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APPELLATE DIVISION.

Second Divisional Court. April 30th, 1918.

*McLEOD v. McRAE.

Limitation of Actions—Action for Recovery of Land—Defence under Limitations Act, R.S.O. 1914 ch. 75—Application of secs. 5, 6 (4)—Land in State of Nature—Acts of Possession—Defendant in Position of Bailiff for Absent Owner—Relationship—Defendant in Loco Parentis to Plaintiff.

Appeal by the plaintiff from the judgment of Lennox, J., who tried the action without a jury, dismissing it with costs.

The action was brought to recover possession of the part of lot 9 in the 1st concession of the township of Cumberland, lying north of the highway and bounded by the Ottawa river.

The defendant admitted the plaintiff's paper-title, but set up the Statute of Limitations, R.S.O. 1914 ch. 75.

The appeal was heard by Mulock, C.J. Ex., Clute, Riddell, and Sutherland, JJ., and Ferguson, J.A.

C. J. Holman, K.C., for the appellant.

G. F. Henderson, K.C., for the defendant, respondent.

Clute, J., in a written judgment, set out the facts and referred to the evidence, which he said fell very far short of shewing such possession as would defeat the admitted paper-title.

He cited the Limitations Act, R.S.O. 1914 ch. 75, secs. 5 and 6 (4); McConaghy v. Denmark (1880), 4 S.C.R. 609, 632, 633; Sherren v. Pearson (1887), 14 S.C.R. 581; Stovel v. Gregory (1894). 21 A.R. 137.

The lands in question were separated from the south portion

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

of the lot by the Montreal road, and the evidence clearly established that during the lifetime of the patentee the portion north of the road was preserved in a state of nature. The southerly 125 acres was the portion of lot 9 partly cleared and occupied by the plaintiff's grandfather. Farquhar McRae, the devisee of the grandfather, never took possession by residing upon or by cultivating any portion thereof, as required by sec. 6 (4), nor did the plaintiff before he left Canada; unless the occupation by the grandfather of the portion south of the road could be regarded as an occupation also of the portion north of the road, it was clear that the lands in question fell within sec. 6 (4); and from the evidence it was clear that there was no such possession by the defendant for over 20 years as would make out a title by possession and deprive the plaintiff of his land.

But, assuming that the case was not brought within sec. 6 (4), the defendant had not made out a title by 10 years' possession. The acts of ownership and care of the property said to have been done and exercised by the defendant were more consistent with his intention to take care of the premises for the plaintiff, to whom the defendant stood in loco parentis, than to acquire title to the property.

None of the alleged acts of ownership, nor all of them together, were sufficient. The fencing was partial only, and not done with the object of taking possession, but to protect the pasture for a few months in summer, and not effective for that. For the rest of the year the lands were wholly vacant, except for occasional acts of trespass in taking some wood and timber. Isolated acts of trespass by one man will not bar the true owner.

The defendant's position was that of bailiff of the plaintiff in respect of the premises, and that relationship was not changed until at least the 15th July, 1908, when the defendant conveyed about 3½ acres to a railway company and received payment therefor. If he thereby repudiated his position as bailiff, ten years from that date had not expired before this action was begun.

The learned Judge referred to a number of authorities, among others to Kent v. Kent (1890-2), 20 O.R. 158, 445, 19 A.R. 352; Taylor v. Davies (1917), 13 O.W.N. 323.

The appeal should be allowed with costs, and judgment for possession should be entered in favour of the plaintiff with costs.

MULOCK, C.J. Ex., and FERGUSON, J.A., agreed in the result, for reasons stated by each in writing.

RIDDELL and SUTHERLAND, JJ., also agreed.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 30TH, 1918.

TEESON v. GRAND TRUNK R.W. CO. AND TORONTO R.W. CO.

Negligence—Street Railway Crossing Tracks of Grand Trunk Railway—Street-car Stopping on Crossing—Danger from Engine—Panic among Passengers on Street-car—Injury to Passenger—Negligence of both Companies—Defective Condition of Appliances—Failure to Operate Gates—Absence of Contributory Negligence—Findings of Trial Judge—Appeal.

Appeals by both defendants from the judgment of FALCONBRIDGE, C.J.K.B., 13 O.W.N. 476.

