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APPELLATE DIVISION.

MAY 19TH, 1913.

*McBRAYNE v. IMPERIAL LOAN CO.

Principal and Agent—Agent's Commission on Sale of Property —Sale Made "by or through" Agent—Purchaser Originally Introduced Interested in Sale Ultimately Made—Change in Form or Scope of Dealing—Causa Causans.

Appeal by the defendants from the judgment of CLUTE, J., at the trial at Hamilton, awarding the plaintiff $3,750 as a commission upon the sale of a property in Hamilton owned by the defendants or held by them under mortgage.

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

J. H. Moss, K.C., for the appellants.

S. F. Washington, K.C., for the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The main objection urged against the judgment is, that the sale was not made to Gustave Schacht, whom the respondent introduced to the appellants. It is the fact that Mr. Schacht did not himself buy; but the respondent contends that the ultimate sale was due to his introduction of Schacht; and that he is, therefore, entitled to a commission. Mr. Schacht, in his depositions taken before the trial, says that his first interest in the matter was for a syndicate who were intending to invest in Clinton, Ontario, but who afterwards dropped out. He also states that during his correspence with Mr. Muntz, the appellants' manager, and before the syndicate abandoned that

*To be reported in the Ontario Law Reports.

project, he was not negotiating so much as a buyer as in organising a company, which was all he was interested in.

It may, therefore, be fairly taken as established that from the beginning Schacht intended that a company, which he would get up or assist in organising, would acquire the property, and not that he would do so personally. Consequently, the subsequent transaction was not a new departure in intent, and its development was not out of line with his original purpose.

The introduction of Schacht to Muntz on the 17th April, 1911, was by telephone, after the respondent had himself telephoned the latter. Muntz then wrote Schacht, and also inquired from the respondent as to the "understanding or agreement, if any, you have regarding this property, should it be sold."

The respondent saw Muntz, who had come to Hamilton, and explained to him about his commission, and at the latter's request wrote on the 27th April, 1911, that his arrangement was ten per cent., but that he was willing to accept half of that amount. At the trial his counsel agreed that he could not claim more. A reply (dated the 7th May, 1911) to this letter, states the understanding of Muntz to be that "any commission payable to you—the respondent—applies only in the event of the sale being made by you or through you." The negotiations between Schacht and Muntz proceeded thereafter by correspondence. Schacht thinks that they lasted for about thirty days, which, if accurate, would mean that they continued till about the middle of May. On the 7th July, 1911, the respondent wrote about other tentative proposals, and was advised in reply by Muntz that he was negotiating with an American automobile firm to manufacture their cars in Canada under a special arrangement.

In the meantime, and after the 17th April, 1911, Muntz says that letters passed between him and Schacht or between Innes, who was connected with the appellants, and Schacht, but that the matter dropped or remained dormant until Schacht's interest was revived by Innes opening up correspondence again with him in the early part of July, and then the plan decided upon was the formation of a new company. It is denied that the company referred to in the letter of the 7th July, above mentioned, was the Schacht Motor Car Company of Ohio, of which Schacht was president. Muntz further says that these later negotiations resulted in the formation of the Schacht Motor Car Company of Canada, and that the National Credit Company were brought into the matter because it was necessary to have some financial house to underwrite the company's stock,

and that they bought the stock, underwriting it between the appellants and the Schacht company. He also says that the appellants eventually sold the property, and got $5,000 in cash from the Schacht Motor Car Company of Canada, and a mortgage for the balance, $70,000.

This sale was ultimately carried out by means of a lease from the appellants to the National Credit Company, the underwriters referred to, containing an option to purchase at $75,000, which lease was almost immediately afterwards assigned to the Schacht Motor Car Company of Canada Limited, who exercised the option and received a conveyance from the appellants, on the terms already stated.

The Ohio company took stock in the Canadian company, in which Schacht also became a shareholder, and of which he and another member of the Ohio company are shareholders. It is impossible to dissociate Schacht, the original negotiator with the appellants, from the transactions perfected in Canada. They were in fact a sale upon different terms to a company in which Schacht retained a direct and personal interest. Schacht is president of the Ohio company, which reaped the benefit by the purchase by the Ontario company of the patents and rights of the Ohio company for Canada.

Schacht in his depositions says that, when Innes saw him after re-opening the matter by correspondence, he (Schacht) did not know whether he wanted to sell the property or not and that he did not discuss it. . . .

The following evidence was also given by Mr. Muntz:—

"Q. So that the final result was in consequence of what happened when you met Mr. Schacht after the conversation with Mr. McBrayne over the telephone? A. Precisely, otherwise we should not have known him.

"Q. Otherwise you would not have known him, and this arrangement would not have been carried out? A. No doubt.

"Q. That is so? A. No doubt of that."

It is true that, upon further examination, he says that the original negotiations were not on the same lines as those ultimately carried out. . . .

Some meaning must be given to the expression "through you" in the letter of the 6th May, 1911. It is used in contrast with or in addition to the words "by you," indicating that more was being provided for than a sale to be actually made by the respondent, and may legitimately mean "through you" by an introduction, by assistance, by advice, by co-operation, or otherwise.

The case of Stratton v. Vachon (1911), 44 S.C.R. 395, is very like the present case in its facts. . . .

That case is founded upon Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, where an agent who had brought the company into relation with the actual purchaser was held entitled to recover a commission, although the company had sold behind his back on terms which the agent had advised them not to accept.

The argument in the latter case, namely, that the transaction as carried out was not such as the agent was employed or promised a commission for bringing about, and that he did not effectuate or endeavour to carry out the transaction, as ultimately completed, and that it was not the result of his exertions, but was negotiated and brought about quite independently of him—was precisely that addressed to this Court by the appellants here. But it was laid down in the Burchell case that the rule to be applied was, that, if an agent bring his principal into touch with a purchaser, the principal, if he negotiates further, has accepted part of the agent's services, which are thus the effective cause of the sale; and that this is so notwithstanding that the sale is at a price below the limit given to the agent or that the consideration is altered. . . .

In Stratton v. Vachon, the Chief Justice (44 S.C.R. at p. 399) states the law to be, that the disappearance as a purchaser of the person introduced, before the transaction was finally completed, did not operate to destroy the right acquired by the agent through his original introduction of the property to the person so introduced, he being one of the three associates, two of whom alone completed the purchase, which had been begun with and through the man to whom it was introduced originally, and who had undertaken then to buy it or find a purchaser for it. Mr. Justice Anglin adverts to a principle which is also adopted by Mr. Justice Clute in Imrie v. Wilson, 3 O.W.N. 1145, 1378, namely, that, had the property being bought by a syndicate in which the person originally introduced was personally interested, the agent's right to a commission would appear to be incontrovertible. A break in the negotiations and the introduction afterwards of other terms is also treated by the former learned Judge as not weakening the agent's act as the efficient cause.

See also Glendinning v. Cavanagh (1908), 40 S.C.R. 414; Morson v. Burnside (1900), 31 O.R. 438; Rimmer v. Knowles (1874), 30 L.T.N.S. 496.

