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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

McKENZIE v. MORRIS MOTOR SALES CO.

Fraud and Misrepresentation—Mortgage of Land Assigned for Value—Representations as to Value of Land—Falsity — Materiality—Intent to Deceive—Counterclaim—Damages.

Appeal by the defendants from the judgment of MASTEN, J., at the trial without a jury, in favour of the plaintiff, in an action for damages for breach of an agreement whereby the defendants were to deliver to the plaintiff two motor cars, in consideration of an assignment by the plaintiff to the defendants of a mortgage of a farm.

The defendants alleged that the plaintiff had misrepresented the value of the farm, as they discovered after they had delivered one of the cars, and they refused to deliver the other. The defendants counterclaimed damages for false representations.

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

Gordon Waldron, for the appellants.

G. T. Walsh, for the plaintiff, respondent.

GARROW, J.A., delivering the judgment of the Court, said that the material representation made by the plaintiff was, that he had recently sold the farm for $4,500. The mortgage assigned was for $2,306.10. The statement was not substantially supported by the proved facts. An exchange is not at all the same thing as a sale. The plaintiff also represented that the mortgage was worth the price of the two cars. The only possible conclusion upon the evidence was, that the plaintiff's opinion was not merely erroneous, but so grossly erroneous that it could not have been honestly held.

The defendants had satisfactorily proved that the statements of which they complained were false; that they were material; that they (the defendants) had relied upon the statements to their injury; and the only proper inference upon all the evidence was, that the statements were made with intent to deceive.

The action should, therefore, be dismissed with costs, and the defendants should have judgment upon their counterclaim with costs. The money realised from the sale of the farm should be fixed as the amount of the damages resulting from the fraud.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

*RE TAYLOR.

Will—Construction — Devise — "Issue" — "In Fee" — Life Estate—Remainder—Rule in Shelley's Case.

Appeal by the executors of George Mackenzie Stewart from the order of RIDDELL, J., ante 271.

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

R. S. Cassels, K.C., for the appellants.

A. R. Clute, for the respondents, the husband and children of Marietta A. Weller.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the question for decision was as to the estate which Marietta A. Weller took under the will of George Taylor in certain land, the appellants contending that it was an estate tail, and the respondents that it was a life estate. The devise was to the testator's two daughters Marietta and Jennie "to have and to hold to the use of them . . . for and during the terms of their natural lives as tenants in common, and after their decease the undivided share of each to the use of their respective issues in fee, so that the child or children of each will take his, her, or their mother's share, but in case . . . Jennie . . . should die without issue then I give and devise her share thereof to the children of . . . Marietta . . . alone, share and share alike."

Reference to King v. Evans (1895), 24 S.C.R. 356; Van Grutten v. Foxwell, [1897] A.C. 658.

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

The case at bar was distinguishable from King v. Evans; and the reasoning in that case was inapplicable to the language used by the testator in this case—"respective issues in fee." The words "in fee" do not necessarily mean "in fee simple"—they may mean "in fee tail." It is unnecessary to give to the word "issue" any other than its primary meaning, i.e., descendants, but rather effect should be given to both expressions, as it is possible to do.

The testator, however, in this case, had interpreted his own language and shewn that he used "issue" as meaning "children."

It was properly held, therefore, that Marietta took an estate for her own life only.

Appeal dismissed; costs of the appeal out of the estate.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

*DAVEY v. CHRISTOFF.

Landlord and Tenant—Lease of Theatre with Furniture and Equipment—Refusal of Lessee to Transfer License—Damages—Retention of Sum Deposited by Lessee as Security—Rent of Premises—Inadequacy of Heating—Implied Stipulation—Fitness for Habitation—Damages for Breach.

Appeal by the defendants from the judgment of MASTEN, J., ante 291, 35 O.L.R. 162; and cross-appeal by the plaintiff as to the damages awarded to him, which, he contended, should be increased by $200.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. A. Henderson, for the defendants.

