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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*ROGERS v. GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORPORATION.

*ROGERS v. MERCANTILE FIRE INSURANCE CO.

Insurance (Fire)—Insurance Act, R.S.O. 1914 ch. 183, sec. 194, condition 5—Construction of—"Effect other Insurance thereon" —Removal of Goods so that they Become Covered by Policy of another Company.

Appeals by the defendants from the judgment of CLUTE, J., 13 O.W.N. 175.

The appeals were heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

A. C. McMaster, for the appellants.

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

RIDDELL, J., in a written judgment, referred to statutory condition 5—sec. 194 of the Ontario Insurance Act, R.S.O. 1914 ch. 183—which provides: "If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of sixty per cent. of the loss . . ."

It was argued that the removal of the goods covered by the policy of one company so that they became covered also by the policy of the other company is to "effect other insurance thereon,"

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

so as to prevent the recovery of more than sixty per cent. of the loss.

Had the Legislature meant, "or if the property covered by the policy hereafter be affected by other insurance," it would have said so. The best way of finding out what the Legislature means is to find out the meaning of what it says. And it has said: "If the assured hereafter"—*i.e.*, after the coming into force of the original policy of insurance—"effects any other insurance thereon." I think this means, to bring about, procure, insurance non-existent at the time of the coming into force of the original policy, and "thereafter" in reference to its "now."

There did not seem to be any decision in the Courts of this Province on the point.

Reference to Harris v. Liverpool and London Fire Insurance Co. (1866), 10 L.C. Jur. 268, 273, 274; Walton v. Louisiana State Marine and Fire Insurance Co. (1842), 2 Rob. (Supreme Court Louisiana) 563; Washington Insurance Co. v. Hayes (1867), 17 Ohio St. 432; Peoria Marine and Fire Insurance Co. v. Anapour (1867), 45 Ill. 86; Vose v. Hamilton Mutual Insurance Co. of Salem (1862), 39 Barb. 302, 304.

If the Court were bound by American cases, the decision would be in favour of the companies. The Court not being so bound, the learned Judge preferred to give to the words of the Legislature their literal meaning and not to stretch this meaning to cover what it was suggested might have been intended.

The appeals should be dismissed with costs.

The other members of the Court agreed in the result; each giving reasons in writing.

Appeals dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*FAYE v. ROUMEGOUS.

Husband and Wife—Claim of Executrices of Deceased Wife to Interest in Property of Husband—Evidence—Partnership—Trust—Limitations Act—Claim for Money Lent—Costs.

Appeal by the plaintiffs from the judgment of BRITTON, J., 13 O.W.N. 251.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

D. L. McCarthy, K.C., and T.L. Monahan, for the appellants.

H. J. Scott, K.C., and J. C. Thompson, for the defendants, respondents.

CLUTE, J., in a written judgment, said that the plaintiffs, Mabel Faye and Gertrude Faye, sued an executrices and trustees under the will of Susan Roumegous, the deceased wife of the defendant. The plaintiffs alleged that the defendant and his wife were the owners of an hotel business during the years 1900 to 1907, and that the wife was entitled to a half interest in the profits of the hotel business during those years; that the defendant received all the profits; that in September, 1907, the business was sold for $25,000, $10,000 of which was then paid to the defendant, who had not paid any part thereof to the deceased wife or to the plaintiff; that in August, 1905, the deceased wife lent the defendant $2,200, and in August, 1914, $500; and that the profits of the business and the proceeds of the sale were expended by the defendant in the purchase of a property at Cooksville. The plaintiffs claimed: (1) a half-interest in the Cooksville property; or (2) a declaration that the plaintiffs were entitled to a one half share of the profits of the hotel business; (*b*) judgment for $5,000 and interest; (*c*) one half of the interest on the balance of the purchase-money for the years 1907 to 1912; (3) judgment for $2,200 and interest; (4) judgment for $500 and interest.

The learned Judge, after reviewing the evidence, and referring particularly to the agreement under which the hotel business was purchased in 1900 (which was not before the trial Judge), said that upon the argument the plaintiffs limited their claim to one half of $7,500, with interest, being part of the first payment of $10,000, less a portion thereof used in the payment of the debts of the business; the wife having received during her lifetime one half of two payments of $5,000 each and interest.

It was not disputed that the husband had received the $10,000, being the first payment on the purchase-money; and it further appeared from his evidence that he had expended the money received from the business in the purchase of the Cooksville property; also that he had received the $500 from his wife on the date mentioned.

It sufficiently appeared from the evidence that the partnership liabilities were paid from time to time out of the profits of the business, and that the purchase-money on the sale represented the net assets of the business, less about $2,500 of liabilities, which were paid out of the $10,000.

The conclusion from the documents and the manner in which the hotel business was carried on was that the husband and wife were equal owners of it; and the plaintiffs were entitled to recover one half of $7,500, unless precluded by the Statute of Limitations.

A married woman may now be a partner: Married Women's Property Act, R.S.O. 1914 ch. 149, sec. 4.

The sale of the hotel business was a sale of property in which the wife had an equal interest with her husband. It included the entire business and assets. The sale, while not formally dissolving the partnership, put an end to the business as carried on by the husband and wife. She had a right to a share of the first payment ($10,000)—a joint and equal right with her husband. He received the amount; he was liable to account to her for it. But the Limitations Act operated so as to preclude her from bringing an action for a partnership account after 6 years from such receipt. He was not a trustee for her in any sense that would preclude the application of the statute: Lindley on Partnership, 7th ed., pp. 551-553; Knox v. Gye (1872), L.R. 5 H.L. 656; Gordon v. Holland (1913), 82 L.J.P.C. 81; Betjemann v. Betjemann, [1895] 2 Ch. 474; and other cases.

Thus the appellants failed in respect of their claim for one half of the $7,500.

The claim for $500 said to have been lent by the wife to the husband was established by the evidence of the defendant. The evidence also clearly shewed that $37.50 interest due to the wife was paid to the husband.

The appeal should be allowed to the extent of $537.50, and judgment entered for the plaintiffs for that amount with County Court costs and without a set-off. Costs of the appeal to be paid by the defendant.

MULOCK, C.J. Ex., SUTHERLAND and KELLY, JJ., agreed with CLUTE, J.

RIDDELL, J., for reasons stated in writing, agreed that the appeal should be allowed as to $537.50. He added that the statute did not run in favour of the defendant as to an instalment of the purchase-money not yet paid. A sum of $5,000 remained unpaid; and, to save further litigation, the Court should now declare that the plaintiffs were entitled to half that sum as and when paid. With that declaration, in addition to the judgment for $537,50, the appeal should be allowed, and the costs here and below, both on the Supreme Court scale, should be paid by the defendant.

Judgment as stated by CLUTE, J.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*WALSH v. WILLAUGHAN.

Mortgage—Amount of Principal Due—Mortgage Given to Vendor by Purchaser of Land, upon other Land, for Amount of Down-payment, and Money Lent—Default of Purchaser under Contract of Purchase and Sale—Rescission of Contract—Effect as to Part of Mortgage-money Representing Down-payment.

Appeal by the defendant Willaughan from an order made by the Senior Judge of the County Court of the County of York dismissing the appellant's appeal from the report of a Referee finding the defendant Stephens entitled to the principal sum of $700 on his mortgage-security.

The appeal was heard by MULOCK, C.J. EX., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

H. T. Beck, for the appellant and for the plaintiff.

Gideon Grant, for the defendant Stephens, respondent.

MULOCK, C.J. Ex., in a written judgment, said that the action was upon a first mortgage and a third mortgage made by the defendant Willaughan. The second mortgage was to the defendant Stephens, to secure payment of $700 and interest; and Stephens was added as a defendant, in the position of a subsequent incumbrancer.

Before the Referee, Willaughan contended that only $200 principal was recoverable upon the Stephens mortgage. The Referee found that $700 principal was owing; and his finding was affirmed by the County Court Judge.

Stephens sold land to Willaughan. The $700 mortgage was given (on other land) for $500, the down payment on the contract of purchase, and $200 advanced to Willaughan by Stephens. By virtue of provisions contained in the agreement for sale, the agreement became, on Willaughan's default, null and void.

Willaughan contended that the mortgage to the extent of $500 was security only for $500, part of the purchase-price; and that, the contract having been rescinded, the mortgagee was not entitled to payment of the $500; also, that, the contract having been rescinded by the vendor, the purchaser was entitled to repayment of the $500 paid by giving the mortgage.

The learned Chief Justice, after a careful review of the facts

and the authorities, stated his opinion that the appellant was not entitled to succeed in either contention.

The rescission of the contract was caused by the default of the defendant; and he was not entitled to profit by his default by recovering the $500.

The appeal should be dismissed with costs.

CLUTE, SUTHERLAND, and KELLY, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J., also agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*RE BAGSHAW AND O'CONNOR.

Landlord and Tenant—Lease—Proviso for Re-entry—Default in Payment of Rent—Tender after Default—Landlord and Tenant Act, R.S O. 1914 ch. 155, sec. 19—Oral Agreement to Terminate Tenancy—Effect of—Summary Proceedings under Overholding Tenants Provisions of Act (secs. 75 et seq.)—Relief against Forfeiture.

Appeal by Albert O'Connor, the tenant, in a summary proceeding under the overholding tenants' sections of the Landlord and Tenant Act, from an order of the Judge of the District Court of the District of Temiskaming, directing the issue of a writ of possession to put the landlord, George Albert Bagshaw, into possession of the premises leased to the appellant.

The appeal was heard by MULOCK, C.J. Ex., BRITTON, CLUTE, SUTHERLAND, and KELLY, JJ.