In Robins v. Hees (1911), 2 O.W.N. 939, 1150, and in Travis

v. Coates, 27 O.L.R. 63—both cited in the argument—a new and independent right intervened, rendering the agent's act not the real and efficient cause of the sale effected by the new agent.

The principle to be deduced from these cases, as applicable to a case like the present, where the original purchaser does not entirely drop out, seems to be that, if the purchaser originally introduced remains throughout the transaction, either directly or indirectly, interested in and by the final outcome, the agent does not lose the right to commission established by the original introduction, although the form and scope of the dealing may be changed, with or without his assent, and although others become interested, either as contributors to the success of the sale or as enlarging the range of the transaction; provided that no right arises from the act of another, without which the sale would not have been consummated, and which act in itself has the effect of reducing the service of the original agent from being the causa causans to that of causa sine qua non. I can find nothing in this case which leads to the conclusion that any such right intervened to deprive the respondent of his commission; and I think he has shewn a state of affairs in which the final sale by the appellants, in the form in which it suited them and Schacht to put it, may fairly be said to be attributable to his agency.

Much stress was laid upon an entry in the respondent's blotter of a solicitor's charge for attending Schacht when he first came to Hamilton, and upon its inclusion in the bill subsequently rendered. This is satisfactorily explained in the letter of the 18th August, 1911; and I can easily understand how, in the early stages, when it was uncertain whether the solicitor's services would ever entitle him to a commission, such a docket entry might be made, and afterwards rendered by inadvertence.

The appeal should be dismissed.

MAY 19TH, 1913

*"MY VALET" LIMITED v. WINTERS.

Trade-name—Infringement—Colourable Imitation — Intention to Deceive—Injunction.

Appeal by the defendant from the judgment of MIDDLETON, J., ante 348, 27 O.L.R. 286.

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

J. H. Cooke, for the defendant.

R. McKay, K.C., for the plaintiffs.

The judgment of the Court was delivered by MACLAREN, J. A.:— . . . Evidence was given to shew that four of the plaintiffs' customers had given work to the defendant, thinking that they were dealing with the plaintiffs. The orders were all given by telephone, and it appears that 75 per cent. of the plaintiffs' orders came over the telephone. In the telephone directory "My New Valet" is above "My Valet"—a single line intervening. In two instances, the customers say that they asked if it was "My Valet" and received an affirmative reply. In a third, the customer put her name on the parcel with a memorandum that it was "to be called for by 'My Valet.'" . . . The defendant does not use the word "Valet" on his sign; nor is it in the city directory. The entry there is "Winters, Nathan, tailor, 599 Queen W."

The trial Judge found, on the evidence, that there was a deliberate attempt on the part of the defendant to trade unfairly, and that he intended to represent his business as being the plaintiffs' business.

These findings were challenged before us, and it was contended that the insertion of the word "New" in the name was quite sufficient to notify the public that it was a different business from that of the plaintiffs.

The word "Valet" being descriptive of the business, the plaintiffs could not acquire a monopoly of it or the right to its exclusive use. Having adopted it with the prefix "My" as his trade-name, and it being an assumed name, the utmost he can require is, that the defendant, in using the word "Valet," shall use it in such a way and with such other distinctive words

*To be reported in the Ontario Law Reports.

as will shew that he is not passing off his business as the business of the plaintiffs, and that the name so adopted is not calculated to deceive or mislead the public. He must submit to any competition that is not unfair or wrongful. No inflexible rule can be laid down as to what may constitute unfair competition. It is always a question of fact, which must be decided upon the particular circumstances of each case. For this reason, no one case can be an authority for another case. This serves to explain, in part, the apparently irreconcilable character of many of the reported cases. Sometimes, of course, the names in question are so unlike that there is no danger of the public being misled; in other cases the similarity is so apparent that it requires little evidence to lead to the opposite conclusion.

In many cases that are close to the line, the scale may be turned by what at first sight might appear to be comparatively trifling circumstances.

Illustrations are found in the following reported cases of the use of new trade-names which have been enjoined as an infringement of older ones, the older in each case being placed first: The Boston Rubber Shoe Co. v. The Boston Rubber Co., 32 S.C.R. 315; the latter name being calculated to lead the public to believe that their goods were those of the plaintiffs. Boulnois v. Peake, 13 Ch.D. 513 (note); the plaintiffs' trade-name, "Carriage Bazaar," infringed by the defendants' "New Carriage Bazaar," which was opened on the same street, and near the plaintiffs'. Manchester Brewery Co. v. North Cheshire and Manchester Brewery Co., [1898] 1 Ch. 539, [1899] A.C. 83; the North Cheshire Brewery Company, which extended its business into Manchester, added "Manchester" to its name; it was enjoined, as the new name was calculated to lead the public to believe that it had acquired the business of the Manchester Company. Lee v. Haley, L.R. 5 Ch. 155; the plaintiffs did business at 22 Pall Mall, under the name of "The Guinea Coal Co;" the defendant opened a business at 48 Pall Mall under the name of "The Pall Mall Guinea Coal Co.;" held to be an infringement. Valentine Meat Juice Co. v. Valentine Extract Co., 83 L.T.R. 259; the defendant restrained, although his name was Valentine. Hendriks v. Montague, 17 Ch.D. 638; Universal Life Assurance Society v. The Universe Life Assurance Association.

The following are examples of cases in which the new trade-names were held to be sufficiently distinct from the older ones

to rebut any probability of confusion: British Vacuum Cleaner Co. v. New Vacuum Cleaner Co., [1907] 2 Ch. at p. 329. Grand Hotel Co. v. Wilson, [1904] A.C. 103; the plaintiffs used the words "Water from Caledonia Springs;" the defendants, "Water from the New Springs at Caledonia." Aerators v. Tollit (Automatic Aerators), [1902] 2 Ch. 319; Randall (American Shoe Co.) v. Bradley (Anglo-American Shoe Co.), 24 R.P.C. 657, 773. Colonial Fire Assurance Co. v. Home and Colonial Assurance Co., 33 Beav. 548.

The comparatively slight change in the plaintiffs' trade-name made by the defendant is also a matter for observation. He retains both the words used by the plaintiffs, and merely inserts a short word between them. The retention of the word "My" as the first part of the name chosen by him has contributed to every one of the mistakes disclosed in the evidence, and this would have been avoided if the defendant had not made "My" the first word of his assumed name, as they all arose from the alphabetical index in the telephone directory. As 75 per cent. of the plaintiffs' orders come by telephone, such a simple change as "Our New Valet," or even "Our Valet," would probably have obviated nearly all the mistakes.

However, as I have said, the law is clear, and the question to be decided is one of fact. The trial Judge, who saw and heard both parties as well as their witnesses, has made a clear finding of an attempt by the defendant to trade unfairly, and to represent his business as being the plaintiffs' business, and that customers were actually deceived; and there appears to be ample evidence to sustain these findings, and an appellate Court would not be justified in interfering with them.

In my opinion, the appeal should be dismissed.

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*STRONG v. CROWN FIRE INSURANCE CO.
STRONG v. RIMOUSKI FIRE INSURANCE CO.
STRONG v. ANGLO-AMERICAN FIRE INSURANCE CO.
STRONG v. MONTREAL-CANADA FIRE INSURANCE CO.