J. W. Payne, for the plaintiff.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the question of the implication in such a case as this of a warranty that the demised premises were fit for the purpose for which they were intended to be used, was an important one, and he had been unable to discover any direct authority in favour of implying such a warranty; while it was abundantly clear that such a warranty was not to be implied in the case of a demise of realty only.

Reference to Smith v. Marrable (1843), 11 M. & W. 5; Edwards v. Etherington (1825), Ry. & M. 268, 7 Dowl. & Ry. 117; Collins v. Barrow (1831), 1 Moo. & Rob. 112; Sutton v. Temple (1843), 12 M. & W. 52; Hart v. Windsor (1843), 12 M. & W. 68; Chappell v. Gregory (1864), 34 Beav. 250, 253, 254; Searle v. Laverick (1874), L.R. 9 Q.B. 122, 131; Westropp v. Elligott (1884), 9 App. Cas. 815, 826; Wilson v. Finch-Hatton (1877), 2 Ex. D. 336, 342, 343, 344; Manchester Bonded Warehouse Co. v. Carr (1880), 5 C.P.D. 507, 510, 511; Murray v. Mace (1874), 8 Ir. R. C.L. 396; Bunn v. Harrison (1886), 3 Times L.R. 146.

Notwithstanding what was said in the case last-mentioned, Sutton v. Temple and Hart v. Windsor ought to be followed; and, if followed, there was nothing to exclude from the application of the rule there laid down the case of an unfurnished house let for immediate habitation; and it followed from the rule that the doctrine of such cases as Hamlyn & Co. v. Wood & Co., [1891] 2 Q.B. 488, did not apply.

Reference also to Bird v. Lord Greville (1884), Cab. & El. 317; Harrison v. Malet (1886), 3 Times L.R. 58; Charsley v. Jones (1889), 53 J.P. 280, 5 Times L.R. 412; Sarson v. Roberts, [1895] 2 Q.B. 395; Campbell v. Wenlock (1866), 4 F. & F. 716.

The case at bar came within the exception established by Smith v. Marrable and Wilson v. Finch-Hatton, and there was to be implied a warranty or condition in the contract between the parties that the theatre was fit for immediate occupation and use as a moving picture theatre.

The demise resembled that of a furnished house—it was of a furnished theatre, realty and contents, the whole let as a going concern and for immediate occupation and use as a theatre. The condition or warranty that it was fit for occupation as such was broken.

The appeal should be dismissed with costs.

No case was made for disturbing the disposition made of the claim for damages; and the cross-appeal should also be dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

*RE LE BRUN.

Will—Construction—Payment of Mortgage Debts—Direction to Pay out of Fund Arising from Sale of Property—Wills Act, R.S.O. 1914 *ch.* 120, *sec.* 38—*Primary Liability of Real Estate—Contrary Intention—Creation of Mixed Fund—Ratable Contribution—Life Estate—Costs.*

Appeal by the widow of the testator from the judgment of BRITTON, J., ante 309, where the facts are stated.

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

J. M. Ferguson, for the appellant.

H. E. Rose, K.C., for the sisters of Carisse Le Brun, respondents.

H. S. White, for the widow of Carisse Le Brun, respondent.

E. C. Cattanach, for the Official Guardian.

The judgment of the Court was delivered by MEREDITH, C.J.O., who, after making a statement of the facts, said that the contest was as to how the mortgage debts were to be paid, the contention of the respondents being that the land devised passed to the devisee cum onere, and to that contention Britton, J., gave effect.

The respondents argued that there was nothing in the will to shew a contrary intention, within the meaning of sec. 38 of the Wills Act, R.S.O. 1914 ch. 120—that, in order to take a case out of sec. 38, the testator must have created or designated a fund out of which the mortgage debts are to be paid, and have constituted it the primary fund for paying them, and that that had not been done by the testator in this case.