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

D. L. McCarthy, K.C., for the appellant the Grand Trunk Railway Company.

Peter White, K.C., for the appellant the Toronto Railway Company.

T. N. Phelan, for the plaintiff, respondent.

THE COURT dismissed both appeals with costs.

SECOND DIVISIONAL COURT. MAY 1ST, 1918.

*MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Contract—Services Rendered by Niece of Deceased Intestate—Contract to Pay for Services—Evidence—Onus—Implication—Account of Moneys of Deceased Left in Hands of Niece—Set-off of Sum to be Allowed as Remuneration for Services—Reference—Costs.

Appeal by the defendant from the judgment of LATCHFORD, J., 13 O.W.N. 144.

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

T. R. Ferguson, for the appellant.

T. N. Phelan, for the plaintiffs, respondents.

MULOCK, C.J. Ex., in a written judgment, said that the action was brought by the administrators of the estate of Ellen Broderick, a deceased intestate, on behalf of the next of kin, for an account of all moneys of the deceased in the hands of the defendant.

At the trial it appeared that the defendant had received from the deceased, who was her aunt, two sums of money—$1,357.30 in October, 1910, and $2,538.62 in January, 1911—and it was considered by the trial Judge that the defendant was accountable to the plaintiffs for these two sums and any other moneys of the deceased which came to her hands.

The trial Judge rightly decided that the two sums mentioned did not become the property of the defendant; and the question now to be determined was, whether the defendant was entitled to remuneration for services rendered to the deceased by the defendant and her sister, Mrs. Slanker.

The defendant had brought the deceased from New York to Toronto in December, 1908, and kept her there for 11 months, when she went to live with the defendant's sister, also in Toronto, at whose house the deceased continued to live until her death in 1911. The deceased had an incurable malady, from which she died. The defendant attended upon her both in her own home and in her sister's. No arrangement was made for the deceased paying the defendant for her services. The defendant boarded and maintained the deceased and disbursed moneys out of her own pocket on the deceased's account. The two sums mentioned comprised the whole of the deceased's money; and there was evidence that she intended the defendant to have it. After the death of her aunt, the defendant paid Mrs. Slanker $1,000, being at the rate of $10 a week for 100 weeks' board of the deceased.

The deceased having been nearly related to the defendant, the onus was on the defendant to shew an agreement, express or implied, that she was to be remunerated for her services. The question was one of fact. If the circumstances made it manifest that both parties understood that the defendant was to be compensated for her services, she was entitled to recover their value: Walker v. Boughner (1889), 18 O.R. 448.

The undisputed facts shewed that both parties expected that the defendant would be properly remunerated; and she was entitled to payment for the services of herself and her sister in the maintenance and care of the deceased and to payment of all reasonable expenses incurred in providing her with medical and other attendance, medicines, and medical supplies, and also funeral expenses.

The defendant had, in her statement of defence, given particulars of her claim, which amounted to $2,980.03. The claim seemed

a reasonable one. The costs of a reference should be avoided, if possible, by the plaintiffs consenting to the defendant having credit for $2,980.03 on the two sums mentioned; but, if the plaintiffs should not consent, they should have a reference, and in such event the defendant should be at liberty to amend her claim of set-off by claiming an amount in excess of that set forth in the particulars. Costs of the reference should be in the discretion of the Master.

The judgment should declare the defendant entitled to remuneration for her and her sister's services; and the defendant should have her costs here and below, to be deducted in the first instance from the balance, if any, found due by her on taking the accounts; otherwise to be payable by the plaintiffs; and, subject to the payment of the defendant's costs, the plaintiffs should be paid their costs as between solicitor and client out of what remained of the money.

Clute, J., agreed in the result, reading a judgment in which he discussed the evidence and reviewed the authorities.

Riddell and Kelly, JJ., concurred.

Appeal allowed.

HIGH COURT DIVISION.

Middleton, J. April 30th, 1918.

Re HANCOCK.

Will—Construction—Division of Estate—Legacies—Interest—Issue of Legatees—"Accumulation."

Motion by three of the trustees under the will of Joseph Hancock, deceased, for an order determining certain questions as to the construction and meaning of the will and a codicil thereto

The motion was heard in the Weekly Court, Toronto.