Fire Insurance—Actions on Policies—New Actions—Consolidation—Extent of Loss—Value of Goods Destroyed—Stock-taking—Furnishing Proofs of Loss—Statutory Condition 13—Duplicate Invoices—Ontario Insurance Act, R.S.O. 1897 ch. 203, sec. 172—Ontario Insurance Act, 1912, sec. 199—Time for Bringing Actions—Variation of Statutory Condition 22—Unjust and Unreasonable—Misrepresentation in Applications—Materiality—Finding of Fact by Trial Judge—Appeal.

Appeals by the defendants in each case from the judgment of SUTHERLAND, J., ante 584.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, and MAGEE, JJ.A., and LEITCH, J.

E. E. A. DuVernet, K.C., A. H. F. Lefroy, K.C., and A. C. Heighington, for the appellants.

N. W. Rowell, K.C., and George Kerr, for the plaintiffs, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O., who referred, first, to the original judgment of Sutherland, J., 3 O.W.N. 481; and then to the appeal from that judgment to the Court of Appeal, and the order made thereon (3 O.W.N. 1534) remitting the actions to Sutherland, J., for trial, with a direction that the defendants should be entitled to deliver pleadings in what were called "the second actions," begun by the same plaintiffs against the same defendants on the 20th December, 1911, and that the original actions and the new actions should be reheard or tried before that learned Judge, without prejudice to consolidation under sec. 158 of the Ontario Insurance Act, 1912; and proceeded:—

The second actions were brought because it was anticipated by the respondents that the appellants would object that the earlier actions were prematurely brought.

*To be reported in the Ontario Law Reports.

The claims of the respondents are resisted by the appellants on several grounds, all of which were unsuccessfully urged before the trial Judge.

The first objection is to the finding as to the extent of the loss which was sustained by the fire, which occurred on the 25th December, 1910, and by which the stock in trade of the assured, Jeffrey, was totally destroyed.

It was urged that the trial Judge proceeded mainly upon a stock-taking alleged to have taken place in the month of August preceding the fire, and that the stock-taking was not reliable, and ought not to have been accepted as affording evidence of the amount of the stock on hand at that date.

I am unable to agree with this contention. There was nothing adduced in evidence which threw doubt on the bona fide character or the accuracy of the stock-taking. It appears to have been conducted in the ordinary manner, and practically all the employees of Jeffery took part in it. . . .

Evidence was given . . . which fully supports the finding that, at the time of the fire, the stock on hand was of the value of $25,000. . . .

I entirely agree with the conclusion of the learned trial Judge on this branch of the case. . . .

It was further objected that the insured had never completed his proofs of loss in accordance with the conditions of the policies.

In my opinion, there was a sufficient compliance by the insured with the conditions of the policies as to furnishing proofs of loss, and the finding that these conditions were complied with was warranted by the evidence.

The American cases cited by Mr. Lefroy in support of his contention that under statutory condition 13 the insured was bound, if required to do so, to procure from the persons from whom he had purchased goods duplicates of the invoices of them and to furnish these duplicates to the insurer, have no application to such a condition as condition 13. The conditions which were under consideration in the cases cited expressly provided that the insured should procure and furnish duplicate invoices where the originals were not in his possession.

If, as the appellants contended, the proofs of loss which were furnished were insufficient, sec. 172 of the Ontario Insurance Act was, in my opinion, properly applied by the learned Judge to relieve the respondents from what otherwise would have been the consequences of their failure to comply with the requirements of condition 13.

The proofs of loss were furnished in good faith, and the appellants objected to the loss upon other grounds than for imperfect compliance with the condition, within the meaning of sec. 172; and, the trial Judge having found that it would be "inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the condition," the objection to the sufficiency of the proofs was not open to the appellants.

In the Ontario Insurance Act, 1912, sec. 172 appears as sec. 199, amended by substituting for the words "allowed as a discharge of the liability of the company on such contract of insurance" the words "allowed as a defence by the insurer or a discharge of his liability on such policy."

It appears to have been thought at the trial that it was decided in National Stationery Co. v. British America Assurance Co. (1909), 14 O.W.R. 281, that, although sec. 172 as amended prevents the non-compliance with the requirements of condition 13 being set up as a defence, the original section did not. Nothing of the kind was decided in that case, and all that was said which bears upon the meaning of sec. 172 was said by Riddell, J., who expressed the opinion that "the whole effect of that section is to prevent the defect in the proofs of loss being 'allowed as a discharge of the liability of the company on such contract of insurance.' This has no reference to the matter of costs;" and it is, therefore, unnecessary to determine whether the trial Judge was right in applying sec. 199, which did not come into force until after the actions were begun.

An important question as to the effect of the provisions of the Insurance Act as to the statutory conditions was raised at the trial and upon the argument before us.

Upon the policies of the appellants in the second and third cases are endorsed variations of the statutory conditions, and by them condition 22 is varied so as to read: "Every suit, action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred unless commenced within six months next after the loss or damage shall have occurred."

This variation, as the respondents contend and the trial Judge had held, is not a just and reasonable condition, and is, therefore, null and void; and this ruling, the appellants contend, is erroneous. . . .

[Reference to Hickey v. Anchor Assurance Co. (1860), 18 U.C.R. 433, and Peoria Sugar Refining Co. v. Canada Fire and Marine Insurance Co. (1885), 12 A.R. 418, distinguished them.]

The first legislation in this Province restricting the right of insurers to introduce conditions into contracts of insurance entered into by them came into force on the 1st July, 1876 (39 Vict. ch. 24). . . .

[Reference to the provisions of that Act.]

The Act contained no express provision that, if any condition, other than or different from the statutory conditions, was held by the Court or Judge before whom a question relating thereto is tried to be not just and reasonable, the condition should be null and void; but in the revision of 1877 that was expressly provided for by sec. 6 of the Fire Insurance Policy Act (ch. 162).

The question as to the rule to be applied in determining whether a variation of the statutory conditions is just and reasonable, within the meaning of the Act, had been discussed in many cases, and very divergent views have been expressed on the subject.

One view was, that "conditions dealing with the same subjects as those given by the statute, and being variations of the statutory conditions, should be tried by the standard afforded by the statute and held not to be just and reasonable if they impose upon the insured terms more stringent or onerous or complicated than those attached by the statute to the same subject or incident." That was the view enunciated by Patterson, J.A., one of the commissioners by whom the statutory conditions were framed: Ballagh v. Royal Insurance (1880), 5 A.R. 87, 107; May v. Standard Fire Insurance Co., 605, 622.

It is a little singular that the learned Judge who expressed that view held in Parsons v. Queen's Insurance Co. (1882), 2 O.R. 45, that a variation of the statutory condition as to the keeping of gun-powder by providing that the company should not be responsible if more than ten pounds of it should be deposited or kept on the premises—although the statutory condition was applicable if more than twenty-five pounds should be stored or kept in the building insured—was a reasonable variation. . . .

[Reference to Mr. Justice Patterson's note-book No. 14—Guelph Assizes, 27th March, 1882.]