The learned Chief Justice said that he was unable to agree with this contention. In his opinion, the testator had by his will signified the contrary or other intention necessary to displace what otherwise would have been the effect of the section. The trustees are directed to pay the testator's debts, including his mortgage debts. The only fund available to them for that purpose is the proceeds of the sale of the property which they are directed to convert into money; and the direction to pay is, therefore, a direction to pay out of that fund.

The effect of a general direction by the testator that his debts shall be paid charges them on the real estate devised by his

will: Jarman on Wills, 6th ed., p. 1990; Legh v. Earl of Warrington (1733), 1 Bro. P.C. 511. Even in the case of an executor a direction to him to pay debts, if he is devisee of real estate, will cast them on the realty so devised: Jarman, p. 1993; Henvell v. Whitaker (1827), 3 Russ. 343.

The conclusion being that the fund to be created by the conversion which the trustees are directed to make, is a fund out of which his funeral and testamentary expenses and his debts, including mortgage debts, are to be paid, the next question is how these are to be borne by the beneficiaries.

Reference to Jarman, p. 2033; Tench v. Cheese (1855), 6 DeG. M. & G. 453, 467.

The fund which the testator had created was a mixed fund; and, therefore, the burden of the charge must be contributed to ratably by the personalty and realty from which the fund is to be derived, which is the whole of the real and personal estate except the life estate devised to the appellant.

The judgment below should be varied accordingly; costs of the motion and appeal to be paid out of the mixed fund.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

*DAVIS v. TOWNSHIP OF USBORNE.

Highway—Nonrepair—Injury to Traveller—Dangerous Ditch—Horse Shying at Motor Vehicle and Overturning Buggy and Occupants into Ditch—Duty of Municipal Corporation—Keeping Road Reasonably Safe for Public Travel—Additional Danger from Motor Vehicles—Failure to Perform Duty—Cause of Injury.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Huron, after trial of the action without a jury, dismissing it with costs.

The action was brought to recover damages for injuries sustained by the plaintiff owing, as she alleged, to the default of the defendants in the performance of the duty, imposed upon them by sec. 460 of the Municipal Act, of keeping in repair the roads under their jurisdiction.

The injuries were met with while the plaintiff was being driven by her son, after nightfall, in a covered buggy drawn by a single horse, on the London road, and were caused by the horse taking fright at a motor vehicle coming in the opposite

direction, shying, and overturning the plaintiff and the buggy into a ditch on the east side of the road.

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

R. S. Robertson, for the appellant.

F. W. Gladman, for the defendants, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O., who said that it was not suggested that the accident was caused or contributed to by any negligence on the part of the appellant or her son, or that the motor vehicle was not lawfully upon the road. The County Court Judge was of opinion that the road was reasonably safe for the purposes of public travel by the means in use before the advent of motor vehicles, and that the respondents, having provided such a road, were under no obligation to improve it so as to make it reasonably safe against the added danger which was or might be occasioned by its being used by motor vehicles—implying that the road was not reasonably safe for public travel under existing conditions.

The question was, was the road reasonably safe for public travel? In considering that question account must be taken of the fact that horses do shy; and a road, in the opinion of the Court, is not reasonably safe for public travel where there is close to the travelled way a ditch 4 feet 7 inches deep with but little slope to its sides, into which, in the case of a horse shying, there would be danger of a horse and vehicle being overturned, and a like danger to persons using the road at night if they should happen to drive into or too close to the ditch. If such a ditch was necessary, it should have been guarded by a railway. An open ditch, however, was unnecessary—the water might have been carried away by an underground tile drain, which would not have been a source of danger to travellers.

In the opinion of the Court, the statutory duty imposed upon the respondents required them to make the road reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor vehicles—which have been in use for several years and are a common means of transportation.

Reference to Colbeck v. Township of Brantford (1861), 21 U.C.R. 276, 278, 279; Toms v. Township of Whitby (1874), 35 U.C.R. 195, 223; Castor v. Township of Uxbridge (1876), 39 U.C.R. 113, 122; Foley v. Township of East Flamborough

(1898), 29 O.R. 139, 141; City of Kingston v. Drennan (1897), 27 S.C.R. 46, 55; Walton v. County of York (1879-81), 30 C.P. 217, 6 A.R. 181.

