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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

*LLOYD v. ROBERTSON.

Will—Action to Set aside—Parties—New Trial.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 35 O.L.R. 264, 9 O.W.N. 339.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley, K.C., and J. J. Coughlin, for the appellants.

Glyn Osler, for the plaintiff, respondent.

THE COURT directed that all proper parties should be added and a new trial had; the order for a new trial not to issue for one month; in the meantime counsel may make such arrangements as they deem best, and, if necessary, speak to the Court; costs reserved.

SECOND DIVISIONAL COURT. APRIL 28TH, 1916

*ROBINSON v. MOFFATT.

Vendor and Purchaser—Agreement for Sale of Land—Judgment for Specific Performance—Title Free from Incumbrance—Objections to Title—Reference—Restrictive Conditions—Res Judicata—Execution against Lands of Vendor—Validity as to Interest of Vendor—Removal of Incumbrance—Rescission upon Failure to Remove—Return of Money Paid—Costs.

Motion by the plaintiff for further relief in pursuance of the judgment of a Divisional Court of the 26th November, 1915 (9 O.W.N. 209, 35 O.L.R. 9), and for judgment for the plaintiff with costs throughout.

When the motion first came before this Court, on the 13th

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

March, 1916, a reference was directed to the Master in Ordinary to ascertain and state whether the defendant could make a good title to the lands in question and convey to the plaintiff, and, if so, when.

On the 24th March, 1916, the Master reported that the defendant was able, on and at any time after the 2nd March 1916, to make a good title and convey to the plaintiff.

The plaintiff (by leave), appealed from the report, and renewed his motion for judgment.

The appeal and motion were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ., on the 12th April, 1916.

J. J. Gray, for the plaintiff.

W. E. Raney, K.C., for the defendant.

MEREDITH, C.J.C.P., read a judgment in which he said that this motion was made for the purpose of having a determination of the question whether the vendor (the defendant) could now give to the purchaser (the plaintiff) that which he sold to him, namely, the land in question in fee simple free from incumbrance. The purchaser contended that the vendor could not, for two reasons: (1) because there are some restrictive building conditions with which the land is burdened; and (2) because of a writ of execution against the goods and lands of the vendor now in the sheriff's hands for execution in full force and virtue.

As to the first of these reasons, it was sufficient to say that this action was brought by the purchaser, to set aside his agreement to purchase, on the ground, among others, that the vendor could not convey to him, as agreed, because of these very restrictive conditions; and that that ground of action and all others failed; and, at his request, a judgment of specific performance was pronounced. The purchaser could not have the benefit of this ground of action a second time.

On the second ground, the contention of the purchaser—that he could not be compelled to take the land until the effect of the fi. fa. was removed—was plainly right. Both at law and in equity the vendor is the owner of the land in the sense of having the lawful right to it; the purchaser has only an equitable right to it; to that extent, if the agreement is carried out, he is treated in equity as substantially the owner; the vendor, however, is still the owner, and can convey his ownership, subject to any equitable right which the purchaser may have. The execution creditor, assuming that his execution is valid, has a right in the land in question to the same extent as his debtor has—to be worked out in the regular way by sheriff's sale of the debtor's interest in the land.

Reference to Parke v. Riley (1866), 3 E. & A. 215.

Upon the vendor clearing the way to a conveyance of the land free from all incumbrances, within 10 days, the transaction should be closed; and, in that event, the vendor should pay all costs subsequent to the judgment for specific performance, to be set off against the costs now payable, under that judgment, by the purchaser to the vendor; otherwise there should be the usual judgment upon failure to convey after reference; and the vendor should pay all costs subsequent to the judgment for specific performance, but not the costs prior to that, because that judgment was made on the terms of payment of such costs, and these costs should be set off against the costs awarded to the purchaser; and, if there be a balance in the vendor's favour, the amount of it may be deducted from the purchase-money to be returned.

LENNOX, J., concurred.

RIDDELL and MASTEN, JJ., agreed in the result, for reasons stated by each in writing.

Judgment accordingly.

SECOND DIVISIONAL COURT. APRIL 28TH, 1916.

*NAEGELE v. OKE.

Contract—Permission to Draw Water from Neigbouring Land—Easement—Lease—License—Personal License not Passing with Land—Registry Act.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Huron in an action in that Court brought to obtain a declaration of the right of the plaintiffs to maintain an hydraulic ram upon and take water from the defendant's land, for the restoration of the ram to working order, and for damages. The judgment of the County Court Judge declared the plaintiffs' right to the easement claimed, granted an injunction restraining the defendant from interfering therewith, and awarded the plaintiffs $10 damages and the costs of the action.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

C. Garrow, for the appellant.

W. Proudfoot, K.C., for the plaintiffs, respondents.

MASTEN, J., read a judgment in which he stated the facts. In 1903 or 1904, Charlotte O. Halliday owned and occupied (along with her husband) lot 14 in the 3rd concession of Colborne, and Joseph Naegele was the owner of lot 13, the adjoining lot. Francis Naegele, one of the plaintiffs, was the son of Joseph, and at the time lived with his father on lot 13. In 1903 or 1904, an oral agreement was made between the plaintiff Francis Naegele and the Hallidays whereby the former was licensed to put in an hydraulic ram at a spring situate on the Halliday's lot and by means of the ram to convey water from the spring to the farm buildings on the Naegele farm. The ram was put in and used for the conveyance of water from 1903 or 1904 until the 29th September, 1911, when John Halliday signed a writing by which he agreed "to lease hydraulic water privilege on part of lot 13 . . . for 49 years to Frank Naegele . . . and also privilege of making any repairs on said privilege without damage to crop and also that undersigned to have privilege of using waste water to be taken by him to his property."

On the 11th August, 1912, Joseph Naegele died, devising all his lands to his wife and after her death to his son Francis. In April, 1915, Francis, having then become the owner, made an agreement for the sale of his farm to his co-plaintiff, Pitblado, who was in possession. On the 17th April, 1915, Charlotte O. Halliday conveyed lot 14 to the defendant, who, in May, 1915, prevented the further use of the ram and of the water, whereupon this action was brought.

The learned Judge said that it was of the essence of an easement that a dominant tenement be specified, and that the grantee of the easement shall have an estate or interest in the dominant tenement at the time of the grant: Rymer v. McIllroy, [1897] 1 Ch. 528. There cannot be an easement in gross; and the interest of the plaintiffs under the agreement was not an easement.

Neither could the arrangement be construed to be a lease, for it is of the essence of a lease that the lessee acquire the exclusive possession of the leased premises: Watkins v. Milton-next-Gravesend Overseers (1868), L.R. 3 Q.B. 350; Glenwood Lumber Co. v. Phillips, [1904] A.C. 405. No exclusive possession of the Halliday farm was acquired by Naegele.

Reference to Ward v. Day (1863), 4 B. & S. 337; Stockport Waterworks Co. v. Potter (1864), 3 H. & C. 300.

The written agreement of September, 1911, was to be construed as relating to the existing ram and pipes and to their then use for the supply of water to lot 13. What the plaintiff Naegele acquired

under his agreement with the Hallidays was a license, personal to himself, good for 49 years, subject to earlier determination by his death or because he was no longer in occupation of the Naegele farm.

The defendant was not bound by the license granted by his predecessor.

The appeal should be allowed and the action dismissed; but the judgment should not issue for six months, and meantime the rights of the parties should continue as under the judgment of the County Court Judge, with the right to the plaintiffs to remove the ram during that period.

MEREDITH, C.J.C.P., in a written opinion, stated his agreement with the judgment pronounced by MASTEN, J., and referred to Milner v. Brown (1914), 7 O.W.N. 303. He also drew attention to the fact that the defendant's title was a registered one, and that he was entitled to the protection of the Registry Act.