Erichsen Brown, for the appellant.

J. M. Ferguson, for the landlord, respondent.

The judgment of the Court was read by MULOCK, C.J. Ex., who said that Bagshaw demised premises to O'Connor for 5 years from the 1st November, 1916, at a monthly rental of $100, payable on the first day of each month in advance. In the lease (under the Short Forms of Leases Act) there was a proviso for re-entry by the lessor on non-payment or non-performance of

covenants. O'Connor went into possession and made certain improvements at his own expense. In March, 1917, it was agreed that these improvements should be treated as satisfaction of the rent until the end of May, 1917, and that O'Connor should, on the 1st June, 1917, and on the first day of each month thereafter, pay rent in accordance with the terms of the lease.

There was correspondence between the parties, but no rent had been paid up to the 22nd July, 1917, when the parties met. Bagshaw swore that O'Connor then agreed to give up possession on the 10th August. The substance of O'Connor's evidence was, that he agreed to give up possession only in the event of a sale. Next day, Bagshaw leased the premises to one Meyers, and notified O'Connor's wife that he had done so. O'Connor refused to give up possession. A day or two afterwards, O'Connor's solicitor tendered to Bagshaw $201.25 in payment of the arrears and interest, but Bagshaw declined to accept the money.

On the 13th August, the overholding tenant proceedings were begun.

It was contended by Bagshaw that the term had come to an end.

The agreement, if made, rested in parol, and could not operate as a surrender of the lease: Johnstone v. Huddlestone (1825), 4 B. & C. 922; Doe d. Murrell v. Milward (1838), 3 M. & W. 327. Then O'Connor did not give up possession—thus there was no surrender by operation of law.

O'Connor contended that the tender of the overdue rent relieved him from the right to forfeit.

The institution of the summary proceedings under sec. 77 of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, was an unequivocal exercise of the lessor's option to determine the lease, and it so operated unless the tender deprived Bagshaw of his right to forfeit.

When the rent remained overdue for 15 days, Bagshaw was entitled to two rights: one to recover the arrears of rent; and the other to re-enter: sec. 19 of the Act, and the proviso in the lease for re-entry, with the meaning given to it by the Short Forms of Leases Act. The two rights are not alternative or independent—the satisfaction of one does not satisfy the other.

Bagshaw's right to possession was properly adjudicated in the summary proceedings. There was no good reason for discharging the order made and leaving Bagshaw to his remedy by action. O'Connor acted in bad faith and should be barred from obtaining equitable relief against forfeiture.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*STEWART v. STERLING.

Slander—Imputing Unchastity to Young Girl—Damages—Failure to Prove Special Damage—Evidence of Illness and Loss of Hospitality—Insufficiency—Repetition of Slander—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 19 (1)—Recovery Limited to Nominal Damages.

Appeal by the defendant Alexander Sterling from the judgment of the Senior Judge of the County Court of the County of Huron, upon the verdict of a jury, in favour of the plaintiff as against the appellant for recovery of $500 damages and taxed costs, in an action for slander.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, SUTHERLAND, and KELLY, JJ.

C. Garrow, for the appellant.

L. E. Dancey, for the plaintiff, respondent.

CLUTE, J., in a written judgment, said that the slander was the imputing to the plaintiff, an infant, unchastity. The innuendo was, that the plaintiff was a girl of unchaste character. The appellant denied that he had spoken the words, and denied the innuendo. At the trial the plaintiff was allowed to amend by alleging special damage.

The Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 19 (1), provides that in an action for defamatory words spoken of a woman imputing unchastity it shall not be necessary to allege or to prove that special damage resulted to the plaintiff from the utterance of such words, and the plaintiff may recover nominal damages without averment or proof of special damage, but shall not be entitled to recover more than nominal damages unless special damage is proved.

No special damage was proved in this case, and only nominal damages could be recovered: Whitling v. Fleming (1908), 16 O.L.R. 263.

It was strongly urged that the effect of the slander was, that the plaintiff became ill; but, if illness was caused by reason of the slander, it was by repetition thereof, for which the defendant was not responsible.

It was also urged that there was sufficient evidence of loss of hospitality to prove special damage. It was to the effect that the

plaintiff "could not go to the Smiths,' friends of ours, on account of this scandal." It was not said that her friends would not receive her or that she lost their hospitality by reason of the slander. For all that appeared, it might have been her own diffidence in visiting her friends, and not their refusal to receive her, that caused the loss of hospitality. The evidence fell short of that definite proof necessary to support an allegation of special damage. A person is responsible only for the utterance by himself of a slander, and not for its repetition; special damage from such repetition is too remote. Each publication is a distinct tort, and every person repeating it becomes an independent slanderer and is alone responsible for his unlawful act: Odgers on Libel and Slander, 5th ed. (Can. notes), p. 177. The exceptions to the rule were not applicable here.

There was no evidence to justify the outrageous conduct of the defendant in attacking, without a shadow of a cause, the plaintiff's moral character. The damages must be reduced to nominal damages, $1; but that was sufficient to rehabilitate the plaintiff in the good opinion of the public. The defendant was entitled to her costs, without set-off, in the Court below; and there should be no costs of the appeal.

MULOCK, C.J. EX., and SUTHERLAND, J., agreed with CLUTE, J.

KELLY, J., reluctantly concurred, briefly stating his reasons in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*RE POULIN AND VILLAGE OF L'ORIGNAL.

Municipal Corporations—Money By-law—Submission to Electors—Municipal Act, secs. 2 (o), 263 (5)—Necessary Publication of By-law—Imperative Duty—Non-compliance with Direction of Statute—Disregard of Principles of Act—Application of sec. 150.

Appeal by B. R. Poulin from the order of MEREDITH, C.J.C.P., 13 O.W.N. 374, dismissing an application to quash a money by-law.

The appeal was heard by MULOCK, C.J. EX., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

McGregor Young, K.C., for the appellant.

No one opposed the appeal.

MULOCK, C.J. Ex., in a written judgment, said that the money by-law in question, before its final passing by the council, required the assent of the electors; and sec. 263 (5) of the Municipal Act requires that such a proposed by-law "shall be published once a week for three successive weeks," and sec. 2 (*o*) defines "published" as meaning "published in a newspaper in the municipality to which what is published relates or which it affects; or, if there is no newspaper published in the municipality, in a newspaper published in an adjacent or neighbouring municipality."

The proposed by-law related to the construction of public works within the corporate limits of the Village of L'Original and the raising of money by the taxation of electors in that municipality therewith to pay for these proposed works. There was a newspaper published in the municipality; and the statute required that the by-law be published in that municipality. That was not done; the publishing was in another municipality.

The publication was, therefore, a nullity as regards compliance with the statutory requirements.

The Chief Justice of the Common Pleas was of opinion that such non-compliance with the requirements of the statute was an irregularity which might be cured under the provisions of sec. 150. But the curative provisions of that section apply only where the election (or voting) is "conducted in accordance with the principles laid down" in the Act.

The statutory duty to publish is imperative; and failure to do so is a disregard of the principles of the Act.

Reference to In re Mace and County of Frontenac (1877), 42 U.C.R. 70, 88; Cartwright v. Town of Napanee (1905), 11 O.L.R. 69; Re Cartwright and Town of Napanee (1906), 8 O.W.R. 65, 67; In re Rickey and Township of Marlborough (1907), 14 O.L.R. 587, 594.

The by-law should be quashed on this ground. It was not necessary to consider the second ground dealt with in the Court below.

The appellant should have the costs of the motion and of this appeal.

The other members of the Court agreed that the by-law should be quashed for want of publication; RIDDELL and KELLY, JJ., each giving written reasons.

Appeal allowed.

SECOND DIVISIONAL COURT MARCH 25TH, 1918.

*COOP v. ROBERT SIMPSON CO.

Negligence—Collision of Motor-vehicles in Highway—Passenger in one Killed—Action against Owner of other by Widow of Man Killed—Findings of Jury—Identification of Driver with Passenger—Judge's Charge—Nondirection—Criminal Trial at same Sittings—Contributory Negligence—Motor Vehicles Act—New Trial.

Appeal by the plaintiff (the widow of Joseph Coop) from the judgment of HODGINS, J.A., at the trial, upon the findings of a jury, dismissing without costs an action, under the Fatal Accidents Act, to recover damages for the death of Joseph Coop, who was killed in a collision between a motor-truck of the defendants driven by one Wooton, and a motor-cycle owned and driven by one Lowry, in the side-car of which the deceased was sitting when the collision occurred, upon a street in the city of Toronto. The plaintiff alleged negligence on the part of the driver of the motor-truck.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. A. Skeans, for the appellant.

Peter White, K.C., and H. S. Sprague, for the defendants, respondents.

CLUTE, J., in a written judgment, said that the motor-truck had the right of way, and the collision was undoubtedly caused by the driver of the motor-cycle disregarding this fact.

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

(1) Was the death of Joseph Coop caused by reason of a motor-vehicle on a highway? A. Yes.

(2) If so, who was the owner and who was the driver of the motor-vehicle? A. Lowry.

(3) If the defendants (the Simpson company) were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle? A. Yes.

(4) If not so satisfied, was the accident caused by the negli-

gence of the driver of the defendants' motor-vehicle causing or contributing to the accident? If guilty of any negligence, state fully in what that negligence consisted. A. No.

(5) Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident? A. Yes.

(6) If so, what was that negligence? A. Not stopping or turning out of the way.

(7) If the driver of the motor-cycle was guilty of negligence causing or contributing to the accident, could the driver of the motor-vehicle owned by the defendants (the Simpson company), after he saw or ought to have seen and apprehended the danger, have done anything which would have prevented the accident? A. No.