In Smith v. City of London Fire Insurance Co. (1887), 14 A.R. 328, 337, Osler, J.A., quoted the passage from the opinion of Patterson, J.A., which I have quoted, and said that it had been expressed without, so far as he had noticed, any dissent on the part of the other members of the Court, and that he con-

curred in it, if it were limited to such conditions only as do not affect the risk.

The same view as was entertained by Patterson, J.A., was expressed by Armour, J., in Parsons v. Queen's Insurance Co., 2 O.R. at pp. 59 et seq.; and the view of Armour, J., was concurred in by Rose, J., in Graham v. Ontario Mutual Insurance Co. (1887), 14 O.R. 358, 365. . . .

[Reference to Lount v. London Mutual Insurance Co. (1905), 9 O.L.R. 699; Cole v. London Mutual Insurance Co. (1908), 15 O.L.R. 619, 622; McKay v. Norwich Union Insurance Co. (1895), 27 O.R. 251; Eckhardt v. Lancashire Insurance Co. (1900), 27 A.R. 373, 393; City of London Fire Insurance Co. v. Smith (1888), 15 S.C.R. 69, 72 et seq.; Eckhardt v. Lancashire Insurance Co. (1900), 27 A.R. 373, 31 S.C.R. 72.]

We are bound by the Eckhardt case to hold that every variation from or addition to a statutory condition is not to be held to be prima facie unjust and unreasonable, but that the justice and reasonableness of a variation or addition must be judged upon the circumstances of the case in which it is sought to be applied.

Tried by that test, I am of opinion that the variation of the statutory conditions upon which these appellants rely is not a just and reasonable condition to have been exacted by them.

But for the statutory condition, an action might be brought to recover the money payable under the policies at any time within 6 or 20 years (depending upon whether the contract was or was not under seal) after it became payable.

The Legislature has enabled that period to be reduced to 12 months; and, in the view of the Commissioners and of the Legislature, it was reasonable to provide that the right of action should be barred if an action was brought within that period.

In the language of Osler, J.A., speaking of an analogous condition, in Smith v. City of London Fire Insurance Co., 14 A.R. 328, the variation which is sought to be engrafted on the contracts of insurance is purely arbitrary, and, therefore, unjust and unreasonable. Twelve months from the happening of the loss—not from the accruing of the cause of action—is a short time to allow to the insured in which to bring his action, and to reduce that period by one half is, in my judgment, an unjust and unreasonable limitation of the rights of the insured.

The variation is one which, to use again the language of

Osler, J.A. (Eckhardt v. Lancashire Insurance Co., 27 A.R. at p. 381), is "intrinsically" unjust and unreasonable; and, as Hagarty, C.J., would have done in the Peoria case, if it had been open to him to do so, I unhesitatingly "pronounce against the fairness" of the variation.

There remains to be considered the question whether the policies in the first three cases are avoided by the alleged misrepresentation in the applications for the insurance.

In the Rimouski case, the answer of Jeffery to the question, "24. Have you ever had any property destroyed by fire?" was in the negative; and in the Anglo-American and Montreal-Canada cases, the question, "Have you ever had any property destroyed or damaged by fire?" was answered in the negative.

The question of the materiality of these representations is made by the Insurance Act a question of fact for the jury, or for the Court, if there is no jury, and that issue has been found against the appellants. The circumstances relied on by the learned Judge for coming to that conclusion are fully stated in his reasons for judgment, and it is unnecessary to repeat them, or to say more than that I am unable to say that he erred in so deciding.

It may be observed, in view of the importance that counsel for the appellants contended was attached by insurance companies to the information which was sought to be obtained by the questions as to an applicant for insurance having had property destroyed by fire, that no such question was asked by the Crown Life Insurance Company.

I would, for these reasons, affirm the judgments appealed from and dismiss the appeals with costs.

MAY 23RD, 1913.

*REX v. GARTEN.

Criminal Law—False Pretences—Purchase of Cattle—Payment by Cheque—Dishonour of Cheque—Insolvency—Fraud—Purchase through Agent—Representation—Evidence—Conviction.

Case stated by MORGAN, Jun. Co.C.J., who tried the defendant, in the County Court Judge's Criminal Court for the County of York, upon a charge of false pretences, and found him "guilty."

*To be reported in the Ontario Law Reports.

The question submitted to the Court was, whether there was sufficient evidence upon which the Judge could properly find the defendant "guilty" of the offence of unlawfully, fraudulently, and knowingly, by false pretences, obtaining from the firm of McDonald & Halligan, cattle to the value of $676.28, with intent to defraud the said McDonald & Halligan.

The learned Judge did not make any statement of the facts, but made the evidence taken at the trial part of the case.

The evidence shewed that the defendant had brought the cattle for cash from McDonald & Halligan, through one Glazer; that Glazer was allowed to take the cattle upon giving the firm the defendant's unmarked cheque for $676.28; that there had been similar dealings before, on which occasions the cheques had been paid; that, on this occasion, when the cheque was presented two days after it was received, there were not sufficient funds for it, the defendant having then only $1.99 to the credit of his account in the bank on which the cheque was drawn; that the balance which the defendant had in the bank on the day upon which the cheque was given, which would have been sufficient, was withdrawn on that day by cheques to Glazer and others, dated on that day; and that the defendant resold the cattle, and made use of the money he got for other purposes.

The defendant said in evidence: "When I received the money for the cattle, and I knew I should not be able to pay all things and for the cattle too, I thought I better give that money right away." He made no more deposits in the bank except $4 or $5.

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

T. J. W. O'Connor, for the defendant.

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

The judgment of the Court was delivered by MAGEE, J.A. (after setting out the facts at length):—Here then was a man, who, according to his own account, was insolvent and dishonest, issuing this cheque concurrently with four others, any one of which would have left an insufficient sum at his credit to meet the amount, and post-dating those cheques so that they would be payable to persons who were pressing for their money, on the very day on which the purchase is made. A jury would be well warranted in concluding that he counted upon the cheque to McDonald & Halligan not being presented in the ordinary

course of business till after those other cheques would be paid, and that there would be no funds for it; and that he deliberately planned that the cheque should be used as it was. If so, it would be unnecessary even to consider whether the actual delivery of the cattle was after he knew that the cheques had been used.

Under sec. 404 and 405 of the Criminal Code, 1906, the false pretence must be a representation of a matter of fact, either present or past: but it is not necessary that it shall be by words. It may be by acts, that is, by "words or otherwise:" sec. 404; and see Regina v. Bull (1877), 13 Cox C.C. 608, and Regina v. Murphy (1876), ib. 298.

The giving of a cheque in payment for goods under such circumstances is a representation not necessarily that there are actual funds at the drawer's credit in the bank at the moment to meet it, but at least either that there are such funds and that he has done nothing to interfere with the payment of the cheque thereout, or that he has then such credit arrangements with the bank to the amount of the cheque that it will be paid on presentation: Regina v. Hazelton, L.R. 2 C.C.R. 134, 135; Regina v. Jones, [1898] 1 Q.B. 119, 123; and see Rex v. Cosnett (1901), 20 Cox C.C. 6. It may be also a representation that he has then no intention of doing anything thereafter to interfere with the payment; but it is not necessary here so to infer, or to consider the question. Garten had no such credit arrangements, and no reason to suppose that the bank would allow him to overdraw his account; and, while it may be possible that, at the moment of the issue of the cheque or even at the moment of the delivery of the cattle, there was sufficient funds at his credit to meet the cheque, yet he had done four acts any one of which would prevent its payment. The representation was, therefore, false as to an existing fact.