RIDDELL and LENNOX, JJ., also concurred, on the ground that at the most the license was a personal one by Halliday, and did not at all bind the land.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 28TH, 1916.

*FOSTER v. MACLEAN.

Libel—Newspaper—Conspiracy—Pleading — Defence—Agreement for Rightful Purpose—Fair Comment—Appeal—Costs.

Appeal by the plaintiff from the order of MULOCK, C.J. Ex., ante 101.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. E. Raney, K.C., for the appellant.

K. F. Mackenzie, for the defendants, respondents.

RIDDELL, J., read a judgment in which he stated the facts. The plaintiff, a Controller of the City of Toronto, sued W. F. Maclean, H. J. Maclean, A.E.S. Smythe, and The World Newspaper Company Limited, for damages for libel. Pleadings were delivered; and the plaintiff applied to the Master in Chambers to

strike out the defence of the defendant Smythe, and particularly para. 4 and clauses (a) and (e) of para. 6. The Master refused; the plaintiff appealed, and MULOCK, C.J. Ex., dismissed the appeal, directing, however, that particulars should be furnished of the allegation in para. 4, "that the plaintiff was and is not a desirable person for Controller." These particulars had been delivered; and previously certain other particulars were delivered pursuant to demand.

As to para. 4, it was not a proper plea in an action for libel alone; but the defendants contended that this was not an action simply of libel or an action of libel at all.

Upon the argument, the plaintiff's counsel agreed to abandon any claim for conspiracy; but, as affecting the costs, it seemed necessary to inquire what was the cause of action alleged in the statement of claim.

The form of the statement of claim was apparently taken from a precedent for a statement of claim in conspiracy in Bullen & Leake's Precedents of Pleadings, 7th ed. (1915), p. 278. The claim was for conspiracy; and it was not necessary to consider whether it was not also a claim for libel.

Paragraph 4 in effect stated that the conspiracy-agreement, if there was any agreement, was for a rightful purpose, i.e., to prevent the election of an undesirable person to office; but that is no defence to an action for conspiracy. This paragraph did not raise the issue whether the acts to be done were according to law—and that was the thing of importance. If it was intended to be a plea to damages, it should be so stated specifically: Dryden v. Smith (1897), 17 P.R. 505; Fulford v. Wallace (1901), 1 O.L.R. 278. If it was intended to make the allegations in this paragraph part of the defence of fair comment, they should be pleaded properly and specifically in that way: Merivale v. Carson (1887), 20 Q.B.D. 275.

This paragraph could not stand; but neither party would be helped or hurt by either retention or removal.

As to para. 6 (a) and (e), if the action was in conspiracy and publications were laid as the overt acts causing damage, these publications must be charged as being either unlawful in themselves or (2) directed to an unlawful end. The defendants were entitled to plead so as to answer either charge concerning these publicat ons. An answer to the first charge must be a contention that the publications are not libellous—accordingly any defence to an action of libel based on these publications would be properly pleadable in an action of conspiracy. If the paragraphs complained

of could be pleaded in an action for libel proper, they would not be wrong in an action for conspiracy.

Paragraph 6 (e) is the ordinary defence of "fair comment," and not objectionable. Paragraph 6 (a) contained matter of inducement setting out circumstances which, it was alleged, rendered comment permissible; it was not objectionable.

The ends of justice would be met, and the plaintiff would have his full rights, if further particulars should be furnished within six weeks after the issue of the order upon this appeal; and that should be directed.

The statement of claim should be amended by striking out all reference to conspiracy and making the claim one for libel simply.

There should be no costs of the appeal.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing. The appeal, he said, was needless.

LENNOX, J., agreed with the opinion of RIDDELL, J.

MASTEN, J., agreed in the result.

Order below varied.

SECOND DIVISIONAL COURT. APRIL 28TH, 1916.

*EVANS v. FARAH.

Vendor and Purchaser—Agreement for Sale of Land—Breach by Purchaser—Damages—Resale by Vendor with Assent of Purchaser—Recovery by Vendor of Deficiency on Resale and Expenses Incurred—Interest.

Appeal by the defendant from the judgment of CLUTE, J., ante 2.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. H. Sedgewick, for the appellant.

W. N. Tilley, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that it was unnecessary to consider the broad question of the remedies of a seller of land against his purchaser, who breaks his contract of purchase; because the parties themselves came to an agreement respecting them when it was made plain that the purchaser

could not pay the price of, and take, his purchase; and that agreement in effect was, that the land should be sold again by the seller, but on the purchaser's account, and that, after the completion of that sale, the rights of the parties to the first sale should be adjusted on the basis of the first agreement, that is, as if that sale had been completed, and the second sale had been made by the first to the second purchaser.

The second sale was made accordingly, with the first purchaser's assent; and the damages awarded to the plaintiff were just the sum coming to the plaintiff upon such an adjustment as was so agreed upon, though not computed by the trial Judge just upon such a basis.

The only item about which there could be any reasonable controversy, in any case, was the interest allowed for non-payment of the purchase-money over and above the amount of the mortgages; but, as the seller cleared the property of tenants and held it ready for the purchaser from the day he was to have had possession until the second sale, the vendor is entitled to such interest; in that item and in the other items comprised in the damages awarded, the plaintiff gets no more nor any less than would have been his if the first agreement had been carried out; and that was the intention of the parties in all that was done between the abortive and the concluded sales.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. APRIL 28TH, 1916.

HARRISON v. MATHIESON.

Appeal—Judgment on Further Directions—Appeal to Supreme Court of Canada—Stay of Judgment on Payment into Court or Giving Security.

Appeal by the defendant Mary Mathieson from the judgment of CLUTE, J., on further directions, ante 117. The judgment was pronounced in spite of a proposed appeal to the Supreme Court of Canada from a judgment of the Appellate Division, ante 54, varying the order made on appeal from the report, 9 O.W.N. 170.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

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

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

THE COURT directed that upon the appellant paying into Court $7,500, or giving security for the full amount found due by her, the appeal should be retained for two weeks, pending an application to the Supreme Court of Canada, unless another order should be made in the meantime; in default of payment into Court, or security, the appeal is to be dismissed with costs.

HODGINS, J.A., IN CHAMBERS. APRIL 22ND, 1916.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Appeal—Privy Council—Security—Order for Payment out of Court of Moneys Representing Subject of Action—Connection with Judgment Appealed against—One Appeal and one Security as to both Judgment and Order.

Motion by the plaintiffs to allow the security on a proposed appeal to the Privy Council from the judgment of the First Divisional Court of the Appellate Division, ante 98, dismissing the plaintiffs' appeal from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624, dismissing the action.

A. C. McMaster and J. H. Fraser, for the plaintiffs.

W. N. Tilley, K.C., for the defendant the Ottawa Separate Schools Commission.

J. A. McEvoy, for the Attorney-General for Ontario.

A. R. Clute, for the defendant the Corporation of the City of Ottawa.

HODGINS, J.A., in a written opinion, said that the plaintiffs had paid $1,000 into Court as security. Objection was taken that there was no appeal from the order—made when the appeal was dismissed—that the money in Court should be paid out to the defendant the Ottawa Separate Schools Commission. It was also said that, if an appeal from that order was competent, it was a separate one, and that an additional $1,000 should be paid into Court.

The action was for an injunction restraining the defendant city corporation from paying the moneys raised by the taxation of separate school supporters to the defendant Commission. An order for the payment into Court of these moneys, so far as they

had reached the hands of the city corporation, was made on the 10th February, 1916, and the moneys were paid in. On the day on which the appeal was dismissed (3rd April, 1915), the moneys were ordered to be paid out to the defendant Commission, and they were paid out.

