would include the sale in question to the inspector; and, therefore, that the sale was one which required the affixing of a stamp at or before the time of the sale. On this ground the appeal succeeds.

It was argued by counsel for the respondent that he should not be liable for the act of his servant, in view of the fact that instructions were given to the clerk to affix stamps on all articles of this kind sold by him. But, following the authority above cited, the clerk omitted to affix the stamp while acting within the scope of his employment in selling the article, and the employer, the respondent, is liable.

The appeal should be allowed, but without costs, and the respondent should pay to the appellant the sum of $50 and such costs as were incurred on the trial before the magistrate.