(8) If so, what could he have done which he neglected to do? (Not answered).

(9) What damages, if any, has the plaintiff suffered, which the defendants (the Simpson company) should pay by reason of the negligence of their driver, if you find that he was guilty of any negligence causing the accident? (Not answered).

The usual questions, "Were the defendants guilty of negligence that caused this accident? If so, what was the negligence?" were not asked.

The jury were not told by the trial Judge in his charge that the plaintiff was entitled to recover notwithstanding the negligence of Lowry unless Joseph Coop in some way himself contributed to the accident. The passenger is not, since Mills v. Armstrong (The Bernina) (1888), 13 App. Cas. 1, to be identified with the driver.

The case proceeded throughout on the assumption that the negligence of Lowry might affect the plaintiff's right to recover. The jury should have been distinctly told that, unless the deceased was himself guilty of some default amounting to contributory negligence, he was not affected by the fact that Lowry was guilty of negligence that caused the accident; and that they might find the defendants guilty of negligence if Wooton was guilty of any negligence that contributed to the accident, notwithstanding that they found Lowry also guilty of negligence.

Wooton did not sound his horn; the collision took place at an intersection of streets in the central part of the city; and there was evidence that the traffic was heavy at the time. It was for the jury to consider whether the rate of speed, the omission to sound the horn, and the other circumstances, were such as to constitute negligence, notwithstanding that the speed of the motor-truck was less than 15 miles an hour; and their attention should have been directed to sec. 11 (2) of the Motor Vehicles Act.

These further instructions to the jury were especially called for, inasmuch as Lowry was indicted and convicted at the same sittings of the Court for criminal negligence in respect of the death of Coop. It was necessary to guard the minds of the jurors against associating the right of the plaintiff to recover with the guilt of Lowry.

It must have been common knowledge among the jurors summoned for the sittings at which this action was tried, and at which Lowry was also tried and convicted, that he had been so tried and convicted, whether any of the jurors who tried the criminal case also tried the civil case or not; and, notwithstanding the very careful charge of the learned trial Judge, and with great respect, the trial in its essential features was unsatisfactory, and there ought to be a new trial.

Costs of the former trial and of this appeal to be costs in the cause.

MULOCK, C.J. Ex., and SUTHERLAND and KELLY, JJ., agreed with CLUTE, J.—MULOCK, C.J. Ex., and KELLY, J., giving written reasons.

RIDDELL, J., read a dissenting judgment.

New trial ordered; RIDDELL, J., *dissenting.*

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*STRUTHERS v. CHAMANDY.

Assignments and Preferences—Assignment for Benefit of Creditors—Previous Transfer of Building and Lease to Creditor—Chattel Mortgage on Building (Treated as Chattel) Made to Person Advancing Money—Priorities—Building Found to be Fixture—Short Forms of Leases Act, Schedule B. (10)—Preference—Assignments and Preferences Act—Intent—Present, Actual, Bona Fide Advance of Money—Fraudulent Transaction—Assignments and Preferences Act, sec. 5 (1).

Appeal by the defendant from the judgment of MASTEN, J., 12 O.W.N. 302.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, JJ., and FERGUSON, J.A.

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

G. S. Gibbons, for the plaintiffs, respondents.

CLUTE, J., in a written judgment, said that the plaintiffs Struthers & Co., wholesale merchants, claimed priority under a deed of trust, given as security for their debt, as against the defendant's chattel mortgage; and both the plaintiffs, Struthers & Co. and Martin, maintained that the chattel mortgage was void as against creditors. The trial Judge gave effect to the first contention, holding that nothing passed under the chattel mortgage; but did not expressly find fraud.

It was argued for the appellant: (1) that the chattel mortgage was valid, whether the building was to be regarded as land or as a chattel; (2) that the instrument in favour of Annie Essa was not a lease but a license and that the chattel mortgage was a proper conveyance of the building, and had priority over the plaintiffs' security.

Effect could be given to neither of these contentions. The building became part of the land, and passed to the lessors, and it was not intended to be a trade-fixture or a chattel that might be removed.

The proviso that the lessee may remove his fixtures (Short Forms of Leases Act, R.S.O. 1914 ch. 116, schedule B. (10), does not cover buildings, but refers to trade-fixtures etc.

Nothing was intended to pass by the chattel mortgage except the building; and, that instrument being ineffective, it was wholly nugatory—there was no property upon which it could operate.

The instrument executed by the Nipissing Mining Company did not purport to grant a license; it was a lease, with a reservation of the mineral rights and the right to work them.

The findings of the trial Judge as to the bona fides of the advance of $2,500 by the defendant were fully supported by the evidence. But the evidence and findings created more than a suspicion of fraud against the defendant. The findings brought the case expressly within the provisions of sec. 5 (1) of the Assignments and Preferences Act, R.S.O. 1914 ch. 134.

The transaction was a fraudulent one; and the chattel mortgage, whether of any worth or worthless, should be declared void as against the creditors of Aunie Essa.

The judgment below should be amended by the addition of this declaration; and the appeal dismissed with costs.

MULOCK, C.J. Ex., and SUTHERLAND, J., agreed with CLUTE, J.

RIDDELL, J., for reasons given in writing, agreed that the appeal should be dismissed with costs.

FERGUSON, J.A., read a dissenting judgment.

Appeal dismissed with costs; FERGUSON, J.A., *dissenting.*

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*ROBINSON v. LONDON LIFE INSURANCE CO.

Insurance (Life)—Application for Insurance Made and Premium Paid—Death of Applicant before Issue of Policy—No Contract Completed.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, in favour of the plaintiff, the widow of J. E. Robinson deceased, for the recovery of $1,000, the amount of an alleged insurance by the defendants on the life of the deceased.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, JJ., and FERGUSON, J.A.

J. M. McEvoy and E. Jeffery, for the appellants.

C. W. Bell and T. B. McQuesten, for the plaintiff, respondent.

MULOCK, C.J. Ex., in a written judgment, said that on the 3rd February, 1917, J. E. Robinson made a written application to Calvert, the defendants' local agent at Preston, for insurance on his (Robinson's) life for $1,000, and paid $5 in cash, giving his (Robinson's) promissory note for $3.62—$8.62 being the estimated amount of the first quarter's premium. Calvert gave Robinson an "interim receipt," on a form used by the defendants, with their name upon it, which stated that no obligation was incurred by the defendants by reason of the payment unless "said application is accepted and a policy granted." This was signed by Calvert. At this time Robinson was engaged as a furnace man in a steel-works establishment, and Calvert explained to him that the defendants might regard his occupation as hazardous and require payment of a larger premium. On the same day, Robinson was, at the instance of Calvert, examined by a physician. Robinson, on the same day, wrote a letter at Preston to the defendants at London, enclosing the application, the $5, and the note.

On the 6th February, the defendants sent the application to their district agent, telling him that the occupation called for an extra premium of $3, and asking him to have the necessary changes made in the application and initialled by the applicant. This was communicated by the district agent to Calvert, who, on the 8th February, sent on the application and note to Robinson, in a letter which informed Robinson that the quarterly premium

would be $9.37 instead of $8.62, and asked Robinson to initial the changes.

The report of the examining physician was sent to the defendants; when produced at the trial by the defendants, it was marked as received on the 10th February, 1917.

On the 24th February, the plaintiff, at her husband's request, saw Calvert at Preston, and gave him the original application and note with the changes initialled. She then paid to Calvert $4.37, the amount of the amended note, which Calvert then delivered up to her; and he then gave her a receipt, signed by himself, for the $4.37, "balance of quarterly premium."

On the same day, Calvert sent the amended application and the $4.37 to the defendants.

On the following day, Sunday the 25th February, Robinson died.

The defendants were not informed of the death until the 28th February. The policy had then been prepared, but had not been signed or sealed.

The defendants endeavoured to return the premium to the plaintiff, but she would not accept it.

Upon these facts, there never was any insurance contract between the defendants and Robinson.

Reference to the Ontario Insurance Act, R.S.O. 1914 ch. 183, secs. 2 (14), 155.

The appeal should be allowed with costs and the action dismissed with costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J., and FERGUSON, J.A., agreed in the result; RIDDELL, J., giving written reasons.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

RE MICHAUD AND LARSON.

Creditors Relief Act—Sheriff's Scheme of Distribution—Amount for which Execution Creditor Entitled to Rank—Contestation—Evidence—Insolvent Estate—Moneys in Hands of Trustee for Creditors not Dealt with in Scheme of Distribution.

Appeal by C. M. Larson, contestant, a creditor of Michaud & Co., from an order of the Judge of the District Court of the District of Rainy River dismissing the appellant's application, under the Creditors Relief Act, to vary the scheme of distribution made by the Sheriff of Rainy River by reducing the amount for which the Swift Canadian Company, also creditors of Michaud & Co., were allowed to rank on funds in the hands of the sheriff for ratable distribution among the creditors of Michaud & Co.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, JJ., and FERGUSON, J.A.

A. A. Macdonald, for the appellant.

C. M. Garvey, for the Swift Canadian Company, respondents.

The judgment of the Court was read by MULOCK, C.J. Ex., who said that on the 10th July, 1917, the Swift company recovered a judgment against Michaud & Co. for $785.44, and placed a writ of fi. fa. in the sheriff's hands, and claimed to be entitled to rank for $802.68, made up of the $785.44, $4 costs of the writ, and a sum for subsequent interest.

Larson contested the claim, contending that it should be reduced by three items of $150, $174 or $175, and $197.27.

The evidence on the question raised was confined to the testimony of George A. Michaud, principal member of the firm of Michaud & Co., and the testimony of Baird, chief clerk of the Swift company.