The respondents had failed to perform their statutory duty of keeping the road in repair, and the injuries of which the appellant complained were sustained by reason of that default.

The appeal should be allowed with costs, and judgment should be entered for the appellant for $150 with costs.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

McKINNON v. COUNTY OF WELLINGTON.

Highway—Nonrepair—Injury to Traveller at Night — Buggy Overturned by Ridges of Ice and Snow—Climatic Conditions—Evidence—Finding of Fact of Trial Judge—Credibility of Witnesses—Appeal—Liability of Municipal Corporation.

Appeal by the defendant, the Corporation of the County of Wellington, from the judgment of the Senior Judge of the County Court of the County of Wellington, after the trial of the action without a jury, in favour of the plaintiff.

The action was brought to recover damages for injuries sustained by the plaintiff by reason, as he alleged, of the default of the defendant corporation to keep in repair a road called the Eramosa road, under the jurisdiction of the county council.

The plaintiff met with his injuries while being driven by his hired man, after dark, on the 20th March, 1915, in a buggy drawn by a pair of horses, and the injuries were caused by the buggy being overturned.

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

H. Guthrie, K.C., for the appellant corporation.

C. L. Dunbar, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., who said that the main contention of the appellant corporation was, that the state of the road was due to climatic conditions which affected not only that road but all the roads in the county; that the ridges of ice and dirt left in the centre of the road, the coming in contact with which of the horses and buggy was said by the respondent to have been the cause of the

accident, were the remains of the hardened track which had been travelled upon during the winter, which had melted more slowly than the ice and snow on each side of the track; and that, having regard to the expenditure which would have been required to remove them, the appellant corporation was not guilty of a breach of its statutory duty on account of its not having removed them.

There was a direct conflict between the testimony of the plaintiff and his hired man, on the one side, and that of two men called as witnesses for the appellant corporation, on the other side; and the County Court Judge accepted the plaintiff's version of what occurred.

The finding upon the fact to be determined depended upon the credibility of the witnesses; and the learned Judge, who saw and heard them, had given full credit to the testimony of the plaintiff.

Upon the whole, the Court was of opinion that the judgment was right and should be affirmed.

In this view, it was unnecessary to consider what would have been the result if the theory as to the character and extent of the ridges had been as contended by counsel for the appellant corporation.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 21ST, 1916.

*STERLING LUMBER CO. v. JONES.

Mechanics' Liens—Claim against Purchaser of Unfinished Building—Absence of Actual Notice of Lien or Claim—Priority of Registration of Conveyance to Purchaser—Application of Registry Laws—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 2 (*c*), 21—"*Owner.*"

Appeal by the plaintiffs from the judgment of an Official Referee refusing the plaintiffs' claim for enforcement of their lien for work and materials against the owners of land, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

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

D. Inglis Grant, for the appellants.

R. G. Agnew, for the defendants the owners, respondents.

The judgment of the Court was delivered by HODGINS, J.A.,

who said that the Official Referee had found that neither the purchaser, Oliver, nor his solicitor, nor his agent, had actual notice of any liens or claims for liens when the purchase by Oliver was completed; and this finding was justified by the evidence. The purchase by Oliver was of an unfinished building to be taken over by him from Jones, the building owner, "as soon as house is completed to inspector's satisfaction." This was done, the deed registered, and the money paid about two weeks before the liens were recorded.

The ground urged by the plaintiffs was, that, the lien having attached by the doing of the work and the supplying of materials, the language of sec. 21 of the Act, "Except as hereinafter provided those Acts" (Registry Act and Land Titles Act) "shall not apply to any lien arising under this Act," took the lien out of the provisions of those Acts, so far as they enacted that registration was necessary to preserve the priority.