The order was really part of the judgment of the Court, or if, in a technical sense, it was a separate order, it came within the rule referred to by Lord Macnaghten in Concha v. Concha, [1892] A.C. 670, that where an order is so connected with the judgment as properly to form the subject of one and the same appeal, and its inclusion will lead to no additional inquiry or expense, an appeal from it may be entertained, so that both may be dealt with together.

Order approving of the security on one appeal, which will include both the judgment and the order; costs in the appeal.

HIGH COURT DIVISION.

KELLY, J. APRIL 22ND, 1916.

TORONTO GENERAL TRUSTS CORPORATION v. ROMBOUGH.

Vendor and Purchaser—Agreement for Sale of Land—Vendors' Action for Specific Performance—Acceptance of Title—Possession—Objection not Going to Root of Title—Laches and Acquiescence.

Motion by the plaintiffs for judgment on the pleadings and admissions in an action for specific performance of an agreement for the purchase of land, or, in the alternative, for rescission, forfeiture, and possession.

The motion was heard in the Weekly Court at Toronto.

E. G. Long, for the plaintiffs.

F. Regan, for the defendant.

KELLY, J., in a written opinion, set out the facts. The agreement to purchase was made by the defendant in 1902; he had previously been in possession as tenant of his vendors, and had remained in possession ever since. The agreement provided that the defendant should search the title at his own expense; that he should not be entitled to call for an abstract or for the production of title-deeds; and that all objections and requisitions in respect to title

should be delivered to the vendors within ten days from the date of the agreement, and all objections not made within that time should be considered to be waived, and in that respect time was made of the essence of the agreement. The defendant made no investigation of the title and submitted no objections or requisitions, but continued in possession and made payments of principal and interest under the agreement until 1912. The land was not conveyed to him. In 1912, he learned that the registered title did not shew any conveyance to his vendors; and he thereupon discontinued his payments.

The learned Judge said that the defendant had chosen to disregard the provisions of the agreement which were intended to afford him the protection of a right to put an end to the contract if he had raised objections which the vendors were unable or unwilling to remove. There was no obligation on the vendors to furnish an abstract or do more than await notice of any objection by the purchaser; and several years had been allowed to elapse, during which, on the defendant's own evidence, the title was ripening through length of possession as against possible claimants not under disability. If the objection—that no conveyance to his vendors was registered—was one going to the root of the title, the defendant's delay might not deprive him of the right to the consideration which he asked.

The conclusion reached in Blachford v. Kirkpatrick (1842), 6 Beav. 232, rested largely on the fact that the objection in that case went to the root of the title. Armstrong v. Nason (1895), 25 S.C.R. 263, could be safely relied upon as an authority here, the present objection not going to the root of the title.

Judgment for the plaintiffs for specific performance, with costs.

BOYD, C., IN CHAMBERS. APRIL 25TH, 1916.

*REX v. DARROCH.

Criminal Law—Keeping "House of Ill-fame"—Summary Trial and Conviction by Police Magistrate—Jurisdiction without Consent—Criminal Code, R.S.C. 1906 *ch.* 146, *sec.* 774—*Change in Wording by Amending Act* 8 *&* 9 *Edw. VII. ch.* 9—"*Disorderly House*"—*Power to Amend Conviction— Criminal Code, secs.* 791, 852, 1124—"*Prior Known Decision*"—*Judicature Act, R.S.O.* 1914 *ch.* 56, *sec.* 32.

Motion on behalf of the defendant for an order quashing her

conviction by one of the Police Magistrates for the City of Toronto for keeping a "house of ill-fame."

A. G. Ross, for the defendant.
J. R. Cartwright, K.C., for the Attorney-General.

THE CHANCELLOR, in a written opinion, referred to the various words used in the statutes descriptive of the same kind of house—disorderly house, bawdy-house, house of ill-fame, etc. Section 774 of the Criminal Code, R.S.C. 1906 ch. 146, gave absolute jurisdiction to the magistrate in case of a person charged with keeping a disorderly house, house of ill-fame, or bawdy-house. But in 1909, by 8 & 9 Edw. VII. ch. 9, a new section was substituted for 774, reading: "The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate . . ." The argument was, that the magistrate had no jurisdiction (without consent) to convict for keeping a "house of ill-fame."

The conviction, the Chancellor said, should be treated as a good conviction in respect of an offence committed, no matter by what one of many synonyms it might be designated. The defendant was well aware of what was charged; she appeared and made defence and offered evidence. If there was any superficial error in the way the charge was formulated and the conviction drawn up, it was susceptible of amendment according to the facts proved. Reference to secs. 791, 852, and 1124 of the Criminal Code.

In Rex v. Hayes (1903), 5 O.L.R. 198, the charge involved matters of substance and not of form.

It was said in argument that a decision of Middleton, J., on the 11th April, 1916, in Rex v. McKenzie, unreported, was a "prior known decision" against the conclusion as to the right to amend; but the Chancellor had conferred with Middleton, J., who entirely concurred in the present judgment: see the Judicature Act, R.S.O. 1914 ch. 56, sec. 32.

The conviction should be amended so as to conform with the amended sec. 774, and the motion should be dismissed.

BOYD, C., IN CHAMBERS. APRIL 25TH, 1916.

*RE D'ANDREA.

Infant—Custody—Neglected Child—Children's Aid Society—Order of Commissioner of Juvenile Court—Foster-home Found by Society—Application of Parent for Return of Child—Discretion of Court—Welfare of Infant—Apprentices and Minors Act, R.S.O. 1914 *ch.* 147, *secs.* 3 (1), 4—*Children's Protection Act of Ontario, R.S.O.* 1914 *ch.* 231, *secs.* 14, 27.

Application by the father of the infant Lilli D'Andrea, upon the return of a habeas corpus, for an order for the delivery of the infant into his custody by the Children's Aid Society of Toronto and foster-parents with whom the society had placed the child.

At the time of the application, the child was eight and a half years old. Three months before the birth of the child, the father had deserted the mother (his wife) and his other children. In June, 1913, while the father was still absent and the mother was undergoing a three months' imprisonment in the Mercer Reformatory, the child was taken by the Children's Aid Society of Toronto; and the Commissioner of the Juvenile Court, upon the child being brought before him and evidence given, found her to be a neglected child, and committed her to the care of the society, by which she was placed in a foster-home. In June, 1914, the father and mother came together again, and since then had continued together in a commendable manner, according to affidavits filed. In November, 1914, the father applied to the society for the return of the child. The society refused, on the ground that the welfare of the child would be best served by leaving it in the foster-home. The present proceeding by habeas corpus was begun in 1915; the delay in bringing it to a hearing was because the officers of the society refused to disclose the name and abode of the foster-parents, and in refusing so were upheld by the Court.

The application was heard in Chambers on the 19th April, 1916.

Frank Denton, K.C., for the applicant.

W. B. Raymond, for the society and the foster-parents.

THE CHANCELLOR, after setting out the facts in a written opinion, said that, had the applicant always lived in his home as now, the removal of the child could not have taken place—the parents by their conduct opened the door for the benevolent

work of the Children's Aid Society to act in loco parentis to the deserted child. The intervention of the society had duly reached its culmination in finding a new and suitable home for the waif so rescued; and the Court ought not, on general principles, lightly to interfere with the status quo. The removal having rightly taken place, and the child having been legally taken over by the statutory guardian and legally transferred to foster-parents, who stand, by the act of the law, in loco parentis, she should not be taken away from an unexceptionable home, in a healthy locality, and transferred to the crowded life of a city, with no reasonable assurance that her well-being would be in any wise bettered by such a change.