J. L. Counsell, for the applicants.

H. J. McKenna, for a class of adult beneficiaries.

J. C. M. Gorman, for Helen C. Conn and for another class.

F. W. Harcourt, K.C., Official Guardian, for the infant grandchildren of the testator.

MIDDLETON J., in a written judgment, said that by his will the testator directed that his estate (after certain provisions had been complied with) should be divided into 13 parts. By his codicil he made the parts 14, to let in another beneficiary. The interest on each share was to be paid to a designated beneficiary. In the case of "female legatees" he sought to discourage fortune-hunters and to leave such "female legatees" to the attractions with which nature had endowed them, by providing that this income should be paid to them only while unmarried or widows and not during coverture. During coverture the income was to "accumulate," which meant, to become part of the capital of the share; on the legatee becoming a widow she was to be restored to the income derived from her share, but not to receive as a bonus or otherwise the accumulated income. This, having become capital, remained capital. "So on as often as any of the said female legatees shall marry and become widows," was this to happen to these "female legatees."

When any of the "legatees," as he called those who were to receive the income upon these shares, died, the share was to be given to the issue of such legatee; and, if any of such issue was not of age, the executors might use his or her share for maintenance.

Upon the death of a "legatee" without issue, his or her share of interest should be paid to the other persons named, and his or her share of the capital should be divided under the clause next mentioned.

This clause provided that, on the death of the last surviving legatee, all principal money in the hands of the executors should be divided per stirpes among the issue of the "legatees."

On any legatee dying leaving issue, there was an immediate gift to the issue, at once payable.

On any legatee dying without issue, his share must be held, and the income divided among the diminishing class of "legatees," and on the death of the last there is to be a distribution of capital then on hand. This would be the capital of the share of the one last to die and the capital of the shares of those who had died without issue.

MIDDLETON, J., IN CHAMBERS. APRIL 30TH, 1918.

*ROWAN v. TORONTO R.W. CO.

Interest—Action for Damages for Personal Injuries—Findings of Jury—"Verdict"—Judgment thereon by Trial Judge and Court of Appeal in Favour of Defendants—Reversal by Supreme Court of Canada—Judgment for Amount of Damages Found by Jury—Interest from Date of Trial not Allowed—Settlement of Minutes of Judgment—Delay—Costs.

Motion by the defendants to vary the minutes of a judgment settled by a judgment clerk on the 20th January, 1900.

J. S. Duggan, for the defendants.
J. E. Jones, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the action (which was brought in the High Court of Justice for Ontario to recover damages for personal injuries sustained by the plaintiff by being run into by a car of the defendants while riding a bicycle in a highway) was tried on the 3rd June, 1897; questions were submitted to the jury, and on the answers the trial Judge directed judgment to be entered for the defendants. The judgment of the trial Judge was affirmed by the Court of Appeal. In the Supreme Court of Canada, that which had been regarded in the Courts below as a finding of contributory negligence was not so treated; and, on the 3rd October, 1899, the appeal was allowed, and it was directed "that judgment should be entered in favour of the appellant (the plaintiff) for $1,500:" Rowan v. Toronto R.W. Co. (1899), 29 S.C.R. 717.

A judgment clerk in the High Court of Justice, having a certificate of this judgment presented to him to carry it into effect, on the 20th January, 1900, settled a judgment directing that the plaintiff should recover $1,751.25—the additional $251.25 representing interest from the date of the trial until the date of the judgment.

The defendant then moved to vary the minutes by reducing the amount to $1,500. This motion was heard on the 25th January, 1900, by Sir W. R. Meredith, then Chief Justice of the Common Pleas, who reserved judgment to allow an application to be made to the Supreme Court of Canada. An application was made by the plaintiff to that Court to vary the judgment so as to make it direct payment of interest or to have it declared that the

effect of the judgment was to entitle the plaintiff to interest; but on the 30th January, 1901, this motion was dismissed, the order reciting that the Supreme Court of Canada was functus officio and without jurisdiction.

The matter was not again mentioned to the Chief Justice, but had remained in statu quo for 17 years; the motion was now renewed before a Judge of the High Court Division; the Chief Justice had become functus, not having delivered judgment within six weeks after his transfer to the Court of Appeal.