The Chief Justice, after an examination of this evidence, saw no ground for attacking the order.

It appeared that certain moneys belonging to the debtors had been paid to Shaw, their trustee for creditors, but whether for all or some did not appear. Shaw was not before the Court; and the trust fund in his hands could not be dealt with. If the Swift company were entitled to share in that fund, they would, on receiving their dividend, be obliged to give credit for the amount; but their prospective share in the fund could not be taken into consideration in dealing with the question of the amount in respect of which they were now entitled to be scheduled.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*UNGER v. HETTLER LUMBER CO.

Public Health Act—Illness of Person Employed in Lumber Camp—Liability of Employer for Expenses of Illness—R.S.O. 1914 ch. 218, sec. 118 (1) (d), (4)—Regulations Made by Provincial Board of Health—Contract with Physician—Oral Agreement—Sufficiency—Right of Father of Employee to Maintain Action for Expenses—Costs of Action—Scandalous Allegation in Statement of Defence.

Appeal by the defendants from the judgment of the Judge of the District Court of the District of Nipissing in favour of the plaintiff for the recovery of $144 and costs in an action for the money expended by the plaintiff in connection with the illness of his son (typhoid fever) said to have been contracted by the son while in the service of the defendants.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, JJ., and FERGUSON, J.A.

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

R. T. Harding, for the plaintiff, respondent.

MULOCK, C.J. Ex., in a written judgment, said that in September, 1915, the plaintiff's son, a young man under 21, entered the service of the defendants in their lumber camp, and continued until the 15th October, 1915, on which day he left on account of illness and returned to his father's home. The plaintiff at once summoned a medical man, and, on his advice, placed the young man in a hospital under the care of Dr. Brandon, who on the 21st October found him suffering from typhoid fever. The plaintiff's claim was for the expenses which he incurred in thus providing his son with hospital and medical services.

The plaintiff contended that by virtue of the Public Health Act, R.S.O. 1914 ch. 218, and the regulations made thereunder by the Provincial Board of Health, he was entitled to recover these expenses from the defendants.

The learned Chief Justice referred to sec. 118 (1) (*d*), (4), and regulations 3, 4, and 5 of the Board, made under the authority of sec. 118.

On the 28th August, 1914, the defendants entered into a written contract with Dr. McKee, a duly qualified physician, whereby the latter agreed to furnish surgical and medical at-

tendance to the men employed by the defendants at their camp during the season of 1914-1915, and to provide hospital accommodation for hospital cases at Cache Bay, North Bay, or Sudbury. The defendants' operations ended in May, 1915; and the contract with Dr. McKee then also terminated.

Before the plaintiff's son entered the service of the defendants, they made an oral contract with Dr. McKee for the coming season, of the same tenour as the expired written one; and, in pursuance of the oral contract, Dr. McKee entered upon his duties as contracting physician and continued to perform them until after the plaintiff's son had left the defendants' service.

It was contended for the plaintiff that an oral contract did not fulfill the requirements of the regulations.

By regulation 4, the employer "may contract . . . in manner hereinbefore provided." This has reference to regulation 3; but that regulation does not require a written contract, nor is there anything in regulation 4 calling for a written contract. Regulation 5 contemplates a written contract, but merely for the purposes of the Provincial Board of Health. Quoad employees a contract, whether oral or written, meets the requirements of regulation 4.

The learned Chief Justice was, therefore, of opinion that the defendants had "contracted" within the meaning of regulation 4, and were not responsible, as in the case of an "employer who does not contract," for the "medical care and maintainance of" an "employee taken ill while in" their "employ" (regulation 4). The defendants were not responsible either to the plaintiff or his son for the son's medical care and maintainance.

This being the conclusion, it was not necessary to determine whether in any event the father could maintain the action.

The defendants had alleged in their statement of defence that the plaintiff's son was dismissed for theft, and that he left their service in apparent good health and without complaining of being unwell. The evidence shewed that he was ill before leaving; and there was no doubt, in the Chief Justice's mind, that the typhoid fever which subsequently developed had its origin while he was in the defendants' camp. No evidence was offered in support of the irrelevant statement that the plaintiff's son was dismissed for theft; it must be concluded that the charge was baseless. The defendants should have publicly withdrawn it at the trial. The allegation should now be expunged from the statement of defence as scandalous; and, because of its baseless nature, the defendants should be deprived of costs.

The appeal should be allowed without costs and the action dismissed without costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J., for reasons stated in writing, agreed that the appeal should be allowed without costs and the action dismissed without costs.

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

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO.

Street Railway—Expropriation of Portion by City Corporation—Special Act, 7 Geo. V. ch. 92, sec. 4 (O.)—Claim of County Corporation for Damages under sub-sec. 7—Disallowance by Ontario Railway and Municipal Board—Right of Appeal to Divisional Court of Appellate Division—No Provision for Appeal in Special Act—Appeal by Leave under sec. 48 of Ontario Railway and Municipal Board Act—Jurisdiction of Court—Rights of County Corporation—County By-law—Transfer of Certain Rights to Minor Municipalities—Agreements between County Corporation and Railway Company—60 Vict. ch. 93, sec. 15.

An application by the Corporation of the County of York for leave to appeal from an order of the Ontario Railway and Municipal Board, disallowing the claim of the appellants against the Corporation of the City of Toronto for injury that will be sustained by the applicants by reason of the exercise by the city corporation of the powers conferred on them by statute whereby the privileges and franchise rights of the appellants will be taken away.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

McGregor Young, K.C., for the appellants.

Irving S. Fairty, for the city corporation, respondents.

CLUTE, J., in a written judgment, said that the question arose under an Ontario Act of 1917, respecting the City of Toronto,

7 Geo. V. ch. 92—sec. 4 of which gives power to the city corporation to expropriate that part of the Toronto and York Radial Railway (Metropolitan Division) upon Yonge street, within the city limits.

Sub-section 7 of sec. 4 provides that, in the event of the Corporation of the County of York making any claim against the city corporation by reason of the exercise of the powers conferred by sec. 4, the county corporation shall furnish particulars of their claim to the city corporation, and such claim, in the event of disagreement, shall be adjudicated upon and determined by the Ontario Railway and Municipal Board.

Counsel for the city corporation objected that no appeal lay to this Court from a decision of the Board. It was arranged that the objection and the merits of the appeal should be argued together, and this was done.

The only right of appeal given by the Act of 1917 is in sec. 4 (1); by it "either party" has "the right to one appeal to the Appellate Division" from the determination by the Board of the compensation to be paid by the city corporation to the railway company upon the exercise of the right of expropriation. "Either party" evidently means the city corporation and the railway company. No right of appeal is given to the county corporation by sub-sec. 7.

The Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 48, provides for an appeal "from the Board," upon a question of jurisdiction or upon any question of law by leave of the Court—that is, this Court. It was objected that this right of appeal does not apply to the present case, inasmuch as it arises under an Act of the Legislature. But the jurisdiction of the Board under the Ontario and Municipal Board Act extends to a case like the present: see secs. 21 to 27 and sec. 48.

This Court had jurisdiction to grant leave to appeal.

The Board declined to hear evidence offered by the county corporation, upon the ground that they were not entitled to present any claim because of the effect of certain statutes and by-laws. That was a question of law as well as of fact.

The decision of the Board proceeded mainly upon the ground that the county corporation, under by-law 712, had abandoned the York roads and transferred them to minor municipalities, and so had ceased to have any claim for damages under the Act of 1917, and had no such interest under their agreement of the 6th April, 1894, as to give any right "in gross" arising out of that agreement, for any claim to damages under the Act.

The agreement with the railway company arose out of the

original agreement found in schedule A. to the Act respecting the Metropolitan Street Railway Company, 60 Vict. ch. 93, by which the agreement was made a part of the Act "in the same manner as if the several clauses of such agreement were set out and enacted as part of the Act:" sec. 15.

By-law 712, giving to the minor municipalities the duty and right of repair to Yonge street, does not affect the county corporation's claim to damages, if they are otherwise entitled. The by-law does not affect the county corporation in respect of the agreements with railway company.

It was not necessary nor would it be proper to express an opinion as to which or all of the clauses of the agreements entitled the county corporation to make claim. That was a question of law and fact, and ought not to be prejudged before the evidence which the county corporation may offer has been submitted to the Board.

The preliminary objection should be overruled; leave to appeal granted; the appeal allowed upon its merits; the order of the Board set aside; and the county corporation permitted to offer such evidence as they may be advised to offer in support of their claim.

The city corporation should pay the costs of the appeal.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with CLUTE, J.

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

KELBY, J., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 25TH, 1918.

*CANADIAN GENERAL SECURITIES CO. LIMITED v. GEORGE.

Contract—Sale of Land—Undertaking by Agent of Vendor-company to Resell at Profit within Specified Period—Promise not Incorporated in Agreement—Independent Collateral Agreement—Authority of Agent—Ratification by General Manager of Company—Promise Binding on Vendor-company—Statute of Frauds—Oral Evidence of Stipulation—Enforcement of Collateral Agreement—Payments under Contract of Purchase not a Waiver of Right to Enforce Contract to Resell—Damages—Set-off—Costs—Counterclaim—Amendment.

Appeal by the defendant from the judgment of MASTEN, J., 13 O.W.N. 355.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. J. McLarty, for the appellant.

G. G. S. Lindsey, K.C., and W. R. Wadsworth, for the plaintiffs, respondents.

RIDDELL, J., reading the judgment of the Court, said, after stating the facts, that the case was that of a sale of land with an independent collateral agreement, not unlike De Lassalle v. Guildford, [1901] 2 K.B. 215 (C.A.), and others mentioned in the notes in Halsbury's Laws of England, vol. 7, p. 528, para. 1058. There was no necessity for such a contract to appear in the agreement for sale.