Reference to the Apprentices and Minors Act, R.S.O. 1914 ch. 147, secs. 3 (1), 4; the Children's Protection Act of Ontario, R.S.O. 1914 ch. 231, secs. 14, 27; In re McGrath, [1893] 1 Ch. 143, 148; In re Goldsworthy (1876), 2 Q.B.D. 75, 84; In re Agar-Ellis (1883), 24 Ch.D. 317, 326; Eversley on Domestic Relations, 3rd ed., p. 510; In re Connor (1863), 16 Ir. C.L.R. 112, 118; In re O'Hara, [1900] 2 I.R. 232; Smart v. Smart, [1892] A.C. 425, 435.

The age of the child, not yet nine years old, is not such as to require the Court to ascertain her views.

The applicant has to prove or to shew in some satisfactory way that the removal of the child from the custody of the foster-parents will enure to the welfare of the child. The onus on the applicant has not been discharged.

Application refused without costs.

MIDDLETON, J. APRIL 25TH, 1916.

BANK OF BRITISH NORTH AMERICA v. TURNER.

Promissory Notes—Demand Notes Made by Directors of Company and Endorsed by Company as Collateral Security for Company's Indebtedness to Bank—Action by Bank against one of Several Directors—Motion for Summary Judgment under Rule 57—Suggested Defences—Hypothecation Agreement—Ultimate Balance of Indebtedness—Realisation of other Securities—Suretyship—Matured Debt.

Appeal by the plaintiffs from an order of the Master in Chambers refusing the plaintiffs' motion for summary judgment under Rule 57.

G. Larratt Smith, for the plaintiffs.

G. S. Hodgson, for the defendant.

MIDDLETON, J., read a judgment in which he said that a certain incorporated company was a customer of the plaintiff bank, and the defendant was a director of the company. The company owed the bank $31,288, and as security for this debt held: (a) an hypothecation of the manufactured and unmanufactured goods of the company of the nominal value of $26,000; (b) an assignment of book-debts amounting to about $8,000; (c) customers' bills current for $5,500 and past-due $5,200; (d) a note made by one Playfair for $1,500; and (e) the notes upon which the defendant was sued, viz., a note for $32,000, payable one day after demand, dated the 21st November, 1913, made by the defendant and his co-directors in favour of the company, and endorsed by the company to the bank, and a similar note for $3,000, of the 15th December, 1913, also endorsed to the bank. Payment of the notes had been demanded and refused, and the notes had been protested.

At the time the notes were endorsed to the bank in December, 1913, an hypothecation agreement was signed, not only by the company, but also by the makers of the notes, presumably to indicate their assent to the terms upon which the notes were held by the bank. Under the agreement, the notes and the proceeds thereof were to be held as a general and continuing security, collateral to the debt of the company to the bank, and for any ultimate balance of such indebtedness.

The bank now sued Turner as maker of these notes, but limited their claim to the amount due by the company.

The defendant filed an affidavit in which he set up as a defence that the bank could not sue him until it had realised upon all the other security which it held as collateral to the debt, basing this contention upon the reference in the agreement to the ultimate balance of the indebtedness.

This, the learned Judge said, ignored the terms of the agreement—the security was collateral to the whole debt, and not merely for the ultimate balance. The agreement shewed that the bank advanced money to the company on the faith of these demand notes, which gave the bank the right at any time they thought it necessary or advisable in their own interest to call for immediate payment, without waiting till other collateral security should become due or be realised upon.

It was argued that the bank must fail, because the defendant was, to the knowledge of the bank, a surety for the company, and so could not be sued till the debt had matured so far as the company was concerned.

This ignored the fact that the debt was due, so far as the company was concerned. The company and the directors were parties to the same note, and on one day's demand it became due as to all.

The appeal should be allowed and judgment should be granted for the amount now due the bank and costs; the amount to be shewn by an affidavit giving credit for all money received pending the action, on account of the debt, to be filed before judgment actually issues.

MIDDLETON, J. APRIL 26TH, 1916.

POWERS & SON v. HATFIELD & SCOTT.

Contract—Sale of Goods—Formation of Contract from Correspondence—Acceptance of Offer—Absence of Ambiguity—Breach by Failure of Vendor to Deliver Goods—Abandonment—Rise in Market-price—Failure to Prove Damage—Time of Breach.

Action for damages for breach of an alleged contract for the sale by the defendants to the plaintiffs of five car-loads of potatoes.

The plaintiffs were dealers at Trenton, Ontario, and the defendants were dealers at Montreal.

The allegation of a contract was based upon correspondence as follows:—

Telegram from the plaintiffs to the defendants on the 14th October, 1915: "Wire at once what you can give us five cars number one White Delaware potatoes delivered Trenton."

Telegram in answer, next day: "Offer four cars Delaware dollar fifteen delivered Trenton immediate acceptance."

("Four" was a mistake for "five.")

Telegram of the 16th October, plaintiffs to defendants: "Your wire of October 15th will accept try and ship them week apart wire if you can give us four cars more."

Letter of the 16th October, defendants to plaintiffs: "Cannot quite agree to ship your cars a week apart on the prices we have quoted you, but will ship them at slow intervals apart."

No reply was made to this letter, and the defendants, regarding this as a cross-proposal which was not accepted, did nothing further.

The next action was on the 17th December, when the plaintiffs wrote a letter requesting delivery of the four cars.

Correspondence followed, in which the plaintiffs maintained and the defendants denied that there was a completed contract

on the three telegrams. On the 27th December, the defendants' position was made plain.

On the 16th October, the market fell from $1.15 to $1.10, then rose to $1.15, and remained at about that price till the middle of November, when it rose to $1.30, and remained about the same till the 1st December, when it rose to $1.40; and, after a period of stagnation, during which the price rose a little, there was an abrupt rise; on the 8th January, 1916, on which day the plaintiffs threatened action, the market price was $1.85.

The action was tried without a jury at Belleville.

E. G. Porter, K.C., for the plaintiffs.

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

MIDDLETON, J., in a written opinion, after stating the facts, said that he was quite satisfied that the defendants acted throughout in perfect good faith; they thought there was no contract.

The question whether there was a contract must be determined from the correspondence.

"It is for the plaintiff, in an action for breach of contract, to shew that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe:" Falck v. Williams, [1900] A.C. 176.

The telegram of the 16th was not an attempt to introduce a new term into the contract; it was an acceptance, followed by a request for a favour in regard to the mode of shipment.

There was thus a contract: but there were two answers to the plaintiffs' claim. First, the contract was in effect abandoned when the plaintiffs, in face of the falling or stationary market, allowed matters to slumber for two months—the contract was not for future delivery. Second, the plaintiffs had not sustained any damage, or at most nominal damage, for the contract was one under which the goods should have been delivered at once—at most within two or three weeks—and was broken at a time when other potatoes could have been bought at a price not exceeding the contract price.

If the breach took place later—on the 27th December—the damages would be 25 cents per bag on 1,700 bags, or $425.

Action dismissed with costs.

SUTHERLAND, J. APRIL 27TH, 1916.

PRUDENTIAL SECURITIES LIMITED v. SWEITZER.

Vendor and Purchaser—Agreement for Sale of Land in Alberta—Vendors' Guaranty of Rise in Value—Construction—Fulfilment—Default in Payment of Instalments of Purchase-Money—Recovery of Default Judgment in Alberta Court—Jurisdiction—Action Subsequently Brought in Ontario—Merger.

Motion by the plaintiffs for judgment upon admissions made by the parties in an action to recover the amount of a money-judgment, recovered by the plaintiffs against the defendant in the Supreme Court of the Province of Alberta.

The motion was heard in the Weekly Court at London.