The learned Judge said that the delay might well be treated as an abandonment of the claim for interest; but, apart from that, the plaintiff had no right to interest. The Supreme Court of Canada might have framed its judgment so as to give interest from the date of the trial, for it had power to pronounce the judgment which, in its view, the trial Judge ought to have given; but it did not do so; and it must be regarded as conclusively determined that the judgment of that Court as issued was what was meant.

The claim to interest was based upon certain clauses of the Judicature Act, found as secs. 35 (4), 60, 61 of the present Act, R.S.O. 1914 ch. 56.

The answers of the jury to questions of fact propounded by the trial Judge are not a verdict. The plaintiff's first recovery was in the Supreme Court of Canada.

The action of the judgment clerk in adding interest was contrary to the certificate before him of the judgment of the Supreme Court of Canada.

Reference to Borthwick v. Elderslie Steamship Co., [1905] 2 K.B. 516; McLaren v. Canada Central R.W. Co. (1884) 10 P.R. 328.

An order should now be made directing that the minutes as settled be varied so as to reduce the recovery to $1,500 as of the date of the minutes.

No costs.

SUTHERLAND, J., IN CHAMBERS. MAY 1ST, 1918.

BAILEY COBALT MINES LIMITED v. BENSON.

Appeal—Leave to Appeal from Order of Judge in Chambers—Security for Costs—Conflicting Decisions—Important Questions Involved—Rule 507.

Motion by the defendants the Profit Sharing Construction Company, under Rule 507, for leave to appeal from an order of

Falconbridge, C.J.K.B., in Chambers, dismissing an appeal by these defendants from an order of the Master in Chambers requiring them to give further security in the sum of $3,000 to answer the plaintiffs' costs of the action, reference, and proceedings, and staying these defendants' proceedings until such security be given.

R. S. Robertson, for the applicants.
W. Laidlaw, K.C., for the plaintiffs.

Sutherland, J., in a written judgment, referred to In re Miller's Patent (1894), 11 R.P.C. 55, 70 L.T.R. 270, 271; Vavasseur v. Krupp (1878), 9 Ch.D. 351; Apollinaris Co. v. Wilson (1886), 31 Ch.D. 632; and Ward v. Benson (1901), 2 O.L.R. 366; and said that the decisions were somewhat conflicting, and the report of the Master in Ordinary, to whom a reference was directed, from which report the defendants the Profit Sharing Construction Company were appealing, involved matters of considerable importance to these defendants which might be finally determined against them unless the order for security was complied with.

Leave to appeal granted; costs of the motion to be costs in the cause.

Masten, J. May 2nd, 1918.

FAIRWEATHER v. McCULLOUGH.

Husband and Wife—Security Given by Wife at Instance of Husband for Liability of Husband to his Employers—Husband not Acting as Agent for Employers—Absence of Duress and Undue Influence—Lack of Independent Advice—Approbation of Security after Time for Deliberation and Obtaining Advice—Prosecution not Threatened by Employers, but Husband Apprehensive of Arrest—Action to Set aside Security—Findings of Fact of Trial Judge.

Action for a declaration that a chattel mortgage made by the plaintiff in favour of the defendants was invalid, and for consequent relief.

The chattel mortgage was made upon the representation of the plaintiff's husband, since deceased, to her, that the defendants, his employers, would probably cause him to be arrested unless he gave security for a sum of $690, representing a shortage in his accounts.

The action was tried without a jury at Toronto.
Gideon Grant and L.C. Smith, for the plaintiff.
D. O. Cameron, for the defendants.

MASTEN, J., in a written judgment, found that the plaintiff had no independent advice; that it was not established that her husband had been guilty of any criminal offence; that the defendants had not threatened the husband with prosecution; that in applying to his wife to give the security the husband was influenced by two motives: first to avoid prosecution; second, to secure his retention by the defendants in their employment; and that the wife, in giving the security, was influenced by the same motives; that the husband, in applying to the wife to give security and in stating to her the danger in which he stood, was acting on his own behalf and not as the agent of the defendants; that the defendants did not threaten the plaintiff with the arrest of her husband; that the plaintiff, a highly intelligent person and of considerable force of character, thoroughly understood the transaction; and that she did not execute the mortgage as a result of undue influence or pressure.