It was objected that there was no authority in the agent George to make such a contract; but that was answered by Clancy's ratification. Clancy being made general manager to sell the plaintiffs' land, the secret restriction of his authority (if there was such) would not affect the defendant, who relied upon Clancy being the general manager: Vansickler v. McKnight Construction Co. (1914), 31 O.L.R. 531; McKnight Construction Co. v. Vansickler (1915), 51 S.C.R. 374; Clarke v. Latham (1915), 25 D.L.R. 751, and cases cited. It would be impossible to hold that the general manager of a company had not the power to make for his company such a contract as was here disclosed.

Then the Statute of Frauds, sec. 4 (sec. 5 of our statute) was set up as an answer. But the contract was not one of sale of

land, but a contract to sell land, and that is not within the statute: 20 Cyc., cases mentioned in notes 34, 35, on p. 234; just as there is no need of a writing to appoint an agent to sell lands: Fry's Specific Performance, 5th ed., p. 269, para. 536, and cases mentioned in notes 4 and 5.

If it should be considered that such an agreement is within the statute, another principle may be appealed to: "If one be induced to sign a written contract for the . . . purchase of land on the faith of . . . the performance of some collateral stipulation, oral evidence of the . . . stipulation so agreed upon will not be excluded by reason of the statute:" Williams on Vendor and Purchaser, 2nd ed., vol. 1, p. 12, and see cases in note (*m*); cf. Dart on Vendor and Purchaser, 7th ed., vol. 1, p. 224. And the party making the collateral promise will not be allowed to enforce the promises made to him in the contract for purchase without being bound by his own promise: Pember v. Mathers (1879), 1 Bro. C.C. 52, 2 Dick. 550; Pearson v. Pearson (1884), 27 Ch.D. 145, 148.

No difficulty arose from the circumstance that George was in a sense acting for the defendant (his cousin) where he was acting for the plaintiffs in filling in the agreement. Either it was intended that the contract to resell should appear in the agreement, or it was not. If not, cadit quæstio; if it was, it was left out by mistake. To allow the plaintiffs to take advantage of the omission would be a gross fraud.

The contract to sell for the defendant was binding on the plaintiffs.

It was argued that the defendant, by paying on the agreement after there was a breach of the contract to resell by the 1st August, had put it out of his power to enforce the contract made with him. But the defendant's agreement to pay the price of the land to the plaintiffs and them to resell the land for him could not be considered dependent: Neveren v. Wright (1917), 39 O.L.R. 397, and cases there cited. The payments made by the defendant might be considered an acknowledgment of his liability to pay, but they were in no sense a waiver of his right to enforce the contract to resell.

The case must be treated as though in the agreement to purchase there had been an express covenant by the plaintiffs to resell the land for the defendant on or before the 1st August, 1914, so as to realise for the defendant a profit of $100 on each lot.

The appeal should be allowed in respect of the claim for damages for breach of the agreement to resell; and, if the parties

cannot agree, it should be referred to the Master to ascertain those damages. The judgment in favour of the plaintiffs should stand, but the damages (if any) should be set off.

Success being divided, there should be no costs of the action or appeal. If a reference is had, the Master should dispose of the costs thereof.

The defendant should have leave to amend by setting up his claim for breach of the collateral agreement as a counterclaim.

The damages should be the difference between the amount the defendant should have received for the lots had the plaintiffs carried out their contract (the purchase-price plus $200) and the value of the lots.

Appeal allowed in part.

HIGH COURT DIVISION.

BRITTON, J. MARCH 27th, 1918.

REDMOND v. STACEY.

Libel—Newspaper—Publication—Failure to Give Notice before Action—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 8—"Defendant"—Editor—Publisher—Release.

An action for libel.

The action was tried with a jury at Whitby.

H. H. Dewart, K.C., for the plaintiff.

D. L. McCarthy, K.C., and F.S. Mearns, for the defendant Stacey.

BRITTON, J., in a written judgment, said that, at the close of the plaintiff's case, counsel for the defendant Stacey asked for a dismissal of the action on two grounds: (1) that, the action being for a libel published in a newspaper, the notice to the defendant required by sec. 8 of the Libel and Slander Act, R.S.O. 1914 ch. 71, had not been given; and (2) that, the action being originally brought against the Reformer Printing Company Limited for publications in their newspaper, the plaintiff had released that company, upon a settlement being made; and, the company and Stacey being sued as joint tort-feasors, the release to the company operated as a release to Stacey.

The learned Judge was of opinion that the first objection must prevail. The alleged libel was contained in a newspaper, and he was not at liberty to add to the word "defendant," in sec. 8, other words limiting it to the editor or publisher for the time being.

The article published was not written by Stacey, nor did Stacey approve of or acquiesce in the writing of it. The evidence of the editor was not contradicted; and, according to that evidence, Stacey did not, at the time of publication, know what the editor had written and printed in the newspaper.

Action dismissed as against the defendant Stacey without costs.

MIDDLETON, J. MARCH 28TH, 1918.

LAWSON v. NATIONAL TRUST CO.

Trusts and Trustees—Marriage Settlement—Will—Construction—Period of Division of Trust Estate—Agreements between Trustees and Beneficiaries—Releases—Account—Investments—Income—Contribution—Declarations—Reference.

James F. Lawson, sole surviving trustee under the marriage settlement, made in 1870, of Frederick William Cumberland and his wife (both now deceased), brought this action for the purpose of having certain matters connected with the administration of the trust and the rights of the parties beneficially interested arising thereout determined by the Court.

The action was tried without a jury at Toronto.

Donald Macdonald, for the plaintiff.

E. D. Armour, K.C., and J. F. Edgar, for Julia E. Skae, Florence Cumberland, and Constance May Foy.

J. F. Edgar, for F. S. Salaman, assignee of Duncan Campbell.

E. C. Cattanach, for the Official Guardian, representing the infant May Ida Foy and the unborn class.

G. W. Mason and H. S. White, for the National Trust Company and Arthur J. Hardy.

MIDDLETON, J., in a written judgment, said that the active trustee under the settlement, until his death in September, 1913, was Barlow Cumberland, the son of the settlor and one of the beneficiaries.

After stating the provisions of the marriage settlement and the will of the settlor, and referring to settlements and agreements made with and releases taken from the other beneficiaries by Barlow Cumberland, and investments made by him, the learned Judge stated his conclusions as follows:—

(1) None of the agreements relied upon precluded the daughters of the settlor (sisters of Barlow Cumberland) from asserting their rights. There was no fraud in obtaining their signatures; but the surrounding circumstances were such as to call for independent and fuller explanation than was afforded to them; there was no adequate disclosure to them of the real nature of the transactions of the trustees; and they did not know their rights in the premises. Therefore the accounts should be taken on the basis of the rights of the parties under the original settlement and the will of the settlor. Duncan Campbell was not at all under the influence of Barlow Cumberland, and the release executed by him must stand. Any difference that this might make should be borne by or enure to the benefit of the other beneficiaries.

(2) The accounts were kept with entire accuracy, and the books of the estate and the accounts embodied in the annual reports should be taken as the basis of accounting without the production of any further vouchers, but with liberty to surcharge and falsify.

(3) The investments in real estate which involved either the purchase of an equity of redemption or the giving of a mortgage, or which were unproductive, were unauthorised.

(4) An account should be taken of the amount of money from time to time invested in any such transactions, and the trustees should be charged with income upon the amount so invested, at the rate of 6 per cent. per annum, and as and when realisations took place the trustees should receive credit for the amounts realised.

(5) If the net result is a loss to the estate, that loss should be borne by the estate of Barlow Cumberland. The result of the unauthorised investments was the cutting down of the income below what was necessary to pay the daughters in full; and his estate must bear that loss. Anything that this charging of income upon the capital so invested produced, over and above what was necessary to pay the daughters in full, would belong to Barlow Cumberland, not only as representing his two shares, but as representing his interest in the surplus. If the taking of this account shewed a gain above the 6 per cent. income, that gain would form part of the capital of the estate.

(6) The effect of this is to wipe out the loss of income which had been charged to capital. This was $16,825, less $5,000 contributed by Barlow Cumberland. He was entitled on the taking of the accounts to the benefit of this contribution and of a second contribution of $5,000 as against any liability that he might be under as the result of this declaration.

(7) The investment in Farmers Loan Company shares was an authorised one, and the loss sustained thereon must be borne by the estate.

(8) As a matter of strict law, Barlow Cumberland was not entitled to replace in the estate any portion of the capital withdrawn by him; but that seemed to be immaterial. His share should be reduced by the amounts which he had from time to time actually withdrawn.

(9) Upon the true construction of the will and settlement, the estate became divisible upon the death of the settlor's widow. As it was not then divided, from that time on the entire income of the estate would be distributable among Barlow Cumberland and his sisters, Barlow having a double share; that is to say, that from that time on the sisters' income would not be limited either to $800 or $1,066.66 as suggested; and all the previous declarations as to the mode of accounting must be read in the light of this.

(10) No further sums than those charged should be allowed the trustee for compensation.

If the parties cannot agree upon the state of the account based upon the above declarations, there must be a reference.

MIDDLETON, J. MARCH 28TH, 1918.

CARSON v. MARTIN.

Sheriff—Poundage—Taxation of Sheriff's Bill without Formal Appointment Served on Execution Creditor—Re-taxation Unnecessary—Motion to Reduce Poundage—Forum—Costs—Unnecessary Contest.

Motion by an execution creditor to set aside the taxation by a local officer of a sheriff's poundage.