That it was made through Glazer does not absolve Garten, even if Glazer were innocent of any knowledge of the falsity or of the intended fraud. Glazer was merely the medium used—just as a letter might be the medium of making the statements. He was the mouthpiece or hand, but not less the instrument, of Garten. The actual presence of Garten when the false representation was made was not necessary. In Regina v. Sans Garrett (1853), 6 Cox C.C. 260, on a charge of attempting to obtain money by false pretences, Lord Campbell, C.J., said: "A person may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England, when he comes within the jurisdiction of our Courts."

And see Russell on Crimes, 7th ed., pp. 104-106, as to crimes committed through innocent agents; and Adams v. The People (1848), 1 N.Y. (Comstock) 173 (Court of Appeals).

There was, in my opinion, sufficient legal evidence upon which, if believed, to convict the accused; and the question reserved by the learned trial Judge should be answered in the affirmative.

Conviction affirmed.

HIGH COURT DIVISION.

KELLY, J. MAY 22ND, 1913.

COLE v. RACINE.

Assignments and Preferences—Assignment for Benefit of Creditors—Action by Assignee to Set aside Chattel Mortgage Made by Insolvent to Secure Debt Previously Incurred—Evidence—Mortgagee's Knowledge of Insolvency—Intent to Prefer—Invalidity of Mortgage—Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, secs. 5, 7—Affidavit of Attesting Witness—Omission to Shew Date of Execution—Imperative Statutory Provision—Account—Application of Assets Freed from Mortgage—Costs.

This action was begun by the plaintiff, as assignee of the estate of Alfred St. Laurent, an insolvent, to set aside, as fraudulent against creditors, a chattel mortgage made by Arthur St. Laurent to the defendant, on the 2nd January, 1912.

When the chattel mortgage was made, Arthur St. Laurent carried on business as a retail merchant in Ottawa.

On the 12th March, 1912, he, by bill of sale, transferred his business to his brother Alfred St. Laurent, who on the 26th June, 1912, made an assignment to the plaintiff for the general benefit of his creditors.

After the evidence had been taken at the trial, before KELLY, J., without a jury, Arthur St. Laurent also executed to the plaintiff an assignment for the general benefit of his creditors; and the plaintiff, as such asignee, on the 7th December, 1912, commenced another action against Arthur St. Laurent, similar to this action. The two actions were then consolidated, and the defendant was given time and opportunity to adduce further

evidence; and on the 8th February, 1913, the matter again came before KELLY, J., but no further evidence was submitted.

A. E. Fripp, K.C., for the plaintiff.
J. U. Vincent, K.C., for the defendant.

KELLY, J.:—On its face, the chattel mortgage was made to secure a debt of the mortgagor already incurred, and the mortgage does not purport to be made on any other consideration, or even to have given an extension of time for payment.

As far back as the beginning of February, 1911, the mortgagor was indebted to the defendant to an amount considerably in excess of $5,000; and, on the evidence adduced for the defendant, at no time afterwards was that indebtedness less than it was in February, 1911. At the end of 1911, it was considerably more. In December, 1911, the defendant's representative at Ottawa interviewed the debtor and his brother Alfred, who acted as manager of the business, and asked for payment or security, and was told that the debtor had no money and could make no payment, and that the debtor was then insolvent.

It is true that the defendant's representative denies that it was stated to him that the debtor was insolvent; but I feel bound to accept the testimony of the debtor and his brother on that point, especially in view of the somewhat peculiar circumstances surrounding the making of the chattel mortgage, and the occurrences leading up to it.

The defendant's representative, Bissonette, in denying knowledge or notice of the debtor's insolvent condition in December, 1911, says that the debtor or his brother then told him that the debtor's stock-in-trade or assets amounted to $12,000; and, though he was pressing for payment and knew of the debtor's inability to make any payment, and knew too that the indebtedness to the defendant, which was, in February, 1911, about $5,400, had considerably increased in the meantime, it is not easy to give much weight to his statement that he did not ascertain the amount of the liabilities, from which, taken in conjunction with the stated value of the assets, he would have learned the true financial condition of the debtor. If we are to believe him, he did not even make inquiries about the liabilities; and I am not, under these circumstances, apart from anything else, prepared to accept his evidence that he did not know that the mortgagor was insolvent. I have no doubt that he did know, and that the mortgagor and his brother also knew, and

that the mortgage was made with that knowledge and for the very purpose of securing the defendant for the debt due him, and thus defeating or prejudicing the rights of other creditors.

In that view of the case, I do not think it necessary to discuss what was said by the mortgagor and his brother about the alleged bargain that the defendant was to advance such cash as would be necessary from time to time to satisfy other creditors, and assist in keeping the business running for a year. The two cash advances, amounting altogether to $950, made by the defendant soon after the making of the chattel mortgage, might indicate some such bargain, but I do not need to pass upon that. If, however, such a bargain were made and did exist, the defendant did not live up to it. It is denied, however, on the defendant's behalf, that any such agreement was entered into.

Something was said, too, that would indicate a desire or intention to keep the other creditors quiet for a time after the making of the mortgage. The evidence on that point was not denied. That, in itself, helps to shew an intent to give defendant a preference. To my mind, therefore, the chattel mortgage is void as against the other creditors of the mortgagor.

On another ground also the mortgage is void. Clause (a) of sec. 5 of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, requires that the affidavit of the attesting witness, which is to be registered with the chattel mortgage, shall, amongst other things, state the date of the execution of the mortgage. Section 7 provides that, if the mortgage and affidavits (that is, the affidavit of the attesting witness and the affidavit of bona fides by the mortgagee) are not registered as by the Act required, the mortgage shall be absolutely null and void as against creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for valuable consideration. The affidavit of the attesting witness filed with this mortgage sets forth that it was executed "on Tuesday the 9th day of January, one thousand nine hundred and ."

This requirement of the statute is imperative, and it must be construed strictly. Failure to mention the year in which it was executed is, in my opinion, a fatal omission, and such a non-compliance with the requirements of the Act as renders the mortgage void.

For the above reasons, apart from any others that were urged, the mortgage should be set aside, and the mortgaged assets held by the assignee freed therefrom. If any of the goods

and chattels covered by the mortgage or the proceeds thereof have been received and not accounted for by the defendant, they must be accounted for and the proceeds thereof paid to the plaintiff; and there will be a reference to the Local Master at Ottawa to ascertain the amount, if the parties cannot agree.

The proceeds of the sale of the mortgaged assets, which have been paid into Court, pending action, will be paid out to the plaintiff.