The plaintiff, when asked to give the security, was taken by surprise and had no opportunity for obtaining independent advice or for deliberation; but the effect of this was substantially modified by the fact that, as far as the evidence shewed, no complaint was made by her in respect to the giving of this security until the present action was launched, some eight months later, after her husband's death; and by the circumstance that—the chattel mortgage having been given in August and the first instalment of interest falling due in October—the plaintiff insisted upon the prompt payment of that interest. This was after she had full opportunity for deliberation and obtaining advice. Even assuming that the husband exercised undue influence—which was not the case—the plaintiff could not succeed unless the defendants were aware at the time that such undue influence had been exercised: Cobbett v. Brock (1855), 20 Beav. 524; Bunbury v. Hibernian Bank, [1908] 1 I.R. 261. There was no evidence of such knowledge on their part.

In these circumstances, the case came within the law stated by the Court of Appeal in McClatchie v. Haslam (1891), 65 L.T.R. 691.

Reference also to Williams v. Bayley (1866), L.R. 1 H.L. 200; Pollock on Contracts, 8th ed., pp. 640 et seq.

The learned Judge said that there was no presumption of law against the validity of the chattel mortgage, and his conclusions of fact were, that the plaintiff was a free and voluntary agent, and that she failed to shew affirmatively that the defendants procured her to execute the mortgage complained of through pressure or undue influence.

Action dismissed with costs.

MIDDLETON, J. MAY 3RD, 1918.

*NATHANSON v. GRAND TRUNK R.W. CO.

Railway—Carriage of Goods—Receipt for Number of Packages Stated by Shipper—Shortgae in Delivery—Effect of Receipt—Prima Facie Case against Carriers—Evidence to Displace—Recovery of Nominal Sum—Costs.

Action to recover the value of certain chattels said to have been shipped by the defendants' railway from Aylmer to Toronto, and not delivered to the plaintiff, the owner and consignee of the chattels.

The action was tried without a jury at Toronto.

George Wilkie, for the plaintiff.

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

MIDDLETON, J., in a written judgment, said that the plaintiff packed his stock of boots and shoes and dry goods in a number of boxes, cartons, and bales, and, without any previous communication with the defendants, called in a carter to ship the packages. The carter applied to the defendants for car-accommodation and was told to place the goods in an empty box-car standing upon a siding at some distance from the Aylmer station. The carter placed the packages, some planks, and a counter and benches, in the car. The plaintiff arrived at the station and stated his intention of going to Toronto by a train soon about to start, and asked for a shipping bill for the goods. The bill was given to him, but the defendants' agent had no opportunity to count and did not count the packages contained in the car. The bill was marked "S.L. & C.," which was said to mean "shipper's load and count;" and the effect of this, in the eyes of railway-men, was said to be that the responsibility for the truth of the statement that the number of packages said to have been shipped had in truth been shipped, was cast upon the shipper. The car was immediately sealed by the agent, who first looked into the car but did not count the packages. In due course the car arrived at Toronto, accompanied by a way-bill, and, when it arrived, it had not been tampered with. It was unloaded by a checker and his assistants. Shortly after its arrival, less than two hours after the seal had been broken, in the freight-shed, it was found that there were four parcels less than were called for in the bills. An advice-note was sent to the plaintiff, he paid the freight, and delivery was made—the delivery-notice being marked "four pieces short." This was based upon the original receipt and upon the count made by the checker.

The learned Judge said that he paid no attention to the placing of the letters "S.L. & C." upon the receipt, as that could not have been understood by the plaintiff.

The case of Mediterranean and New York S.S. Co. Limited v. Mackay, [1903] 1 K.B. 297, did not justify the contention that the statement in the shipping receipt was conclusive and not subject to any explanation or controversy.

The receipt was not conclusive, and might be controverted by evidence shewing that the goods were not received. The railway agent had no authority to make a contract of carriage so as to bind the defendants, save in respect of goods actually received by him.

Reference to Leduc v. Ward (1888), 20 Q.B.D. 475, 479; Smith & Co. v. Bedouin Steam Navigation Co. Limited, [1896] A.C. 70, 75, 77.

The receipt cast the onus upon the defendants; but, when the circumstances in which that receipt was given were looked into, it was seen that it was based entirely upon the statements of the plaintiff; and there was much in his testimony which indicated that there might have been an error as to the number of packages.

The question resolved itself into an issue of fact—did the defendants deliver to the plaintiff all the goods actually received from him? Upon the evidence, the issue must be determined in favour of the defendants.