Reference to In re Craig (1883), 3 C.L.T. 501; Hynes v. Smith (1879), 27 Gr. 150; McNamara v. Kirkland (1891), 18 A.R. 271.

Recently the decisions in the Appellate Division have adhered to the view that priority of registration, in the absence of notice, must prevail: Cook v. Koldoffsky (1916), ante 433; Marshall Brick Co. v. Irving (1916), ante 427.

In this case no actual notice of the liens was brought home. Knowledge that building is going on upon the lands is not enough: Richards v. Chamberlain (1878), 25 Gr. 402; nor could it be successfully contended that Oliver came within that part of the definition of an owner (sec. 2 (*c*)) which depends upon privity, consent, or benefit, so as to render the land in the hands of his representatives subject to the liens: Gearing v. Robinson (1900), 27 A.R. 364; Slattery v. Lillis (1905), 10 O.L.R. 697; Cut-Rate Plate Glass Co. v. Solodinski (1915), 34 O.L.R. 604; Orr v. Robertson (1915), ib. 147; Marshall Brick Co. v. Irving, ante 427; Reggin v. Manes (1892), 22 O.R. 443; Blight v. Ray (1893), 23 O.R. 415.

Appeal dismissed with costs.

KELLY, J., IN CHAMBERS. FEBRUARY 21ST, 1916.

*REX v. HURLEY.

Liquor License Act—Magistrate's Conviction of Unlicensed Person for Keeping Intoxicating Liquor for Sale—Proof of Intoxicating Nature of Liquor—Certificate of Government Analyst—Production by Chief Constable of City—"Inspector or any Officer of the Crown"—R.S.O. 1914 *ch.* 215, *sec.* 106.

Motion to quash the conviction of the defendant by the Deputy Police Magistrate for the City of Stratford for having, on the 19th December, 1915, kept intoxicating liquors for sale without a license therefor, in violation of the Liquor License Act, R.S.O. 1914 ch. 215.

F. R. Blewett, K.C., for the defendant.

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

KELLY, J., read a judgment in which he said that the defendant was the keeper of a restaurant in the city of Stratford. On the evening of the 19th December, the Chief Constable for the city and one of his officers entered the premises, and seized a bottle from which a man named Mallion was drinking. Only a portion of the contents had been taken from the bottle. The Chief Constable swore that he sent the bottle to the Government analyst at Toronto on the 21st December, and on the 23rd received the analyst's certificate, which was produced at the hearing, that in the contents of the bottle there was $7\frac{31}{100}$ per cent. of proof spirits. By sec. 2 (*i*) of the Liquor License Act, any liquor which contains more than $2\frac{1}{2}$ per cent. of proof spirits shall be conclusively deemed to be intoxicating.

The magistrate based the conviction on the evidence contained in the analyst's certificate; apart from that, he would not have found the defendant guilty.

The question was, whether the certificate was admissible in evidence.

"In any prosecution under this Act the production by the Inspector or any officer of the Crown of a certificate . . . signed by the Government analyst . . . shall be conclusive evidence of the facts stated in such certificate:" sec. 106 of the Liquor License Act.

"Inspector" means an Inspector of Licenses: sec. 2 (*d*). Admittedly the Chief Constable was not the "Inspector."

Was he an "officer of the Crown?" (Reference to secs. 360, 363, and 368 of the Municipal Act, R.S.O. 1914 ch. 192; and secs. 126, 128, and 129 of the Liquor License Act.)

Section 129 cannot be so construed as to make of a policeman or constable an officer of the Crown with the powers conferred by sec. 106; nor is there any other warrant for so holding.

The conviction should be quashed, but without costs, and with protection to the magistrate.

BOYD, C. FEBRUARY 21ST, 1916.

*MIDLAND LOAN AND SAVINGS CO. v. GENITTI.

Mortgage—Funds Derived from Fire Insurance and from Sale of Mortgaged Premises—Application of Insurance Moneys—Mortgages Act, R.S.O. 1914 ch. 112, sec. 6 (2)—Marshalling—Execution Creditors—Second Mortgagee — Priorities—Master's Report—Appeal—Costs.