L. H. Dickson, for the plaintiffs.

J. B. McKillop, for the defendant.

SUTHERLAND, J., set out the facts in a written opinion. On the 31st January, 1913, the plaintiffs, in writing, agreed to sell land in Alberta to the defendant for $1,200, payable $400 on the date of the agreement (that was paid) and $400 on the 31st July in each of the years 1913 and 1914. The agreement contained this clause: "The vendors hereby agree that the purchaser will realise an increase on the above-described lot, at the rate of 25 per cent. on the money invested in it, within the term of one year from this date." On the 13th March, 1915, the plaintiffs, alleging that the defendant had made default in the subsequent payments, obtained a default judgment against him in the Alberta Court for $1,008.15, which included principal, interest and costs.

This action was brought in the Supreme Court of Ontario to recover the amount of the Alberta judgment and interest, or, in the alternative, to recover the sum of $1,020.50, balance of purchase-money and interest under the agreement.

The admissions made by both parties included the fact of the recovery of the Alberta judgment; that the defendant was not at the time of the recovery nor at any time resident or domiciled in Alberta, and did not submit to the jurisdiction of the Court there; that the plaintiffs were the owners of the land and in a position to convey with a good title; that the defendant had personally inspected the land before purchasing; that between the 31st January and the 31st July, 1913, the land had advanced in value to

the extent of $100, and could have been sold for $1,300; that the plaintiffs did not communicate to the defendant any information as to the increase, nor offer to sell the land for him at the advanced price; that the defendant did not employ the plaintiffs to sell the land; that the defendant had paid no more than the $400; and that the defendant had not tendered to the plaintiffs a reconveyance.

The Alberta judgment, the learned Judge said, was not binding upon the defendant in Ontario, and the action was maintainable here. The foreign judgment was not a merger of the original cause of action; the plaintiff might sue either upon the original cause of action or upon the judgment: Trevelyan v. Meyers (1895), 26 O.R. 430; Bugbee v. Clergue (1900), 27 A.R. 96; S.C., sub nom. Clergue v. Humphrey (1900), 31 S.C.R. 66.

The clause of the agreement above-quoted should be construed to mean that the lot would increase or advance in value within a year to such an extent that, if the defendant saw fit to sell, he could realise the profit mentioned. The plaintiffs did not agree to apprise the purchaser of an increase. The plaintiffs' covenant was satisfied by the fact of the increase.

Judgment for the plaintiffs for the balance due on the contract, with interest and costs.

SUTHERLAND, J. APRIL 27TH, 1916.

*DODDS v. HARPER.

Land Titles Act—Assignment of Charge—"Subject to the State of Account"—R.S.O. 1914 *ch.* 126, *sec.* 54(4)—*Conveyancing and Law of Property Act, R.S.O.* 1914 *ch.* 109, *secs.* 2, 7—*Charge Executed in Blank—Moneys Advanced by Assignee Misappropriated by Agent of Chargee—Right of Assignee to Enforce Charge—Authority to Receive Moneys Advanced—Fraud—Mortgage—Foreclosure.*

An action by a second mortgagee to enforce by foreclosure a mortgage or charge made by the defendant upon land which had been bought under the Land Titles Act.

The action was tried without a jury at Toronto.

J. E. Jones and V. H. Hattin, for the plaintiff.

S. H. Bradford, K.C., for the defendant.

SUTHERLAND, J., set out the facts in a written opinion. There was a prior mortgage or charge upon the land; and the defendant

negotiated with one Constant for an advance of $800 upon a second mortgage or charge. A written, but unsealed, charge or mortgage under the Land Titles Act for $1,000 and interest, dated the 10th December, 1914, covering the land, was prepared by Constant, the name of the chargee being left blank, and in that form was signed by the defendant. After the execution, Constant filled in the name of his wife as chargee. Constant applied to the plaintiff for a loan on the land, and told her that, if she would advance $850, he could procure a mortgage for which she would receive $1,000; the plaintiff agreed, and Constant's wife on the 19th December, 1914, executed an assignment to the plaintiff of the charge for $1,000. The charge and assignment were registered in the Land Titles office at Toronto on the 23rd December, 1914. The plaintiff's solicitors drew a cheque for $835 (their costs being $15), in favour of Constant's wife, who endorsed the cheque; Constant received the money for it, appropriated it to his own use, and afterwards disappeared.

The defendants set up that the plaintiff became assignee of the charge subject to the existing state of the accounts between chargor and chargee; and that the onus was upon the plaintiff to shew that Constant was clothed with authority to receive the money from the plaintiff, and had failed to satisfy the onus.

It was important, the learned Judge said, to consider the effect of the words "subject to the state of the account" in sub-sec. (4) of sec. 54 of the Land Titles Act, R.S.O. 1914 ch. 126—"Every transfer of a charge shall be subject to the state of account upon the charge between the chargor and the chargee." The learned Judge was of opinion that sec. 54 was to be read in conjunction with secs. 2 and 7 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109. This charge was to be considered and treated as though it were an instrument under seal, a mortgage (see secs. 30 and 102 of the Land Titles Act); and, no notice having been brought home to the plaintiff that the consideration acknowledged therein by the chargor had not in fact been paid, the effect of the words "subject to the state of account" was, that it was only in so far as the chargor had made payments to the chargee subsequent to the date of the charge that the assignee could be affected by the state of the accounts; and here, of course, no such payments were made.

On the question of the authority of Constant to receive the money, counsel referred to such cases as McMullen v. Polley (1886-7), 12 O.R. 702, 13 O.R. 299; but this was rather a case in which the chargor, by his own indiscretion in signing the charge in blank and delivering it in this condition to Constant, put it in his power to insert his wife's name as the chargee and deceive the plaintiff.

In the circumstances, the plaintiff had a right to treat Constant's wife as a valid holder of the charge; it was the ignorance or lack of caution of the defendant that led to the commission of the fraud, and he must suffer rather than the plaintiff.

Reference to Coole's Law of Mortgages, 8th ed., vol. 2, pp. 1320, 1321; Farquharson v. King, [1902] A.C. 325; Jones v. McGrath (1888), 16 O.R. 617; Manley v. London Loan Co.; (1896), 23 A.R. 139; and other cases.

Judgment for the plaintiff for foreclosure as prayed; the plaintiff agreeing, her claim is limited to $850, the amount actually advanced, with appropriate interest, and with costs.

BOYD, C. APRIL 27TH, 1916.

*RE CUTTER.

Will—Construction—Real and Personal Estate Given to Executors upon Trust—Residuary Gift in Favour of Sister—Gift over—Absolute Interest Cut down to Life Interest—Gift over in Event of Marriage of Sister—Invalidity—"Revert"—"Unused or Unexpended Balance"—Maintenance of Sister—Allowance—Encroachment upon Capital—Insurance Moneys—Moneys in Specie—Usufruct of Land.

Motion by the executors and trustees under the will of George W. Cutter, deceased, for an order declaring the true construction of the will upon certain questions arising under the gifts, devises, and bequests therein.

The testator died on the 3rd October, 1915, at the city of Mishawaka, in the State of Indiana, having a fixed place of abode in Ontario. The will was dated the 15th April, 1915, and was admitted to probate on the 6th January, 1916.

The testator gave all his estate and effects to his executors and trustees in trust for the purposes mentioned in the will, viz.: (1) to pay all debts and testamentary expenses; (2) to pay a legacy of $1,000 to a friend, and to give certain personal chattels to the friend's wife; (3) to pay a legacy of $300 to another friend; (4) to hand over certain personal chattels to a named society (an Odd Fellows Lodge, to which he belonged) and to certain named persons; (5) "To my sister Rose A. Cutter I leave all the residue of my estate. On the decease of my sister Rose A. Cutter the unused or unexpended balance shall revert to the Odd Fellows Home of Toronto, Ontario. In the event of the marriage of my sister Rose all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home of Toronto, Ontario."