The two planks or boards (value $3) which were placed in the car were lost in the railway freight-sheds in Toronto, and they should not be included in the above finding.

Judgment for the plaintiff for $3, with Division Court costs, subject to a set-off.

MASTEN, J. MAY 3RD, 1918.

*RALSTON v. TANNER.

Contract—Sale of Land—Agreement between Physician as Purchaser and Patient as Vendor—Confidential Relationship—Lack of Independent Advice—Unfairness of Agreement in Certain Respects—Gift of Part of Purchase-price to Brother of Patient—Action by Son and Devisee of Patient to Set aside Agreement—Evidence—Onus—Findings of Fact of Trial Judge.

Action by the only son and sole devisee and legatee under the will of Samuel Archibald Ralston, deceased, to set aside an agree-

ment made by the deceased, during his last illness, for the sale to his medical attendant, the defendant Tanner, of the deceased's land and buildings thereon for the sum of $1,500, and to set aside a conveyance made pursuant to the agreement.

The action was tried without a jury at Barrie.

W. A. Boys, K.C., for the plaintiff.

M. B. Tudhope, for the defendant Tanner.

Masten, J., in a written judgment, found that the sale-price was not unfair as a cash-price; that the defendant Tanner had fulfilled the terms of the agreement; and that, although the vendor was in a weak and miserable physical condition, he understood and appreciated that he was selling his homestead for the price mentioned.

Notwithstanding these findings in favour of the defendant, the learned Judge was of opinion that the agreement and deed were invalid and must be set aside. The relationship of physician and patient existed between the defendant Tanner and the deceased at the time when the agreement was made, had existed for a considerable period before that, and continued afterwards until the death of the patient. The testator had no independent advice, and in certain respects the operation and effect of the agreement were unfair.

Reference to Huguenin v. Baseley (1807), 14 Ves. 273, 292; Rowe v. Grand Trunk R.W. Co. (1866), 16 U.C.C.P. 500, 506; Vanzant v. Coates (1917), 39 O.L.R. 557, 40 O.L.R. 556; Wright v. Carter, [1903] 1 Ch. 27, 50, 54.

Considering the relationship of physician and patient, the condition of the patient at the time of the transaction, the absence of independent advice, and the unfairness of the agreement in certain aspects, the defendant Tanner had failed to discharge the onus cast upon him of justifying the transaction.

The defendant Robert A. Ralston, who did not defend, benefited under the agreement, because part of the purchase-price was to be paid to him; and as against him the case was stronger, because what he was to receive was a gift from his brother, the deceased.

Judgment setting aside the agreement and deed as against both the defendants, with costs.

LATCHFORD, J., IN CHAMBERS. MAY 3RD, 1918

HAYS v. WEILAND.

Libel—Discovery—Examination of Defendant—Disclosure of Name of Person to whom Printed Copies of Libellous Document Given —Re-examination of Defendant—Refusal to Answer—Motion to Commit—Forum—Order for Further Attendance—Costs.

Motion on behalf of the plaintiff for an order to commit the defendant for refusing, upon his re-examination for discovery on the 29th April, 1918, to answer certain questions, especially question numbered 53 put to him upon his former examination for discovery, and certain proper questions relating to the subject-matter of question 53.

R. S. Robertson, for the plaintiff.
W. Lawr, for the defendant.

LATCHFORD, J., in a written judgment, said that objection was taken that the motion should have been made, not in Chambers, but in Court.

It was stated by counsel for the plaintiff, and not disputed, that the formal judgment of the Appellate Division directed the amendment of an order made by the Master in Chambers. The present application appeared, therefore, to be based upon the order of the Master in Chambers as amended, and was in the proper form.

The learned Judge said that he had had an opportunity, since the motion was argued, of perusing the reasons for the judgment of the Appellate Division—23rd April, 1918—not yet reported (noted ante 146). It was stated in the reasons that the name of the person to whom the defendant delivered copies of the matter alleged to be libellous "may be illuminating and indicate the purpose underlying the secrecy observed and may even destroy the present defence and aggravate the damages. It might also tend to mitigate them if it turned out that the respondent (the defendant) was misled or inveigled into what he did by his friend."