In view of the circumstances, particularly of the insolvency of the mortgagor at the time the mortgage was made, and of the bill of sale later on made by Arthur to Alfred, who was and had been manager of Arthur's business, and had full knowledge of its financial condition, the net proceeds of the mortgaged assets will be applied, first, towards payment of the claims of Arthur's creditors, and then towards the payment of those of Alfred's creditors.

Owing to the form in which the first action was brought, I think that, instead of costs being awarded against him, the defendant should be paid out of the estate his costs down to the consolidation of the two actions; the plaintiff also to be entitled to costs of the action out of the estate. Costs of the reference are reserved until after the Master's report.

KELLY, J. MAY 23RD, 1913.

*WYNNE v. DALBY.

Motor Vehicles Act—Person Injured by Motor Car—Liability of "Owner" under sec. 19—Purchaser of Vehicle—Unpaid Vendor Retaining Property in Vehicle—Person Employed by Purchaser—Breach of Statutory Duty—Secs. 6 (1) and 15—Finding of Jury.

Action for damages for injury to the plaintiff by a motor car driven by the defendant Dalby.

The action was tried before KELLY, J., and a jury, at Toronto.

J. P. MacGregor, for the plaintiff.

C. M. Garvey, for the defendants Dalby and Adams.

L. F. Heyd, K.C., for the other defendants.

*To be reported in the Ontario Law Reports.

KELLY, J.:—The defendant Adams, on the 2nd May, 1912, ordered in writing from the defendant the McLaughlin Carriage Company Limited a motor car, at the price of $1,400, of which $500 was payable on the 6th May, 1912, and the balance by monthly payments of $90 each on the first of every month. The written order contained this provision: "It is agreed that the right and title to the goods shipped under this order shall remain in the McLaughlin Carriage Company Limited until the price thereof, and any cheque, bill, or note given therefor, or any part thereof, is paid in full." The order was accepted in writing by the company, and the receipt of a $50 cheque as deposit was acknowledged on the same date. For the unpaid instalments Adams made promissory notes to the company, which was therein called the vendor. There was added to these notes a term that Adams agreed and understood that "the express condition of the sale and purchase of the vehicle or property for which this note is given is such that the title or ownership thereof does not pass from the vendor until this note and any and all renewals thereof or of any part thereof be fully paid." At the time of the accident referred to later on, the purchase-price had not been paid in full.

On the 10th June, 1912, the plaintiff, Lillian Wynne, when about to board a street car on Queen street, in Toronto, was struck by this motor car, which was being driven by the defendant Dalby. She was knocked down and had her ankle broken.

. . .

The license for this car for the year 1912, as required by the Motor Vehicles Act, was issued to Dalby and in his name; and this action, as originally constituted, was against him as the only defendant. The action was begun on the 4th July, 1912, after which it was learned that Adams was the purchaser of the car; that Dalby was operating it under arrangement with Adams or as his servant; and that the company from which it was purchased had still an interest therein, as it had not been paid the full contract-price thereof.

By order of the 19th November, 1912, Adams and the McLaughlin Motor Car Company Limited were added as parties defendant—that company being added on the assumption that it was to it that the order of the 2nd May was given by Adams.

The defendant Dalby's statement of defence having been struck out on the 12th October, 1912, judgment against him, for damages to be assessed, was signed on the 12th December, 1912. The action, as against the parties then defendants, came down to

trial before Mr. Justice Latchford on the 30th January, 1913, and was adjourned, as I understand it, at the request of the plaintiff, so as to have the McLaughlin Carriage Company Limited also added as a defendant. It was so added; and, the case being called for trial on the 25th February, it set up that it had not received proper notice of trial. The action was tried on the 27th February. At the close of the evidence, counsel for the plaintiff consented to a dismissal as against the McLaughlin Motor Car Company Limited. The jury found in favour of the plaintiff, and assessed the damages at $800. . . .

[Reference to secs. 6 (1) and 15 of the Motor Vehicles Act, 2 Geo. V. ch. 48.]

There was evidence to go to the jury and which justified their finding.

The McLaughlin Carriage Company Limited asks that the action be dismissed as against it. The ground on which the plaintiff seeks to make it liable is, that sec. 19 of the Motor Vehicles Act makes the owner of a motor vehicle responsible for any violation of the Act or of any regulation prescribed by the Lieutenant-Governor in Council; and that, under the condition under which this motor was sold, the McLaughlin Carriage Company Limited is the *owner*, within the meaning of the Act. . . .

It is true that the vendor had the right, by the terms of the notes, to resume possession of the car on the purchaser's default in keeping up his payments, or otherwise in observing the terms of his contract; but it had not that right so long as there was no default, or so long as nothing happened which caused it to feel insecure in respect of the purchaser's liability.

It is to be observed, too, that, by the terms of the notes, in the event of the vendor retaking possession and reselling, it was to apply the proceeds, after payment of expenses incidental to the sale, on the unpaid purchase-money. The retaking and reselling, however, were not to relieve the purchaser from liability for the unpaid purchase-money; so that it seems quite beyond doubt that the contract between the company and Adams was an agreement to sell and purchase, but on terms which, in case of default, gave the vendor remedies not possessed by vendors in ordinary cases of sale. These special terms, while aimed at giving the vendor additional security, did not take from Adams the character of purchaser.

Then to whom does the word *owner* as used in the Act apply? Does it extend to and include a person or corporation holding

an interest in the article such as this company continued to have from the time of the order given by Adams, the acceptance by the company, and the delivery to Adams in pursuance thereof? Or does it apply to Adams, the purchaser? Or does it apply both to him and the vendor? The Act gives no express interpretation of that word as used therein, so that we are to find its meaning elsewhere, and from its ordinary acceptation. In the language in everyday use, *owner* is usually understood to mean a person who has acquired the right of possession in a chattel or property, even though it be subject to a lien or mortgage, and not the person who holds or is entitled to the benefit of such lien or mortgage. . . .

One who holds subject to a mortgage, or otherwise, has only a qualified fee, is generally termed *owner* if he has a right to possession: Century Dictionary, p. 4214. . . .

[Reference also to Bouvier's Law Dictionary, vol. 2, tit. "Owner;" Stroud, 2nd ed., vol. 2, pp. 1387, 1392; Hughes v. Sutherland, 7 Q.B.D. 160; White v. Furness, [1895] A.C. 40.]

Even in the case of a hiring agreement which reserves the property in the goods, and provides that the hiring shall continue until the whole purchase-price has been paid in rentals or otherwise, if it compels the hirer to carry out the purchase, such an agreement is an agreement to purchase the goods: Hull Ropes Co. v. Adams (1895), 65 L.J.Q.B. 114.

But what was the intention of the Legislature in passing the Act? What it evidently sought to do was to hold liable the person having legal possession of a motor vehicle as owner or purchaser (whether or not the purchase-price was fully paid), or the person on whose behalf the driver or operator of such vehicle operates or by whom he is employed, and not the manufacturer or dealer or vendor, who has no control over the driver or operator, and between whom and the operator there is no such relationship as that of master and servant, principal and agent, etc. . . .

The legislators intended to reach the person who, having the control and management of the motor vehicle, and having an interest such as that of a bona fide purchaser, has an interest in securing a proper driver or operator, and who should, under the intention of the Act, be responsible for the acts of the person to whom, as servant, employer, or agent, he intrusts its operation.

