The
Ontario Weekly Notes

VOL. XVI. TORONTO, MARCH 21, 1919. No. 2

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MARCH 14TH, 1919.

*WHIMBEY v. WHIMBEY.

Husband and Wife—Alimony—Action for—Charge of Adultery of Wife Made in Defence—Making Unfounded Charge not a Ground for Awarding Alimony.

Appeal by the plaintiff and cross-appeal by the defendant from the judgment of MEREDITH, C.J.C.P., at the second trial of an action for alimony, in favour of the plaintiff for the recovery of alimony at the rate of $15 a month from the date of the trial.

At the first trial, RIDDELL, J., gave judgment for the plaintiff; but, upon the defendant's appeal, a new trial was ordered: Whimbey v. Whimbey (1918), 14 O.W.N. 128.

The plaintiff appealed from the judgment of MEREDITH, C.J.C.P., upon the ground that the allowance was inadequate, and that alimony should run from the date of the issue of the writ of summons; and the defendant appealed upon the ground that, upon the facts disclosed, the plaintiff was not entitled to succeed at all.

The appeal and cross-appeal were heard by MAGEE and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

T. H. Lennox, K.C., and C. W. Plaxton, for the plaintiff.

Gideon Grant, for the defendant.

MIDDLETON, J., read a judgment in which he said that the defendant by his defence charged the plaintiff with adultery. The trial Judge found that adultery had not been proved; and based the plaintiff's right to alimony upon the one ground that the defendant had made against his wife an unfounded charge of adultery.

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

The defendant contended that, upon the evidence, adultery was abundantly proved; and that the making of an unsuccessful attempt to establish adultery as an answer to a claim for alimony was not in itself a ground for granting alimony—at any rate unless it was shewn that the plaintiff's health was thereby jeopardised.

Reference to Russell v. Russell, [1897] A.C. 395; Lovell v. Lovell (1906), 13 O.L.R. 569, 571 (per Moss, C.J.O.), 579 (per Meredith, J.A.).

The latter case had gone further in favour of the wife than any case since Russell v. Russell; but it fell far short of establishing the proposition that pleading adultery as an answer to an action for alimony, and attempting unsuccessfully to support the plea by evidence, in itself constituted a ground for alimony.

In the present case no endeavour was made to shew that the defendant's conduct in this respect affected the plaintiff's health; she was not a woman whose health was likely to be affected by the proceedings in the action; she did not say that it was so affected, nor was the fact found at the trial.

In this view of the case, the action failed; and it was unnecessary to deal with the other questions raised; but the learned Judge did not desire to be taken as concurring with the finding of fact that the adultery had not been adequately proved by the admissions of the plaintiff and her witness Alderson, apart from the defendant's testimony.

MAGEE, J.A., agreed with MIDDLETON, J.

HODGINS, J.A., also agreed, but expressed no opinion as to whether adultery was proved.

FERGUSON, J.A., agreed in the result, for reasons briefly stated in writing.

Plaintiff's appeal dismissed; defendant's appeal allowed.

FIRST DIVISIONAL COURT. MARCH 14TH, 1919.

REX v. GUROFSKY.

Criminal Law—Obtaining Money by False Pretences—Evidence—Promissory Guaranty not False Representation of Fact.

Case reserved by the Senior Judge of the County Court of the County of York, under the provisions of sec. 1014 of the Criminal Code.

The defendant was tried by the Judge and convicted of obtaining by false pretences from three foreigners the sums of $25, $25, and $19.40 in money.

The question submitted was: Was there any evidence upon which the defendant could properly be convicted of the offence charged?

The case was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

L. M. Singer, for the defendant.

Edward Bayly, K.C., for the Crown.

MIDDLETON, J., read the judgment of the Court. He said that the evidence was very confused, as the witnesses were mainly foreigners, examined through an interpreter.

Gurofsky was a ticket-agent, who sold tickets to foreigners desiring transportation to Europe. The foreigners concerned some time previously had bought tickets, but had been refused leave to enter the United States en route.

On the occasion in question, Gurofsky charged them $25 in addition to the price of the tickets, guaranteeing that they would be permitted to pass the border and would not get into trouble. One of the men had not enough money to pay this, and so paid the smaller sum only.

The learned Judge in his reasons for judgment finds "the false pretence was that Gurofsky alleged that he had a right to guarantee their entrance into the United States for the purpose of going to Marseilles and to Malta. The evidence shews that he had no right to guarantee; it was a false pretence and a false representation to these foreigners."

In the view of the Court, the evidence did not disclose this false representation; the guaranty in its nature was promissory; Gurofsky was to communicate with the Customs authorities—to telegraph and to telephone—so as to secure the free passage of the men. This was not a false representation of fact, which is essential to the offence.

For these reasons, the question should be answered in the negative, and the conviction should be quashed.

FIRST DIVISIONAL COURT. MARCH 14TH, 1919.

REX v. SANDERSON.

Criminal Law—Manslaughter—Evidence—Conviction of Husband for Causing Death of Wife—Death not Caused by Neglect of Husband to Provide Medical Attendance.

Case stated by MASTEN, J.

The defendant was convicted of manslaughter—his wife being the victim.

Two questions were submitted: (1) as to the admission of evidence; (2) whether there was any evidence on which the defendant could properly be convicted.