The purpose of question 53 was to have the name of the person referred to disclosed, and the Appellate Division had determined that the defendant was bound to make such disclosure. He had refused to do so.

The proper order to make now is one requiring him to attend at his own expense for re-examination as to the name of the person to whom he delivered copies of the document on the publication of which the action was based. Perhaps now that the matter had

been carried so far, a disclosure of the name by the defendant's solicitor, to whom it was said to be known, would be accepted on behalf of the plaintiff.

Costs of the motion in the cause to the plaintiff in any event of the action.

KINGSLEY V. KINGSLEY—MIDDLETON, J.—APRIL 29.

Husband and Wife—Alimony—Failure of Wife to Prove Allegations Made against Husband—Dismissal of Action—Effect of, on Matrimonial Obligation of Husband—Costs—Cash Disbursements.]—Action for alimony, tried at Peterborough. MIDDLETON, J., in a written judgment, said that no case for alimony had been made out. There was no reason why the plaintiff should not return to her husband. The dismissal of the action on this ground is not an end of the matrimonial obligation of the husband. As there is no reason why the wife should live apart, she may change her mind and return at any time; and, if the husband fails to receive her, he will then become liable for alimony unless he can shew some reason for his refusal. The allegations upon which this action was based not having been proved, the action should be dismissed, and the defendant should pay the plaintiff's disbursements, less any interim disbursements paid under order therefor. Otherwise no costs. J. Wearing, for the plaintiff. L. V. O'Connor, for the defendant.

HUFF V. BURTON—BURTON V. CUNDLE—LENNOX, J., IN CHAMBERS —APRIL 30.

Trial—Convenience of Trial of two Actions at same Sittings—Removal of County Court Action into Supreme Court of Ontario—County Courts Act, sec. 29—Terms—Security for Costs—Directions as to Trial.]—Motion by Burton, the defendant in the first action and the plaintiff in the second action, for an order, under sec. 29 of the County Courts Act, R.S.O. 1914 ch. 59, transferring the first action from the County Court of the County of Simcoe to the Supreme Court of Ontario, and consolidating it with the second action, which was begun in the Supreme Court of Ontario, or directing that the two actions be tried together. LENNOX, J., in a written judgment, said that the plaintiff Huff would be embarrassed, if not prejudiced, by having his action linked with the other; but the rights of the parties seemed to be dependent upon the same

facts; and justice for all parties would be more assured if the two actions were tried by the same Judge and at or about the same time. Upon the defendant Burton paying into Court, on or before the 4th May, $100 by way of security for costs, an order should go directing the transfer of Huff's action into the Supreme Court of Ontario, and that it be tried at or about the time of the trial of the other action, by the same Judge and at the same sittings. Costs of this motion to be disposed of by the trial Judge. If the money shall not be paid into Court, the motion will be dismissed with costs. Harcourt Ferguson, for Burton. W. A. J. Bell, K.C., for Huff. J. Y. Murdoch, for Cundle.

BOEHMER V. KELLY AND SELBY—MIDDLETON, J.—APRIL 30.

Trusts and Trustees—Purchase of Hotel Property for Company not in Existence—Failure to Form Company—Purchaser Named by Promoters—Use of Purchaser's own Money to Make Down-payment —Action by Promoter for Declaration of Trust for Company— Dismissal on Facts.]—Action for a declaration that the defendant Kelly was trustee of the Arlington Hotel property, which was purchased in her name from the Canada Permanent Mortgage Corporation, for a company, not formed, but the formation of which was promoted by the plaintiff. The defendant Kelly became the purchaser of the property, expecting to convey it to the company when formed, but in fact used her own money to make the down-payment, $2,000. The plaintiff alleged that the defendant Kelly put up her own money in fraud of him after he had arranged to place her in funds. The action was tried without a jury at Toronto. MIDDLETON, J., in a written judgment, said that his findings were against the plaintiff on the facts. The plaintiff had no funds and no means of obtaining any, and the defendant Kelly took up the contract because she was obliged to, as she had means, and the plaintiff had left her in the lurch. It had not been shewn that the property was worth more than the price it sold for. If the defendant Kelly took possession of any of the plaintiff's goods, she might be liable in an action for conversion; but there was no such claim in this action. Action dismissed with costs. R. S. Robertson, for the plaintiff. A. Cohen, for the defendant.