The motion was heard in the Weekly Court, Ottawa.

J. E. Caldwell, for the execution creditor.

A. H. Armstrong, for the Sheriff.

MIDDLETON, J., in a written judgment, said that an execution was issued against a mortgagor upon a judgment obtained on the covenant. The sheriff did not proceed to enforce this with the degree of harshness required by the execution creditor, and did not leave a bailiff in actual possession. In the meantime the unfortunate debtor was attempting to arrange with the creditor, and finally gave him a chattel mortgage; and the sheriff was instructed not to proceed. The sheriff, assuming that satisfaction had been obtained, withdrew from possession. He sent in his account, including a charge for poundage. The poundage was rightly computed; but, under Rule 683 (2), the sheriff had no right, without taxation, to collect any fees, costs, poundage, or expenses, as the execution creditor had asked for taxation.

What the execution creditor desired was not a taxation—for the taxing officer could only ascertain whether the charges were in accordance with the tariff—but a reduction of the amount charged for poundage under Rule 686. The application to fix the lesser sum under that Rule should be made, not to a taxing officer, but in Chambers.

When the demand for taxation was made, the deputy-sheriff arranged an appointment with the taxing officer and wrote to the execution creditor's solicitor, advising him of the day and hour. At the time appointed, the deputy-sheriff attended, and the plaintiff's solicitor came into the office; he was asked by the officer whether he was attending; but, without answering, he left the room and did not return for some time. The officer in the meantime went on and taxed the bill and issued his certificate. The taxation, in the absence of formal service of a formal appointment, was improper; but it did not follow that it should be set aside. Cranston v. Blair (1893), 15 P.R. 167, shewed that the only right is to a re-taxation, of which, if the bill is reduced, costs will be given—if not reduced, there will be no costs. It was admitted that no change would be made on re-taxation.

The parties agreed to treat this as a motion for reduction of poundage.

In all the circumstances, the poundage should not be reduced. If there should be a sale under the writ of fi. fa. hereafter, there must not be a duplication of this charge.

The result is, that the taxation is not set aside and the poundage is not reduced. So far as the motion was to set aside the taxation, there should be no costs. So far as it was a motion for reduction of the poundage, the sheriff should have $10 costs and such sum (to be fixed by the clerk) as represents the costs of the cross-examination of the sheriff. The last award of costs was made to mark disapproval of the expense incurred in a useless contest.

MIDDLETON, J. MARCH 28TH, 1918.

SNITZLER ADVERTISING CO. v. DUPUIS.

Account—Open Contract—Settled Account—Particulars—Onus.

Appeal by the plaintiffs from a 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 in the Weekly Court, Toronto.
T. Mercer Morton and H. S. White, for the plaintiffs.
H. J. Scott, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiffs were an advertising company. The defendant became surety to the plaintiffs for the payment of the amount due by a patent medicine company to the plaintiffs for advertising. The plaintiffs acted as advertising agents of the patent medicine company during 1912 and 1913. This action was brought to recover about $4,000 alleged to be due as the balance of account, the total amount for the two years being about $25,000. At the trial it was held that the accounting must be on the basis of an open contract, and it was referred to the Local Master to take an account upon that basis. Upon appeal from the judgment of the trial Judge, that judgment was varied by providing that in taking the accounts the Master was to have regard to any settled accounts between the parties.

The plaintiffs made no claim for anything prior to the 7th February, 1913. They claimed to recover the amount of all bills rendered from that date to the end of the dealings between the parties. In the first place, they gave as particulars the amounts of these bills. Later, they gave as particulars not only the items but the summaries from bills rendered to them by the publishers of newspapers, shewing the number of lines and the rates per line charged.

In the ruling now complained of, the Master directed that like particulars should be given by the plaintiffs of all transactions from the beginning of their dealings down to the end of 1912, although these particular items had been paid and settled for and no claim with respect thereto was before him for adjudication. In this the Master was clearly wrong.

The direction was given upon the theory that the defendant had a right to shew that in fact these accounts were passed upon

and contained overcharges. If this were shewn, the amount overcharged could now be brought into account. The plaintiffs did not dispute this; but the onus of shewing the overcharge in respect of the accounts already paid was on the defendant. The defendant was entitled, for the purpose of enabling him to criticise these accounts and to make a surcharge if advised to do so, to obtain discovery as to the exact facts; but he had in his possession all the data which he now sought.

On the argument there was much discussion as to what constituted a settling of accounts. Where an account is rendered by one party to another, anything which serves to shew that it is accepted as correct will amount to a settlement of account; and nothing is more conclusive as shewing acceptance than the actual payment If a balance was claimed as due upon the settled account, the settlement by the debtor would not bind the surety; but in this case no balance was claimed as being ascertained as due by the debtor by his settlement. Everything that was settled was paid by the debtor.

The Master's direction was improper; and the appeal should be allowed with costs against the defendant in any event of the litigation.

ROSE, J., IN CHAMBERS. MARCH 30TH, 1918.

CANADA WIRE AND CABLE CO. LIMITED v. GRANT.

Pleading—Statement of Claim—Allegation Made by Creditor of Company against Directors—Wrongful Dealing with Bonds of Company—Claim Maintainable only by Company—Striking out Allegation and Claim for Relief—Pleading of Directors in Denial and Assertion of Proper Dealing—Leave to Withdraw.

Motion by the defendants to strike out a paragraph of the statement of claim and a corresponding clause in the claim for relief, upon the ground that the paragraph disclosed no reasonable cause of action and was embarrassing.

Gideon Grant, for the defendants.
Alfred Bicknell, for the plaintiffs.

ROSE, J., in a written judgment, said that the plaintiffs, judgment creditors of the defendant company, sought a declaration that a mortgage given by the company to secure an issue of bonds

was void for non-compliance with the provisions of the Bills of Sale and Chattel Mortgage Act. The directors of the defendant company were made defendants, the allegation against them being that they "wrongfully dealt with" the bonds of the issue secured by the mortgage in question and of other issues, or with the proceeds of them; and the plaintiffs claimed an account and an order that the directors repay to the company all moneys "wrongfully diverted." It was to this allegation and this claim against the directors that the motion related.

No case was cited that seemed to lend any support to the contention that a creditor of the company had any status to maintain such a claim—a claim that could be asserted only by or on behalf of the company itself. There would be no difficulty about making the order for which the defendants asked, were it not that one, at least, of the directors had pleaded, denying the allegations made in the paragraph attacked, and asserting that the proceeds of the sales of bonds had all been properly dealt with, and were it not that certain orders for particulars and for further production had been made. However, if the pleading should be allowed to stand, the expenses in connection with production and examination for discovery would be increased, and there would also be unnecessary expense in preparing for the trial. It was, therefore, a matter of importance that the pleadings should be now corrected, and that the defendants should be relieved of the consequences of their delay in moving.

An order should, therefore, be made permitting the defendants who have pleaded to amend their statements of defence by striking out anything intended as a defence to para. 9 of the statement of claim, and striking out para. 9 and clause 2 of the prayer.

See Dominion Sugar Co. v. Newman (1917), 13 O.W.N. 38.

Costs in the cause.

MIDDLETON, J. MARCH 30TH, 1918.

RE STAMP.

Will—Construction—Bequest to Infant—Gift over in Event of Donee Surviving Testator and Dying before Attaining Majority —"And"—"Or"—Vested Interest not Subject to be Divested —Donee Surviving Testator and being still an Infant.

Motion by the executor of the will of one Stamp, deceased, for an order determining a question as to the meaning and construction of the will.

The motion was heard in the Weekly Court, Toronto.

M. C. McLean, for the executor.

F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, said that under the will there was a gift to F.S.S. to be handed to him upon his attaining the age of 21 years. The will proceeded: "In the event of the said F.S.S. not surviving me and dying before he attains the age of 21" the property shall go to the heirs of the testator.

F.S.S. survived the testator and was still under 21. It was sought to have it declared that his interest was absolute, so that his property might be used for his benefit.

When there is an absolute gift, and it is provided that if the donee dies under 21 and without issue it shall go over, "and" is not to be read as "or;" so to read it would be to change the expressed wish of the testator and to make the gift over operative in events other than those mentioned by the testator: Malcolm v. Malcolm (1856), 21 Beav. 225; Coates v. Hart (1863), 32 Beav. 349.

Here, if the testator knew the law, the provision is meaningless, as it is a provision that there shall be a lapse upon the death of the legatee during his life—and this would be so even if he left issue—but this is not enough to warrant changing the words written.

"And" should be read as "and" not as "or" unless it is clear that the testator meant "or," and not merely because "or" would make what might be regarded as a more artistic or logical will.

Order declaring that, the donee having survived the testator, his interest is not subject to be divested.

MIDDLETON, J. MARCH 30TH, 1918.

RE DRAPER.

Will—Construction—Fund to be Divided among Surviving Members of a Class on the Death of two Annuitants—Class Ascertainable at Time of Later Death—Member of Class Surviving one Annuitant and Predeceasing the other.

Motion by the executors of the will of Chester Draper, deceased, for an order determining the true construction, meaning, and effect of the will.

The motion was heard in the Weekly Court, Toronto.
J. C. Thomson, for the executors and for the Campbell heirs.
G. G. McPherson, K.C., for H. G. and G. A. Moulton.
A. J. Russell Snow, K.C., for F. W. Weston & Sons.
W. S. Ormiston, for three beneficiaries.

MIDDLETON, J., in a written judgment, said that under this will a certain fund was to be divided by the executors "among the surviving children of my sisters Jane Campbell and Hester Ann Moulton and the children of Annie Cochrane share and share alike on the death of my said sisters Jane Campbell and Hester Ann Moulton." These sisters had been given annuities. The testator died on the 16th December, 1876; Hester Ann Moulton, in October, 1890; and Jane Campbell, on the 23rd October, 1917.