The testator was a widower and childless, and his sister was his only near relative. She lived at Mishawaka, where the testator died.

The estate consisted of: (1) debentures worth about $4,500; cash in banks about $10,000; furniture, pictures, and jewels, worth about $700; a life policy in the Odd Fellows Association for $1,000; a parcel of land in Toronto, valued at $4,000: total, about $19,000; residue, about $17,500.

The motion was heard in the Weekly Court at Toronto.

R. G. Smythe, for the applicants.

D. Inglis Grant, for the sister.

O. L. Lewis, K.C., for the Odd Fellows Home.

THE CHANCELLOR, in a written opinion, said that he had much difficulty with the first part of the clause above-quoted. He referred to Bull v. Kingston (1816), 1 Mer. 314; Jasman on Wills, ed. of 1910, vol. 2, p. 1208; Constable v. Bull (1849), 3 De G. & S. 411; Bibbens v. Potter (1879), 10 Ch. D. 733, 735; Re Sheldon and Kemble (1885), 53 L.T.R. 527; In the Estate of Lupton, [1905] P. 321; Philson v. Stevenson (1903), 37 Ir. L.T.R. 104, 225; Roman Catholic Episcopal Corporation of Toronto v. O'Connor (1907), 14 O.L.R. 666; and said that the weight of authority and the manifest intention of the testator to benefit the Odd Fellows, as well as his sister, led to the conclusion that the apparently absolute gift should be cut down to a life estate.

The second part of the clause quoted, giving the estate over in the event of the sister's marriage, was void as in general restraint of marriage: Lloyd v. Lloyd (1852), 2 Sim. N.S. 255, 263. This rule applies to mixed funds: Bellairs v. Bellairs (1874), L.R. 1899, 510, 516; and to real and personal estate given together: Dudley v. Gresham (1878), 2 L.R. Ir. 442; In re Pettifer, [1900] W.N. 182. This condition of forfeiture being taken out of the will, it leaves the sister with an estate for life; see Re Coward (1887), 57 L.T.R. 285, 287, 291; Allen v. Jackson (1875), 1 Ch. D. 399.

There was no difficulty as to the import of the direction that on the death of the sister the balance should "revert" to the Odd Fellows Home. "Revert" is a flexible term, and sufficiently expresses the intention of the testator that the estate shall go to the home: Jardine v. Wilson (1872), 32 U.C.R. 498, 502; O'Mahoney v. Burdett (1874), L.R. 7 H.L. 388, 393; Cowan v. Allen (1896), 26 S.C.R. 292, 312.

The trustees desired a direction as to how they should deal with the estate, in view of the life-tenant being non-resident. It

was said that she was about 54 years of age. Reference to Re Johnson (1912), 27 O.L.R. 472; In re Thomson's Estate (1880), 14 Ch. D. 263; Re Fox (1890), 62 L.T.R. 762; In re Ryder, [1914] 1 Ch. 865. "The unused or unexpended balance" is to go over. This contemplates that she shall use and shall expend what is bestowed—but to what extent? The Chancellor answers that the whole residue may be employed so far as it may prove sufficient for her comfortable maintenance suitable to her state in life: if necessary, the capital may and should be encroached upon for the purpose of her proper maintenance, but for no other purposes.

The sister is entitled in specie to the money and other articles *quæ ipso usu consumuntur:* In re Tuck (1905), 10 O.L.R. 309, 311, 312. If the insurance money goes to the trustees under the trusts of the will, it should be regarded as money. The sister will be entitled as of course to the corpus from the debentures and the usufruct of the land.

If any difficulty arises, there will be a reference to ascertain to what the sister is entitled as a yearly allowance for maintenance; but an amicable arrangement will probably be made.

Costs of all parties out of the estate.

LENNOX, J. APRIL 27TH, 1916.

CITY OF WINDSOR v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY.

Street Railways—Extension of Lines upon Streets of City—Operation of Railway—Want of Authority—Ontario Railway Act, 3 & 4 *Geo. V. ch.* 36, *secs.* 6, 250, 251—*Municipal Franchises Act*, 2 *Geo. V. ch.* 42, *sec.* 4—*Trespass—Declaration of Right—Damages—Injunction.*

The acts of the defendants complained of in this action were the same as those which gave rise to the action of Mitchell and Dresch v. Sandwich Windsor and Amherstburg R.W. Co. (1914), 32 O.L.R. 594. In April, 1914, the defendants, with the object of constructing and establishing a street railway thereon, broke up and destroyed permanent pavements upon certain streets in the city of Windsor and made excavations in the roadways.

The plaintiffs asked, inter alia, for a declaration that these acts were wrongful and that the defendants had no rights upon these streets, and for an injunction and damages.

The action was tried without a jury at Sandwich.

J. H. Rodd and F. D. Davis, for the plaintiffs.
A. R. Bartlet and G.A. Urquhart, for the defendants.

LENNOX, J., read a judgment in which he set out the history of the events leading to this action, which was begun on the 19th October, 1915, and the facts of the case, and referred to the judgment of the Second Divisional Court of the Appellate Division in the Mitchell case, above-mentioned.

The learned Judge then stated his opinion that the defendants had not a legal right to do the acts complained of; that they were wrongdoers in entering upon and excavating the streets referred to; that the plaintiffs, by reason of the defendants' acts, were compelled to expend money to restore the streets and put them in a reasonable state of repair and make them safe and reasonably convenient for public user; the plaintiffs were entitled to damages, and also to a declaration that the defendants had no right to use or occupy the streets from Sandwich street to London street for the construction or operation of a street railway thereon, and to an injunction against the defendants.

Reference to secs. 6, 250, and 251 of the Ontario Railway Act, 3 & 4 Geo. V. ch. 36; sec. 4 of the Municipal Franchises Act, 2 Geo. V. ch. 42; Little v. Wallaceburgh (1876), 23 Gr. 540; In re Great Western R.W. Co. and Corporation of North Cayuga (1872), 23 U.C.C.P. 28; Halsbury's Laws of England, vol. 27, p. 184, paras. 356, 357, 358, and notes; Maxwell on the Interpretation of Statutes, 5th ed., pp. 485, 486, 487, and cases collected.

Judgment for the plaintiffs for $900 damages. This includes restoring the streets to as good a condition as they were in on the 6th April, 1914. If, however, in the ultimate disposal of this action it should be determined that the defendants have a right to use these streets in the way proposed, the further expenditure spoken of will not be necessary, and the plaintiffs should be confined to the expenditure already made, placed at $500.

There should be a declaration that the defendants were not and are not entitled to use or occupy the streets in question (not including London street) for the construction or operation of a railway, and an injunction restraining them from doing so.

The plaintiffs should have the costs of the action, including the costs of the appeal from the order of the Railway Board.

MIDDLETON, J. APRIL 29TH, 1906.

*UNITED STATES PLAYING CARD CO. v. HURST.

Trade Mark—Infringement—Colourable Imitation—Trade Name—Intent to Deceive—"Passing off"—Evidence—Laches and Acquiescence—Abandonment—Injunction—Damages — Profits—Reference—Costs.

Action to restrain the defendant from infringing certain trade marks of the plaintiff company for playing cards.

These trade marks consisted, first, of the word "Bicycle" as applied to playing cards; secondly, of three designs, separately recorded as trade marks. These trade marks were registered by the plaintiff company on the 3rd August, 1906, but the marks had been in use during many previous years.

The action was tried without a jury at Toronto.