Appeal by the defendants the Cornwall Beef Company and Donald Ciotti, execution creditors, as subsequent incumbrancers made parties in the Master's office, from the report of the Local Master at Sault Ste. Marie in a mortgage action.

The appeal was heard in the Weekly Court at Toronto.

A. W. Langmuir, for the appellants.

G. S. Hodgson, for the plaintiffs.

No one appeared for the defendant Wilcox, who was served with notice.

THE CHANCELLOR said that the doctrine of marshalling had been misapplied by the Master in dealing with the administration of money in this case.

"Where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much against the fund, to which they otherwise could not have access." That is the definition of marshalling in the argument of Mr. Romilly (afterwards Master of the Rolls) in Aldrich v. Cooper (1803), 8 Ves. 382, 383.

In this case the Master treated the moneys derived from mortgaged premises as two funds because part came from moneys derived from an insurance upon buildings on the mortgaged premises destroyed by fire, and part from the sale of the mortgaged premises after the fire. The Master dealt with the proceeds of the insurance by process of marshalling between prior and subsequent mortgagees, and thus impaired the rights of execution creditors intermediate between the mortgagees.

There were in truth not two funds to administer: one fund, represented by the insurance moneys, was at home in the hands of the plaintiffs before the other fund, derived from the sale moneys, arose. By sec. 6 (2) of the Mortgages Act, R.S.O. 1914 ch. 112, the mortgagees had the right to apply all the insurance money to satisfy their own mortgage, which right they exercised on the 23rd December, 1915; and that concluded any claim to dispose otherwise of the money. That reduced the first mortgage for the benefit, as was right, of the execution creditors, and afforded no ground of complaint to the second mortgagee: Edmonds v. Hamilton Provident and Loan Society (1891), 18 A.R. 347.

The appeal should, therefore, be allowed.

The purchaser should have his vesting order; and the plaintiffs should get no costs beyond those already taxed to them. The appellants should get their costs of appeal out of the fund in Court as a first charge before payment to the plaintiffs. The report to be readjusted so as to fix exactly the amount to be paid out to the respective parties entitled.

LATCHFORD, J. FEBRUARY 25TH, 1916.

RE HAMILTON.

Deed—Trust-deed Settling Share of Beneficiary under Will—Judgment—Omission of Clause Restraining Anticipation of Income—Assignments of Income by Beneficiary—Application by Beneficiary for Correction of Master's Report and Deed Settled by Master—Applicant Required to Do Equity in Regard to Claims of Assignees.

Motion by Annie Seaborn Hill, a daughter of Robert Hamilton, deceased, and one of the beneficiaries under his will, by way of appeal from the report of the Local Master at Peterborough, dated the 14th May, 1914, and for an order referring the report back for amendment, and directing that the report and the deed of settlement consequent upon it should be made conformable to the judgment and order of BOYD, C., of the 10th December, 1912 (27 O.L.R. 445), as affirmed by a Divisional Court of the Appellate Division (28 O.L.R. 534), on the ground that the report and deed did not, as they should, restrain the applicant from anticipating the income payable to her.

The motion was made pursuant to leave granted by MIDDLETON, J., on the 7th January, 1916, and pursuant to the judgment of a Divisional Court of the Appellate Division of the 11th December, 1915 (ante 264).

The motion was heard in the Weekly Court at Toronto.

J. A. Worrell, K.C., for the applicant.

B. D. Hall, for the Royal Trust Company, trustees.

D. W. Saunders, K.C., for the Union Bank of Canada, assignee of the applicant.

R. R. Hall, for William Fortye Hamilton, another assignee of the applicant.

LATCHFORD, J., said that the Union Bank of Canada, as security for advances made to the applicant, obtained from her on the 22nd March, 1915, an assignment of so much of the income payable to her under her father's will as would satisfy its claim. None of the income was paid to the bank; but the bank had in an Alberta Court recovered judgment against her upon the assignment. The applicant admitted that the position of the bank ought not to be prejudiced by the order for which he applied.