Hester Ann Moulton left three sons and one daughter surviving her. The daughter and one son, who survived Mrs. Moulton, predeceased Mrs. Campbell. The assignees of the son contended that the son, having survived his mother, took under the will.

"Words of survivorship are to be referred to the period of division and enjoyment unless there be special intent to the contrary:" Cripps v. Wolcott (1819), 4 Madd. 11; In re Poultney, [1912] 2 Ch. 541.

In Stevenson v. Gullan (1854), 18 Beav. 590, there was, as here, a life-interest in two annuitants, and after their death the estate was to be divided among the surviving children of both, share and share alike. It was held that those children who survived both annuitants alone took

That case was in point and satisfactory.

Order declaring that the assignees of the deceased son of Mrs. Moulton were not entitled to a share. Costs out of the estate.

MIDDLETON, J. MARCH 30TH, 1918.

RE BARNETT.

Will—Construction—Bequest of Bank-shares to Executors in Trust—Income to be Paid to Widow for Life—After Decease of Widow Shares to be Divided among Children "then Living"—Distribution to be Made at Death of Widow among Children then Living—Exclusion of Representatives of Children Predeceasing Widow.

Motion by the executors of one Barnett, deceased, for an order determining certain questions arising in the administration of his estate as to the meaning and construction of his will.

The motion was heard in the Weekly Court, Toronto.
G. L. Smith, for the executors.
J. F. Orde, K.C., for the widow and daughters of the testator.
E. J. Stewart, for other adults interested.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, dealt with one of the questions submitted. Certain bank-shares were given to the executors to hold in trust and pay the income to the widow for life, and after her decease to "divide the said bank-stocks among my sons and daughters then living share and share alike."

It was argued that this gave a vested interest to all the sons and daughters, not contingent on their surviving the widow, and that the word "then" referred to the death of the testator.

It was said that this was the result of the case of Re Johnson (1893), 68 L.T.R. 20; but, when that case was referred to, it was clear that the question there determined was not at all that presented here. Discussion and explanation of that case.

Here the general rule—established by many cases—must govern, viz., that only those who are living at the period of distribution take when there is a direction to divide among those "then living" after the expiry of a life estate. The children or representatives of those who predecease take nothing unless there is some provision to be found in the will.

Order declaring accordingly.

LENNOX, J. MARCH 30TH, 1918.

MANIE v. TOWN OF FORD.

Municipal Corporations—Drainage—Cellar of House Connected with Municipal Drains—Injury by Flooding—Defective System—Action for Damages—Finding of Jury—Jurisdiction—Statutory Remedy—Municipal Drainage Act—Municipal Act—Local Improvement Act—Question not raised before Appellate Court which Directed Trial of Action.

An action for damages for injury sustained by the plaintiff, by reason of the flooding of the cellar of his house in the town of Ford.

The action was tried with a jury at Sandwich.
J. H. Rodd and John Sale, for the plaintiff.
J. M. McEvoy and F. D. Davis, for the defendants.

LENNOX, J., in a written judgment, said that, with the consent of the municipal council, the plaintiff provided for the drainage of the cellar by connecting weeping tiles therein or thereunder with such system of drainage or sewage works as the municipality had theretofore provided for that part of the town. It was obviously a defective system, and the burden of the defence was that the pipes which the defendants had installed were intended to carry off only such surface-water as should accumulate or fall upon the streets under which they passed, and that these pipes were put in only in connection with and as part of certain street paving works—that the defendants had not yet provided any general sewage or drainage system for that part, if any part, of the town.

The jury found in favour of the plaintiff and assessed his damages at $1,000.

Counsel for the defendants submitted that the Court had no jurisdiction to try the action; that the plaintiff's remedy was compensation under the Municipal Drainage Act, the Municipal Act, or the Local Improvement Act; citing Burke v. Township of Tilbury North (1906), 13 O.L.R. 225, and Bank of Ottawa v. Township of Roxborough (1908), 11 O.W.R. 320, 1106. Neither of these cases was of any assistance in determining the point raised. The learned Judge was unable to see that the general jurisdiction of the Court to redress wrongs was excluded by the provisions of the statutes referred to.

This action and a County Court action for the same alleged wrongs came before a Divisional Court of the Appellate Division, and that Court ordered that the County Court action be stayed in the meantime, and that this action should be tried at the sittings of this Court at Sandwich commencing on the 4th March instant, at which it was tried, and the costs of the County Court action should abide the event. It might be that the question of jurisdiction was not specifically referred to. But the question should have been raised before the Divisional Court, if at all. The failure to raise it would not, of course, confer jurisdiction; but it was almost farcical that it should be held in abeyance until the trial and then be effective. There was at least sufficient doubt to make it desirable that the question should be settled by the Divisional Court, if counsel for the defendants had faith in their contention.

There should be judgment for the plaintiff for $1,000 with costs.

LENNOX, J. MARCH 30TH, 1918.

RE MAILLOUX.

Will—Construction—Specific Devises of Different Portions of one Farm—Descriptions in Will—Oral Evidence—Conflicting Constructions—Rational and Convenient Disposition.

By an order of the Court of the 23rd January, 1917, under Rule 606 (1), the following questions were directed to be tried on oral evidence:—

(1) What part of lot 122 in the 1st concession of the township of Sandwich East did the testator Hypolite P. Mailloux give and devise to his daughter Rose St. Louis and her sons, by his will dated the 10th April, 1909?

(2) What portion of lot 122 does Eugene Mailloux, the son of the testator, take under the will?

These questions were tried without a jury at Sandwich.

T. Mercer Morton, for Rose St. Clair and her infant sons.

A. St. G. Ellis, for the executors and the Official Guardian, representing certain infants.

LENNOX, J., in a written judgment, set out the relevant portions of the will as follows:—

"I give and devise to my daughter Rose, wife of Joseph St. Louis, the use for her life of . . . that part of lot 122 in the 1st concession . . . where I now reside, having a frontage of 80 feet and lying between the channel bank of the river Detroit on the northerly end and the street-car track on the southerly end (excepting thereout the house and the adjoining lands hereinafter bequeathed to my wife and Patrick (Teddy) Mailloux) and from and after her death to her sons their heirs and assigns forever in equal shares as tenants in common . . . I give and devise to my son Eugene Mailloux the use for his life of that part of lot 122 . . . owned by me and not hereinbefore or hereinafter bequeathed containing about 80 acres . . . and from and after his death to his sons and their heirs and assigns forever in equal shares as tenants in common. . . . I give and devise to my wife Archange Mailloux the use for her life of my present residence, being a part of lot 122 . . . having a frontage on the Detroit river of 100 feet and running back to a line 150 feet south of the south limit of Sandwich street, and from and after her death to my grandson Teddy Mailloux, now residing with me, his heirs and assigns forever."

There was a judgment of the Court on the 3rd December, 1910, upon the question of the construction of the same will.

The order directing the trial of the two questions above set forth directed that "upon the trial all questions, including that as to the effect of the former judgment, be open."

The learned Judge read the order as meaning that he was not to consider himself bound by that judgment, and that he was to determine the two questions in accordance with the terms of the will construed in the light of admissible oral evidence of surrounding and material circumstances.

So reading the will, the learned Judge was of opinion:—

(*a*) That the testator by the will gave and devised to Rose St. Louis and her sons all that part of lot 122 which at the time of the death of the testator belonged to him lying north of the lands owned or occupied by the Windsor and Tecumseth Railway Company, including water lots in front thereof to the channel bank of the Detroit river, save the testator's residential property devised to his wife and Teddy Mailloux and described in the will as having a frontage on the Detroit river of 100 feet and running back to a line 150 feet south of the south limit of Sandwich street.

(*b*) That the portion of lot 122 referred to by the testator as not hereinbefore or hereinafter bequeathed, containing about 80 acres, and taken by Eugene Mailloux and his sons under the will was and is the part of the lot owned by the testator at the time of his death lying to the south of the southerly boundary of Ottawa street, and no other part of lot 122.

(*c*) That, in making the devise to Eugene, and using the expression "and not hereinbefore or hereinafter bequeathed," the testator by the word "hereinbefore" referred to and intended to except all the land north of the railway lands except the plot thereinafter devised to his wife, and by the word "hereinafter" be referred to and intended to except 15,000 square feet thereinbefore indefinitely referred to but not devised, and thereinafter specificially excepted from the devise to Rose St. Louis and her sons and specificially devised to his wife and Teddy Mailloux.

In balancing conflicting constructions, both open upon the language of the will, the Court leans towards the construction that recognises the reasonable expectations of persons having claims upon the testator's bounty and makes a rational and convenient disposition of his property: Halsbury's Laws of England, vol. 28, para. 1283, and cases cited.

Judgment declaring accordingly. Costs of all parties out of the estate; those of the executors as between solicitor and client.

SUTHERLAND, J. MARCH 30TH, 1918.

RE BOLTON.

Will—Construction—Devises and Bequests—Gift of "Balance" or Residue—"My Heirs Named in this Will as Devisees"—Inclusion of Legatees.

Motion by the executors of the will of Henry Johnston Bolton, deceased, for an order determining the meaning and construction of the will.

The motion was heard in the Weekly Court, Ottawa.

J. A. Hutcheson, K.C., for the executors, and also for Pearl McDonald Peguin, a legatee, and Lucy Barber.

R. G. Code, K.C., for the executors of Caroline Vickery, a sister of the testator, living at his death but since deceased.