D. L. McCarthy, K.C., and Britton Osler, for the plaintiff company.

F. B. Fetherstonhaugh, K.C., and A. C. Heighington, for the defendant.

MIDDLETON, J., set out the facts in a written opinion, and said that the proper inference from all the evidence was that the defendant and Messrs.Goodall & Co.,the largest English manufacturers of playing cards, conspired together to defraud the plaintiff company of its trade name and of the profits legitimately its as the result of its advertising and enterprise.

Numerous defences were argued, but none of them had been made out.

Under our law, a trade mark exists independently of registration; and here the plaintiff company was entitled to succeed, not only by virtue of its trade marks, but because a plain case of "passing off" had been made out. No person who had been deceived was called as a witness; but, where the intention to pass off is abundantly proved, and the goods are put up in such an imitative form as to make the passing off easy, it is not by any means essential that an actual case of passing off should be proved.

It was said that the plaintiff company had, by acquiescence and laches, abandoned its trade marks, and that they had become publici juris, not only because of the defendant's user, but because of the manufacture, by two Montreal makers, of cards which might be deemed infringements; but these were not really infringements. Another firm manufactured a card called the "Bicyclette," which was probably intended as an imitation of the plaintiff company's

"Bicycle" card, and may well have been put out fraudulently; but it was not shewn that the plaintiff company knew of this card, nor of a similar one called the "Senator."

It was also said that Goodall & Co. had, long prior to their employment of the defendant, themselves used the word "Bicycle" in connection with playing cards; but the limited use of the word "Bicycle," as the name of a series, was insufficient to prevent the plaintiff company from acquiring an exclusive trade mark for their bicycle series. "Long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction:" Halsbury's Laws of England, vol. 27, p. 774.

There was no sufficient evidence of any acquiescence in the user by the defendant or Messrs.Goodall & Co.,to constitute an abandonment.

Reference to Ford v. Foster (1872), L.R. 7 Ch.611, 625, 628; National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co., [1894] A.C. 275.

Judgment for the plaintiff company restraining the defendant from the infringement of the plaintiff company's trade marks, including the use of the word "Bicycle," but not including the use of the pictures of bicycles found on the "Viceroy" card.

The defendant should pay the costs of the action and $250 damages, subject to the right of either party, at its own risk as to costs, to have a reference as to damages, and subject to the right of the plaintiff company, at its own risks as to costs, to have an inquiry as to profits.

GAGE v. REID—MASTER IN CHAMBERS—APRIL 12.

Security for Costs—Action against Constable for Assault and False Imprisonment—Protection of Public Authorities Act, R.S.O. 1914 *ch.* 89, *sec.* 16—*Affidavit—Inquiry as to Means of Plaintiff—Defence.*]—Motion by the defendant (the Chief of Police of Orillia), under sec. 16 of the Public Authorities Protection Act, R.S.O. 1914 ch. 89, for an order for security for costs in an action brought against him in trespass for assault and false imprisonment. The defendant, in the affidavit upon which his application was grounded, sworn on the 4th April, 1916, sought to maintain his claim to an order for security by setting up, as the only allegation of inability to satisfy the costs of the action, if determined against him, that he had made inquiry, and was advised and believed that the plaintiff did not possess the requisite means to defray such costs. In cross-examination upon this affidavit, the defendant admitted that

no other inquiry was made regarding the plaintiff's financial standing than one addressed to the plaintiff himself on the 7th February, which elicited the answer that he was without means. As to the existence of a good defence on the merits, the defendant alleged that he had arrested the plaintiff on a telegram from a License Inspector, and detained him in the lock-up or police station at Orillia until a constable from Belleville should arrive with warrants of commitment issued to enforce two convictions under the Liquor License Act, when he passed him over to the latter's charge, and that he believed that he had the right to do as he did, and that he acted in good faith and without malice or any improper motive. The Master held that the motion failed upon both of these essential points. *Quære*, whether sec. 16 of the Act entitles any officer other than a Justice of the Peace to security for costs. Motion dismissed with costs to the plaintiff in any event. H. S. White, for the defendent. J. B. Mackenzie, for the plaintiff.

TOUGH OAKES GOLD MINES LIMITED v. FOSTER—KELLY, J. —APRIL 22.

Company—Directors—Motion to Restrain from Acting as such—Ownership and Control of Shares—Interim Injunction.]—Motion by the plaintiffs for an interim injunction restraining the defendants from acting or assuming or attempting to act as directors of the plaintiff company, and for other relief. The motion was heard in the Weekly Court at Toronto. The learned Judge (in a written opinion) said that the question of the right to vote at what was said to have been a meeting of the shareholders of the plaintiff company upon or in respect of two blocks of the capital stock of the company, one of 25,000 shares and the other of 15,000 shares, at one time owned by Myrtice Oakes and Winnifred Robins respectively, the ownership of which had passed from them, was material to the determination of the present application. The plaintiffs asserted that, by virtue of an injunction order issued in an action pending in England, the plaintiffs in that action had reserved to them the right to direct as to the voting in respect to these shares, which, with others, were at the time the subject of litigation pending in the English Courts; and that at what they said was a meeting of the plaintiff company's shareholders held on the 26th January, 1916, that right was exercised by direction of Mr. Burt, who, they asserted, sufficiently represented the English company for that purpose. The learned Judge was not convinced that there was sufficient warrant, on a motion of this kind, for interference with the administration of the company's affairs, such as by the injunc-

tion asked for, pending the determination at a trial of the rights of the various parties. Apart from other considerations leading to the conclusion reached, the learned Judge said, in so far as the plaintiffs' right to restrain the defendants from acting as directors depended on the votes representing the two blocks of stock above mentioned, and assuming that the English Tough Oakes Company was entitled to direct how these shares were to be represented and voted upon, he would hesitate, on an application of this kind, and in a matter where the consequences of disturbing existing conditions might be very serious, to find that the evidence of the exercise of the right in that company to direct the manner of voting on the occasion referred to, the 26th January, 1915, was satisfactory. Application dismissed; costs reserved to be determined by the trial Judge. R. McKay, K.C., and A. G. Slaght, for the plaintiffs. G. H. Watson, K.C., and S. J. Birnbaum, for the defendants.

FOSTER v. OAKES—KELLY, J.—APRIL 22.

Company—Ownership and Control of Shares—Power of Voting on Shares—Interim Injunction.]—Motion by the plaintiffs to continue an interim injunction restraining the defendants from transferring, holding, or representing, or attempting to transfer, hold, represent, or otherwise deal with certain shares of the capital stock of the Tough Oakes Gold Mines Limited (a co-plaintiff with the plaintiff Foster), or from interfering with or stating or representing any right of the defendants to deal with or represent or vote upon these shares. The motion was heard in the Weekly Court at Toronto. The learned Judge, after shortly stating the facts in a written opinion, said that the position of the defendants upon the motion was not meritorious. The affairs of the company, or rather the question of the ownership or control of large blocks of its capital stock, had become the subject of litigation in other actions, all now pending, some in Ontario and some in England, and injunctions had been issued for various purposes both here and there. Whatever might be said about the strict technical right of the defendants to exercise the powers sought to be restrained, if the matter were being determined at a trial, there was no sufficient ground for refusing to continue the injunction already granted. No hardship such as would justify a removal of the restraint could accrue to the defendants; while, on the other hand, persons having substantial beneficial interests in the company would, pending the determination of important questions relating to the company, be exposed to the risk of having these interests

dealt with or interfered with by the votes or other acts of those who had absolutely no beneficial interest in these shares. Injunction continued till the trial; costs of the motion to be disposed of by the trial Judge. G. H. Watson, K.C., and S. J. Birnbaum, for the plaintiffs. R. McKay, K.C., and A. G. Slaght, for the defendants.