In the absence of an express interpretation of the word

owner, and especially in view of what I take to be the object of passing sec. 19 of the Act, I can give no other meaning to the word than that in ordinary use and as defined above. If the legislators had intended it to have a wider or different meaning, they would, no doubt, have said so.

My view is, that the defendant the McLaughlin Carriage Company Limited does not come within the meaning of the word *owner,* and is, therefore, not liable.

Adams asks to be relieved, on the ground that, owing to the arrangement existing between him and Dalby, the car was beyond his control. That view is not, in my opinion, sustainable.

Adams, after purchasing the car, entered into an arrangement with Dalby by which the latter was to run it as a livery car and drive it and give Adams ninety per cent. of the earnings, retaining the other ten per cent. as his remuneration. . . .

The relationship which existed between these two defendants was such as to render Adams liable for the occurrence; and, there being sufficient evidence to submit to the jury, and they having found as they did, I think judgment should be entered against Adams, as well as against Dalby, for the $800 assessed by the jury, and costs; the costs against Adams being subject to the allowance of his costs of the day by Mr. Justice Latchford on the 30th January; the costs as against Dalby from the time judgment was signed against him on the 12th December, 1912, to be limited to what is applicable to assessing the amount of damages and entering judgment therefor.

The action, as against the McLaughlin Motor Car Company Limited and the McLaughlin Carriage Company Limited, is dismissed with costs; but there should be only one set of costs to these defendants.

LATCHFORD, J. MAY 23RD, 1913.

PRESSICK v. CORDOVA MINES LIMITED.

Master and Servant—Injury to and Death of Servant—Action by Widow for Damages—Negligence—Statutory Duty—Breach—Contributory Negligence—Finding of Jury—Absence of Evidence to Support—Rejection of Finding by Trial Judge.

Action by the widow of John Arthur Pressick for damages by reason of his death while working for the defendants in their mine, owing to their negligence, as alleged.

The action was tried before LATCHFORD, J., and a jury, at Peterborough.

F. D. Kerr, for the plaintiff.

M. K. Cowan, K.C., and A. G. Ross, for the defendants.

LATCHFORD, J.:—But for the finding of contributory negligence, the plaintiff would be entitled to recover. Where a statute imposes a duty on an employer, and one for whose benefit that duty is imposed is injured by failure to perform it, the authorities are clear that, prima facie,and if there be nothing to the contrary, a right of action arises.

But that prima facie right disappears when a finding of contributory negligence is properly reached. If there was any evidence to warrant the conclusion at which the jury arrived in regard to the negligence of the plaintiff's late husband, I should, I think, in the present state of the law, be obliged to dismiss the action, notwithstanding the negligence of the defendants in not covering the dangerous winze or "glory hole," and in failing to supply Pressick with a proper wrench. But there is, in my opinion, no evidence whatever to support the particular and only finding of the jury that Pressick was negligent in not using with more care the defective wrench given him by the defendants, with knowledge that he would have to use it in a place dangerous because of their neglect. The tightening and loosening of the swing nut required the exercise of great force. The nut had to be unscrewed every time the drill was set for a new hole. The machine might have been more safely placed for the loosening of the nut if the valve had not been on the side on which it was at the time of the accident. This was the contributory negligence which the defendants sought to prove Pressick guilty of. By their verdict the jury shew that they rejected this contention, and accepted the evidence that the drill was properly placed. If it had been turned into the position suggested by the defendants as the only proper one, the peril resulting from a slip in tightening the nut would have been the same as would have existed in loosening the nut with the drill in the position it actually occupied. The jury found none of the grounds of contributory negligence sought to be established by the defendants, but evoked by some obscure process of reasoning a ground which is, in my opinion, unsupported by any evidence.

Entertaining this opinion, I reject their finding, and direct that judgment be entered for the plaintiff for the damages found by the jury, $1,750. There was, I may add, evidence to warrant a verdict for a much larger sum. The plaintiff is also entitled to her costs.

KENNEDY v. KENNEDY—MASTER IN CHAMBERS—MAY 20.

Lis Pendens—Motion to Vacate Registry of—Speedy Trial of Action—Terms.]—Motion by the defendants to vacate the registry of a certificate of lis pendens in part, and to expedite the trial. The Master said that the lands in question were wholly unimproved, and at the present time must be of a more or less speculative value. The action was by a judgment creditor to set aside a transfer made by the judgment debtor to his wife, on the ground that it was fraudulent and designed to defeat and delay the realisation of the plaintiff's judgment. It was clearly for the interest of the plaintiff, as much as for that of the defendants, that the action should proceed with expedition, and that no chance of a sale, in the present condition of activity in the real estate market, should be lost. This view was emphasised by the plaintiff's counsel, and he offered and still was ready and willing to allow any sales to be made if the purchase-money were paid into Court, or retained by the defendants' solicitors to abide the result of this action. This seemed to be a fair and reasonable arrangement, and one which it was in the interest of both parties to carry out. It would give the defendants all that the Court could properly require the plaintiff to accept. The statement of claim having been delivered on the 24th April, there was no reason why the action should not be tried some time in June. If there should be any delay, the defendants could set it down. The motion was, therefore, dismissed; costs in the cause. O. H. King, for the defendants. E. D. Armour, K.C., for the plaintiff.

STAUFFER v. LONDON AND WESTERN TRUST CO.—MASTER IN CHAMBERS—MAY 20.

Venue—Change—Action for Dower—Local Venue—Rule 529(c)—Security for Costs—Next Friend—Temporary Residence in Jurisdiction.]—In this action, to recover dower in land in the county of Bruce, the venue was laid at Toronto. The plaintiff, a person of unsound mind not so found by inquisition, sued by her son as next friend. The defendant company moved to change the venue to Walkerton, and for security for costs, on the ground that the next friend was not resident in Ontario and had no property therein. The Master said that Con. Rule 529 (c) applied, and no ground was shewn for having a trial else-

where than at Walkerton.—As to security for costs. The next friend was cross-examined and said that he intended to remain in Ontario during his mother's life—though for the past twenty-one years he had been in the western provinces. The Master said that the next friend came within the protection of the judgment in Gagne v. Canadian Pacific R.W. Co., 3 O.W.R. 624. In that case, the action was the plaintiff's own. Here, perhaps, the remarks in Scott v. Niagara Navigation Co., 15 P.R. 409, at p. 411, might have some application. But the facts of this case were similar to those in the Gagne case. The next friend was a labouring man and unmarried. It was only right and natural that he should return to his aged mother on hearing of his father's death last December, and resolve to stay here as long as she lived to look after her. Order accordingly. Costs in the cause. W. Proudfoot, K.C., for the defendant company. Stanley Beatty (Kilmer & Irving), for the defendant Geddes. C. M. Garvey, for the plaintiff.

DAVISON v. THOMPSON—MASTER IN CHAMBERS—MAY 22.