J. F. Smellie, for the Official Guardian, representing Karley Pinkerton and Caroline Phyllis Morrison, infants.

SUTHERLAND, J., in a written judgment, set out the important parts of the will which may be summarised as follows:—

(1) The testator gave devised and bequeathed his house and lot to his brother in-law, John G. Barber.

(2) The testator bequeathed to Pearl McDonald (now Peguin) $1,000, to be paid $100 each year for 10 years, but if she should die before getting the $1,000 the amount not paid shall be divided equally "between all my heirs named in this will that may be still living and shall in addition be paid each year interest" at 3 per cent. during the term of 10 years.

(3) He bequeathed to Karley Pinkerton $300, "but should he be dead the amount ($300) to be paid to the heirs still living."

(4) He bequeathed to "Callie Morrison's daughter" $300 "and if said daughter be dead then it shall go to Callie Morrison her heirs and assigns."

(5) He bequeathed $100 to Callie Morrison.

(6) He bequeathed to his sister Caroline Vickery "any and all of my wood and coal."

(7) He bequeathed his clothes to "Ed. Bedour."

(8) He bequeathed his bed-clothes to Amelia Bedour and Julia Bedour.

(9) He requested his executors to sell and convert into money "all the balance of my personal estate" and to pay three trifling sums, "and divide the balance share and share alike to all

my heirs named in this will as devisees after erecting a monument over my grave costing not less than $100."

(10) He requested Mrs. John G. Barber (Lucy) to take charge of his papers and property until disposed of by his executors.

(11) He appointed executors.

(12) He added: "I do not designate the following as my heirs or devisees, viz., Ed. Bedour, Amelia Bedour, and Julia Bedour."

Besides John G. Barber, devisee of the house and lot, and the persons to be paid the trifling sums mentioned in para. 9, there were eight legatees, namely, Pearl McDonald Peguin, Karley Pinkerton, Caroline Phyllis Morrison, Callie Morrison, Caroline Vickery, Edward Bedour, Amelia Bedour, and Julia Bedour—of whom only one, Caroline Vickery, was a blood relation. At his death, the testator had three sisters alive, namely, Caroline Vickery, Lucy Barber, and Elizabeth Miller; another sister, May Pinkerton, was dead, leaving children, the son of one of whom was a legatee.

The questions for determination were:—

(a) Who were the "heirs" of the testator entitled to share in the residue under para 9?

(b) Who were the "heirs" entitled to a contingent interest under para. 2?

(c) Is "Mrs. John G. Barber," named in the will, but not given anything for herself, to be included as an "heir" under the contingent request in para. 2?

Reference to Re Phillips (1913), 4 O.W.N. 898.

Having regard to the language of the whole will in this case the word "heirs" should be taken to mean devisees and legatees.

Question (a) should be answered by saying that the "balance" referred to in para. 9 should be divided equally among the five legatees above named, excluding the Bedours.

The same answer should be given to question (b).

Question (c) should be answered by saying that Mrs. John G. Barber will not be included as an heir.

YORK SAND AND GRAVEL LIMITED v. WILLIAM COWLIN AND SON (CANADA) LIMITED—SUTHERLAND, J.—MARCH 25.

Contract—Formation—Correspondence—Sale of Goods—Delivery and Acceptance—Payment for Certain Deliveries—Evidence—Agency for another Company—Action for Price of Goods.]—The defendants, builders and contractors, had, in association with the John ver Mehr Engineering Company Limited, a contract with the Corporation of the City of Toronto, for the erection of a filtering plant upon the Toronto Island. The engineering company had entered into correspondence with the plaintiffs, who were dealers in sand and gravel, with reference to the sale by the plaintiffs to the engineering company of 6,000 cubic yards of sand and 400 to 800 cubic yards of gravel. The correspondence continued from August to October, 1915. The plaintiffs, having apparently learned that the defendants were interested, wrote to the defendants on the 16th October, 1915, saying: "Please let us know when you expect to take delivery of sand." The defendants answered; there was further correspondence; and at the end of April and afterwards certain quantities of sand and gravel were delivered by the plaintiffs to and received by the defendants and some of them paid for. The engineering company asserted that the plaintiffs had entered into a contract with them; and, upon the plaintiffs declining to supply sand and gravel in accordance with the alleged contract, the engineering company intimated that they would get the material elsewhere and hold the plaintiffs responsible for their failure to supply material according to contract. Thereupon the plaintiffs discontinued their deliveries, and rendered the defendant an account for a balance due for what they had supplied, amounting to $1,288.85. This account not being paid, the plaintiffs sued the defendants for that sum. The defendants denied liability and counterclaimed for non-delivery of the material they required and for delay etc. The action was tried without a jury at Toronto. The defendants offered no evidence. SUTHERLAND, J., in a written judgment, said that the plaintiffs had shewn a contract with the defendants upon which they could recover. From April to September, 1916, the plaintiffs treated the defendants as their customers, and the defendants acted as purchasers, receiving all the material, paying for part of it, and referring to it in their correspondence as material for "our requirements." No agency of the defendants for the engineering company to receive delivery of the material was made out or notice thereof shewn to have been brought home to the plaintiffs.

Judgment for the plaintiffs for $1,288.85, with interest from the 22nd November, 1916, and costs—without prejudice to any counterclaim of the defendants. H. H. Dewart, K.C., and G. R. Roach, for the plaintiffs. Shirley Denison, K.C., or the defendants.

RE TRAYNOR AND CATHOLIC MUTUAL BENEFIT ASSOCIATION OF CANADA—LATCHFORD, J., IN CHAMBERS—MARCH 26.

Insurance (Life)—Presumption of Death of Insured—Order Declaring—Payment of Insurance Money to Beneficiary—Costs.]—Motion by Hannah Traynor for an order declaring that William Traynor is presumed to be dead and permitting the insurers, a benefit society, to pay the amount of a policy upon the life of William Traynor to the applicant. LATCHFORD, J., said that, upon the material before him (the original material having been supplemented), it was proper to make an order as asked. The society should be allowed to deduct from the amount the costs of their solicitor, fixed at $60. M. J. O'Reilly, K.C., for the applicant. C. J. Foy, for the society.

RE HAY AND ENGLEDUE—SUTHERLAND, J., IN CHAMBERS—MARCH 30.

Mines and Mining—Order Vesting Mining Locations in Applicant—Mining Act of Ontario, R.S.O. 1914 ch. 32—Application to Set aside Order after Expiry of three Years—Order Made on Notice—Delay not Satisfactorily Accounted for—Application Refused—Leave to Appeal.]—An application by John S. Whiting and E. F. Kendall to set aside an order made by SUTHERLAND, J., on the 27th April, 1915, whereby certain mining locations were vested in Alexander M. Hay for all the estate, right, title, and interest of Engledue and others. That order was made on the application of Hay under the Mining Act of Ontario, R.S.O. 1914 ch. 32. SUTHERLAND, J., in a written judgment, said that it was argued that the order made in 1915 was an ex parte order; but that was not the fact. A summons had been granted and served upon all the parties concerned, and proof of such service was furnished when the order was made. After the order came to the notice of the present applicants, there was considerable delay, not satisfactorily explained, before this motion was launched. In these

circumstances, the motion should not be granted. Leave to appeal to the Appellate Division was asked. As the matter was of considerable importance, the learned Judge was not disposed to refuse such leave in so far as he had power to give it. Motion to set aside the order dismissed with costs. J. W. Bain, K.C., for Whiting and Kendall. T. R. Ferguson, for the executrix of Hay.

REID v. MILLER—LENNOX, J.—MARCH 30.

Damages—Action to Recover Possession or Value of Chattels—Ascertainment of Value—Judgment for Small Sum—Costs—Counterclaim—Malicious Prosecution—Assessment of Damages—Set-off—Costs.]—The plaintiffs sued for possession of certain oil-well machinery and equipment, which they valued at $1,307, and alternatively for $1,307. The defendant Philoméne Miller counterclaimed damages for the injury to her property by the failure of the plaintiffs to clear it of the equipment; and the defendant Dornton counterclaimed damages for malicious prosecution. The action and counterclaims were (by agreement and consent of the parties) tried without a jury at Sandwich. LENNOX, J., in a written judgment, said that if the plaintiffs had made any honest effort to carry out the terms of the judgment in a previous action, there would have been no excuse for the present litigation. The equipment in question was best described as "scrap" or "junk." There should be judgment for the plaintiffs for $450 in full of all claims and demands, including the equipment still upon the property of the defendant Philoméne Miller, with costs upon the County Court scale. If the plaintiffs prefer it, they may have, at their own risk as to costs, a reference to the Local Master at Sandwich to ascertain their damages; and in that case costs of the action and reference and further directions will be reserved. There can be no damages or compensation in respect of anything done prior to the 11th May, 1916, when the former action was tried. The defendant Philoméne Miller should have judgment on her counterclaim for $75 with costs upon the Supreme Court scale. Upon the counterclaim of the defendant Dornton, he must prove the absence of reasonable or probable cause for setting the criminal law in motion. The criminal proceedings instituted by the plaintiffs against Dornton (for larceny) were not instituted or carried on in good faith. The information was sworn to by the plaintiff Estlen, but it was on behalf of both plaintiffs, and both were responsible. It was not established that advice was taken and full and honest disclosure made. The information was laid

while this action was pending. There should be judgment for the defendant Dornton against the plaintiffs for $500 damages and costs on the Supreme Court scale. If the plaintiffs accept the $450 damages awarded to them, the amount and County Court costs will be deducted from the damages and costs allowed to Dornton, and judgment will be entered for him for the excess. If a reference is taken, judgment will be for the amount found by the Master. F. C. Kerby, for the plaintiffs. J. H. Rodd, for the defendants.