UPPER CANADA COLLEGE v. CITY OF TORONTO—FALCONBRIDGE, C.J.K.B.—APRIL 25.

Municipal Corporations—Assessment and Taxation for Local Improvements—Liability of School Corporation—Local Improvement By-laws—Widening of Street—Powers of Municipality—Action for Declaration and Injunction—Costs.]—Action for a declaration that three local improvement by-laws of the defendants, in respect of the widening of Oriole road and parkway, were ultra vires and void, upon the ground that the majority of owners of property assessed had not given their consent, and upon other grounds, and for an injunction restraining the defendants from proceeding with the work. The action was tried without a jury at Toronto. The learned Chief Justice said that the chief point in the case was whether or not the plaintiffs were liable for assessment and taxation for local improvements; and upon that and the minor points involved he adopted the contentions of counsel for the defendants and of counsel for P. W. Ellis and others, who was heard as amicus curiæ. The action should be dismissed. The parties were public bodies—both trustees—and each (no doubt in good faith) asserting what each believed to be just rights, and so there should be no order as to costs. The amendment asked for by the plaintiffs at the trial should be allowed. Frank Arnoldi, K.C., and D. D. Grierson, for the plaintiffs. Irving S. Fairty, for the defendants. H. E. Rose, K.C., for P. W. Ellis and others.

MCLEOD v. MCILMOYLE—FALCONBRIDGE, C.J.K.B.—APRIL 27.

Contract—Action for Money Payable under—Counterclaim for Rectification—Failure to Establish—Evidence.]—Action to recover $4,655 upon an agreement. The defendant counterclaimed for rectification of the agreement and for the return of $75 paid. The action was tried without a jury at Peterborough. The learned Chief Justice said that the attempt of the defendant to make out a case for reformation failed; and the testimony of the plaintiff

should be accepted in preference to that of the defendant when their stories conflict. But in any case there was no mutual mistake and there was no fraud on the plaintiff's part. The Mortgagors and Purchasers Relief Act, 1915, did not apply. Judgment for the plaintiff for $3,325 with interest and costs. G. H. Watson, K.C., for the plaintiff. G. N. Gordon, for the defendant.

TRUSTS AND GUARANTEE CO. LIMITED v. BOAL—SUTHERLAND, J. —APRIL 27.

Trusts and Trustees—Conveyance of Land to Brother—Express Trust for Sale and to Make Certain Payments—Validity of Sale—Advances—Action by Administrators of Grantor—Account—Costs.] —Action for a declaration that the defendant holds certain lands conveyed to him in January, 1915, by his brother Robert Boal, now deceased, as bare trustee for the estate of the brother, represented by the plaintiffs as administrators; to compel the defendant to transfer the lands to the plaintiffs, and to hand over to the plaintiffs such of the personal property of the deceased as has been taken possession of by the defendant; for an injunction restraining the defendant from dealing with the estate of the deceased; and for an account of his dealings with the estate. The action was tried without a jury at Toronto. The learned Judge set out the facts in a written judgment, and stated his conclusion that the conveyance of January, 1915, was upon an express trust to sell the lands, pay $400 to one Nichols, pay or retain any moneys advanced on behalf of the deceased, and hold the balance for the deceased. The defendant sold the land for $1,100, which, upon the evidence, was a fair and reasonable price. Part of the $1,100 was paid in cash, and the defendant paid Nichols $400 thereout. The sale should be confirmed and carried to completion. From the balance of the money in his hands after deducting the $400 paid to Nichols, the defendant should be at liberty to deduct any proper advances made by him to or on account of the deceased before the death, and any further proper sums paid in connection with the effecting and carrying out of the sale. Certain personal articles belonging to the deceased, taken possession of by the defendant, belonged to the estate. The defendant had substantially succeeded in his defence, and was entitled to deduct from any balance in his hands his costs of defence. If the plaintiffs and defendant cannot agree as to the amount of the advances of the defendant to his brother's estate, there should be a reference to ascertain the amount. M. J. Folinsbee, for the plaintiffs. W. A. Skeans, for the defendant.

BANQUE NATIONALE v. SAENGER—LENNOX, J.—APRIL 28.

Money Demand—Action for—Defence—Payment—Evidence—Reservation of Rights as to Moneys Collected in Foreign Country—Interest—Costs.]—The plaintiffs' claim, as specially endorsed upon the writ of summons, was to recover 342,985.88 francs, or about $68,597.57. Ruldolf Saenger, one of the defendants, made an affidavit, filed with the appearance, in which he swore that he and his co-defendant had a good defence to this action on the merits, viz., "that from the assets of myself and co-defendant in France the plaintiffs have been paid the amount of their claim." The action was tried without a jury at Toronto. The learned Judge said that the examination of the defendant Rudolf Saenger upon commission in New York shewed that his affidavit was untrue. Satisfactory evidence in support of the plaintiffs' claim was taken at Lyons, in France. The amount due was, with interest, 390,106.19 francs, and judgment should be given to the plaintiffs for that sum, reserving to the defendants the right, by action or other proceeding, to compel the plaintiffs to account for any sums received through the French Government, not already accounted for, and any sums paid in respect of bills payable in enemy or foreign countries subsequent to the execution of the commission in France. Judgment for the plaintiffs for the amount mentioned (in Canadian currency, reckoning a franc as 18 cents), with subsequent interest on the principal money, and with costs, including the costs of appointing a receiver. W. J. McLarty, for the plaintiffs. T. N. Phelan, for the defendants.

ROELOFSON v. GRAND—BOYD, C.—APRIL 29.

Contract—Work and Material—Evidence—Rate of Payment—Findings of Fact of Trial Judge.]—Action to recover $5,000 and upwards as the balance due to the plaintiff for work done in repairing two hydraulic elevators. The action was tried without a jury at Berlin and Toronto. The Chancellor, in a written opinion dealing with the facts, said that, however decided, this case would be hard on the loser; it was an unsatisfactory dispute owing to the conflict of testimony; the witnesses were credible, but their recollection was imperfect or confused. It was lamentable that the parties did not put in writing the terms arrived at. After consideration of the whole evidence, the Chancellor concluded that the plaintiff's version of the transaction had not been successfully displaced. The written evidence on the crucial point corroborated the plaintiff's oral evidence as to the price of the work which he

undertook to do. The plaintiff undertook to do the work of repair to the elevators on an open contract on a "work and material" basis—which means that the cost of the labour done and material expended is to be reckoned, plus a fair quantum of profit; the plaintiff's quantum was 25 per cent. on the material and 100 per cent. on the wages. The plaintiff absolutely refused to fix a stated price—stood firm on a basis of "work and material"—and he said that the defendant gave way and accepted that mode. The main defence was, that the plaintiff undertook to make a thorough preliminary examination in order to report whether the repairs could be made for $2,000; that, if the report was unfavourable, the work was to stop and the plaintiff was to be paid $100 for his trouble; if he found the conditions after the preliminary examination satisfactory, the work was to proceed at a cost of $2,000. The finding upon the whole evidence should be in favour of the plaintiff. Judgment for the plaintiff with a reference on the details and quantum of profit added to work and materials, if a reference is asked. Counterclaim dismissed with costs. The plaintiff should have costs up to judgment; and, if there is a reference, the Master should dispose of the costs of it. M. A. Secord, K.C., for the plaintiff. W. N. Tilley, K.C., for the defendant.

CORRECTION.

In LEMON v. YOUNG, ante 82, in the preliminary statement of the nature of the appeal, "sub-sec. 2 of sec. 2" should be "sub-sec. 2 of sec. 31."