Pleading—Statement of Defence and Counterclaim—Action for Return of Bonds—Disclaimer—Interest of Third Person not a Party—Principal and Agent.]—In this action the plaintiff asked for the return of certain bonds deposited with the defendant as security for a payment by him of $10,000 for a half share in a contemplated venture, which bonds were to be returned on a division of profits of such joint venture, which the plaintiff alleged has been made. This division apparently was not denied. The defendant, by the statement of defence, alleged that this $10,000 was only a loan to the plaintiff, and that the bonds were deposited as security for the sum lent. This loan, it was said, was made by one Charlton, who thereupon became entitled to the bonds, and the defendant disclaimed any interest in them (paragraph 7). In paragraph 11, the defendant submitted that the bonds should be delivered to him as agent for Charlton; and, in paragraph 12, the defendant counterclaimed for payment of $6,000 and interest to Charlton or to himself as Charlton's agent. It was not shewn how this $6,000 was arrived at. The plaintiff moved to strike out paragraphs 7, 11, and 12 as embarrassing. The Master said that there was nothing objectionable in paragraph 7, as it informed the plaintiff of the defendant's contention. But the other two paragraphs could

not stand. There was no way in which the relief asked for in them could be granted to Charlton, who was not a party to the action. If the defendant had a power of attorney, he could bring an action in Charlton's name; or, if he had an assignment of the cause of action, he could sue in that capacity. Here, however, he did not set up either position. On the contrary, he asserted that Charlton was the person entitled to the bonds, and the one against whom the plaintiff should proceed to recover them. Since the argument, a telegram from Charlton, dated the 19th May, was produced, in which he spoke of these as "my bonds," and asked to have them sent to him. Paragraphs 11 and 12 should be struck out, with leave to the defendant to amend in a week as he might be advised—and the plaintiff to have further time to reply, if desired. Costs of the motion to the plaintiff in the cause. J. T. White, for the plaintiff. W. M. Hall, for the defendant.

WIDELL CO. & JOHNSON v. FOLEY BROS.—MASTER IN CHAMBERS—MAY 23.

Partnership—Action in Name of, after Dissolution—Absence of Authority of one Partner to Use Partnership Name—Parties—Stay of Proceedings.]—Motion by the defendants for an order striking out the name of the plaintiffs and staying all proceedings. The action, according to the endorsement on the writ of summons, was by "a partnership, of whom one partner, the Widell Co., is a corporation, having its head-office in Mankato, in the State of Minnesota, one of the United States of America, and the other partner, Frank W. Johnson, resides at the city of Toronto." It appeared that the partnership had terminated. The motion was made on grounds similar to those in Barrie Public School Board v. Town of Barrie, 19 P.R. 33, where all the authorities are cited. It was supported by an affidavit of the solicitor for the defendants, to which were annexed as exhibits copies of a letter and telegram from the Widell Co., sent before action, to the plaintiffs' solicitors, disclaiming any right of action against the defendants, and notifying the solicitors that Johnson had no authority to represent the Widell Co. & Johnson partnership, for the purpose of bringing such an action. The writ was issued on the 18th April, the letter above-mentioned being dated the 7th April, and the telegram the following day. No affidavit was put in by the plaintiffs, and there

had not been any cross-examination on the affidavit in support of the motion. The Master said that the motion was entitled to prevail—leaving the plaintiff Johnson to proceed as pointed out in Whitehead v. Hughes, 2 Cr. & M. 318, and in the very recent case of Seal & Edgelow v. Kingston, [1908] A.C. 579. As the Widell Co. was a foreign corporation, there might be some difficulty in carrying the suit to a successful or any conclusion, if that company was unwilling to assist, by accepting indemnity or otherwise. This, however, could be left for the consideration of the plaintiff Johnson. On the existing material, the order should go as asked staying the action until the consent of the Widell Co. is obtained. If this is not given, the plaintiff Johnson must take such steps as he may be advised to enforce this alleged claim of the partnership. Costs of the motion to the defendants in any event. R. McKay, K.C., for the defendants. G. S. Hodgson, for the plaintiffs.

RE FERGUSON AND HILL —PURSE V. FERGUSON—MASTER IN CHAMBERS—MAY 23.

Execution—Moneys in Court—Surplus Proceeds of Mortgage Sale — Execution Creditors of Mortgagor — Payment out to Sheriff—Creditors' Relief Act.]—Hill, a mortgagee, sold the mortgaged land under the power of sale in his mortgage from Ferguson; and, on the 18th April, the surplus proceeds of the sale were paid into Court, being $550.38. There were certain execution creditors of the mortgagor; one of them had in the Sheriff's hands execution against the mortgagor alone; two had executions against the mortgagor and his wife; and two had executions against the mortgagor and his wife and another. One of these execution creditors, Purse, moved to have the money in Court paid out to the execution creditors as their rights should appear. The Master said that this could not be done. An order must go as in Campbell v. Croil, 8 O.W.R. 67, for payment out to the Sheriff of Toronto; the money paid out to be deemed to be money levied under executions against the Fergusons, and to be dealt with by the Sheriff as the Creditors' Relief Act directs. As this motion was necessary, the costs of the applicant and of those appearing on the motion might be added to their claims. R. F. Segsworth, for the applicant. A. E. Knox, for the Home Bank of Canada.

ARMSTRONG v. ARMSTRONG—MASTER IN CHAMBERS—MAY 23.

Trial—Postponement—Grounds—Terms—Powers of Master in Chambers—Pleading—Amendment.]—Motion by the defendant for leave to amend the statement of defence, and to postpone the trial, on the ground of the absence in Europe of her daughter, who was sworn to be a necessary and material witness in her behalf. No objection was made by the plaintiff to the amendment asked for; but the postponement was strongly opposed. The reason of this was, that the relations of the plaintiff and defendant, who were husband and wife, were such that they made, as the plaintiff, the husband, said, "a continual living together almost unbearable." His counsel stated it as his firm conviction that, unless the parties separated, it was by no means unlikely that one of them might lose his or her life at the hands of the other in a fit of passion. The Master said that such a condition of affairs might, no doubt, justify unusual remedies. But it was to be observed that the plaintiff was a commercial traveller, and as such was for the greater part of his time absent from the city where his wife lived. One great point in dispute was as to the custody of the young boy who was the only offspring of the marriage. Both parents were anxious to have the custody of this child; and counsel for the plaintiff was willing, on the plaintiff's behalf, to consent to the postponement if the plaintiff was given the custody meantime. This, however, the Master said, he had no power to direct or to impose as a term of postponement. The defendant seemed to be entitled to a postponement—and the trial must be postponed until the first week of the Toronto non-jury sittings after vacation. If there should be no probability of the return of the witness by that time, her evidence should be taken on commission, if the plaintiff so required. But it would be more satisfactory to have her evidence as to the conduct and habits of the plaintiff given at the trial. The witness was the step-daughter of the plaintiff. At present engaged as a trained nurse in attendance on a patient, she could not be expected to give this up and break her engagement to expedite the trial. She was clearly not in any way under the defendant's control. Order as above; costs in the cause. See Maclean v. James Bay R.W. Co., 5 O.W.R. 495. W. G. Thurston, K.C., for the defendant. J. W. McCullough, for the plaintiff.