The assignment to the bank was subsequent to the report and deed of settlement. The assignment by the applicant to her brother, William Fortye Hamilton—also of income—was made in March, 1913, after the order of the Chancellor had been affirmed upon appeal, but before the execution of the deed.

The applicant was not content that the security which she gave to her brother should be protected in the same way as the security which she gave to the bank.

What the applicant now sought was, no doubt, intended to be carried into effect by the judgment of the Chancellor. His reasons clearly implied that the deed should prevent her from anticipating the income; and the intention of the Divisional Court was the same; but the judgment, as settled and issued, did not contain a clause restraining anticipation of the income.

In other circumstances, the applicant might be entitled to have the judgment supplemented so as to conform to the expressed intention of the Court; but to grant the present application would enable the applicant to derogate from her assignment to her brother—and, but for her consent, from her assignment to the bank. Seeking equity, she must do equity. Until such time as the debt to the brother is paid, or the assignment to him is set aside, and the debt due to the bank is discharged, the application cannot be granted. When that time arrives, the application may be renewed.

Costs of all parties to be paid by the applicant.

EVANS v. EVANS—BRITTON, J.—FEB. 25.

Husband and Wife—Alimony—Evidence—Finding of Fact of Trial Judge—Dismissal of Action—Rule 388*—Costs—Disbursements.*]—Action for alimony, tried without a jury at Cayuga. The parties were married on the 1st January, 1896, and had nine children. The plaintiff had been, since October, 1914, living apart from the defendant; that separation was the third in 20 years. The causes of it, according to the plaintiff, were cruelty on the part of the defendant, assault, and accusations of infidelity. The plaintiff also alleged that the defendant drove her away from his home. Upon the whole evidence, the learned Judge was of opinion that the plaintiff was not entitled to recover; and he dismissed the action. Pursuant to Rule 388, the defendant must pay the disbursements actually and properly made by the plaintiff's solicitor. W. E. Kelly, K.C., for the plaintiff. G. Lynch-Staunton, K.C., for the defendant.

JARVIS v. KEITH—LATCHFORD, J., IN CHAMBERS—FEB. 26.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507*—Limitation of Discovery.*]—Motion by the plaintiff for leave to appeal to a Divisional Court of the Appellate Division from the order of the Chancellor in Chambers, ante 138, allowing an appeal by the defendant A. Keith from an order of the Master in Chambers requiring the defendant to file a better affidavit on production of documents and to attend for further examination for discovery, to the extent that until the initial matters in controversy—the election or non-election of the plaintiff to renew a lease—should be determined, no better affidavit on production or fuller disclosure upon examination should be required of that defendant. LATCHFORD, J., referred to Rule 507, and said that he had not been referred to nor had he found any conflicting decisions by Judges upon the matter involved in the proposed appeal; and there did not appear to be good reason for doubting the correctness of the judgment appealed from. The proposed appeal would, indeed, involve matters of such importance that, if the granting of the leave sought were permissible on that ground alone, he would be disposed to accord it; but that ground warrants the granting of leave only in a case where there appears, in addition, "good reason to doubt the correctness of the judgment appealed from." Motion refused, with costs to the defendant A. Keith in any event of the action. E. D. Armour, K.C., for the plaintiff. H. S. White, for the defendant A. Keith.

JUDGMENTS OF THE APPELLATE DIVISION OF THE SUPREME COURT OF CANADA RECENTLY AFFIRMED, REVERSED, OR VARIED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AND THE SUPREME COURT OF CANADA.

BRANTFORD GOLF AND COUNTRY CLUB AND LAKE ERIE AND NORTHERN R.W. Co., RE—Judgment of the First Divisional Court, 7 O.W.N. 197, 32 O.L.R. 141, varied by the Supreme Court of Canada by reducing the amount awarded to $9,240 (Feb. 1, 1916.)

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