The case was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

W. A. Henderson, for the defendant.

Edward Bayly, K.C., for the Crown.

MIDDLETON, J., read the judgment of the Court. He said that, in the view which the Court took, it was necessary to consider the second question only.

Sanderson and his wife had been separated. There was a short-lived reconciliation, but Sanderson again left her, in such circumstances that, upon the evidence, he might well be regarded as having abandoned her. The wife was then not well; on the next day she went to her mother's house; Sanderson was told that his wife was ill; he telephoned to his mother-in-law's house, and was forbidden to communicate further or to go to the house; he was not then told that his wife's illness was serious. The mother, on the next day, sent for a doctor, who attended the wife until her death. On the day after the doctor's first visit, a constable was sent to the defendant at his place of business, and was received by him with violent and profane language. About a week later, the woman died of pneumonia following upon influenza.

Upon these facts it was plain that the charge of manslaughter was not made out. It was not shewn that the woman's death was caused by any neglect on the part of any one. She was with her own mother; and, as soon as the necessity for medical attendance became apparent to those with her, medical attendance was procured, but this did not prevent her illness having a fatal termination.

It could not be said that the conduct of the husband brought about the death of the wife, when there was the admission that proper medical attendance was in fact procured by some one else.

The woman had the medical attendance, and so it could not be said that her death was caused by its absence.

Reprehensible as the defendant's conduct was in many ways, as disclosed by the evidence, there was nothing to justify his conviction.

The second question should therefore be answered in the negative, and the conviction should be quashed.

FIRST DIVISIONAL COURT. MARCH 14TH, 1919.

*REX v. HOFFMAN.

Criminal Law—Forgery—Endorsement of Name of Payee on Bank-cheque without Authority—Bona Fide Belief of Authority—Failure to Prove—Intention to Defraud—Evidence—False Document—Criminal Code, sec. 466—Conviction by Police Magistrate—Case Stated under sec. 1014 of Code—Form of Case—Question of Law.

Case stated by one of the Police Magistrates for the City of Toronto, under the provisions of sec. 1014 of the Criminal Code.

The defendant was tried before the Police Magistrate for and was convicted of the offence of forgery.

The case was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

W. A. Henderson, for the defendant.

Edward Bayly, K.C., for the Crown.

MIDDLETON, J., reading the judgment of the Court, said that a cheque was drawn, by the law firm of Mercer Bradford & Campbell, on the Standard Bank of Canada, for $300, payable to Holmes & Mogan (solicitors) and James H. Hoffman, the defendant (a solicitor). This cheque was in settlement of a claim by one Harris, a client of the firm of Holmes & Mogan, against a client of Mercer Bradford & Campbell—Hoffman having conducted the litigation as agent for the firm of Holmes & Mogan, upon an agreement which entitled him to one-half of all the fees earned. Of the $300, $241 was payable to Harris and $59 was divisible between Holmes & Mogan and Hoffman.

Upon receipt of this cheque, Hoffman, without any authority, endorsed the name "Holmes & Mogan" upon it, and also his own name. The handwriting of the signature "Holmes & Mogan" was entirely dissimilar to his own writing. He then deposited the cheque in his own bank, and in due course it was paid and the money carried to his credit.

Although Hoffman received the proceeds of the cheque in April, he did not advise either Harris or Holmes & Mogan of the receipt; but, on the contrary, he told Holmes (on the 14th September) that the case would be settled shortly—that Mr. Bradford, of the firm of Mercer Bradford & Campbell, was busy. The untruth of this statement being discovered, an information was laid against Hoffman on the 16th September; and on that day Hoffman sent his cheque to Harris for $241 and a cheque to Holmes for $29.50.

The question submitted by the Police Magistrate was: "Was I right in finding, upon the facts disclosed on the evidence adduced, that the said James H. Hoffman was guilty of the crime of forgery?" This question was not properly framed as a question of law, but counsel agreed that the case should be treated as if the question submitted was: "Was there evidence upon which I could find the said James H. Hoffman guilty of the crime of forgery?"

It was contended that an intention to defraud was an essential ingredient of the crime of forgery, and that a bona fide belief in the existence of authority to sign the name "Holmes & Mogan" would constitute a defence.

The evidence before the magistrate justified a finding that there was an intention to defraud. The feigned handwriting of the signature "Holmes & Mogan," the retention of the money from April until September, the false statement that the settlement had not been made, were all most significant facts. The failure to produce a bank-book to shew that the funds were kept intact during this period, was also not without significance.

If the existence of an honest belief of authority to endorse the cheque constituted a defence, then, although Hoffman in his depositions said, "I believed I had authority to endorse this cheque," he gave no reason for the belief, and the finding of the Police Magistrate indicated his disbelief of the statement. There was nothing in the case submitted to indicate that the magistrate dissented from the view of the law presented by the defendant and his counsel.

Under sec. 466 of the Criminal Code, the statutory crime was abundantly proved. "Forgery," it is said, "is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine to the prejudice of any one . . ."

Manifestly the false signature of Holmes & Mogan was placed upon this cheque with the intention that it should be acted upon by the bank upon which the cheque was drawn in the belief that it was the genuine signature of the firm.

The question (as amended) should be answered in the affirmative.

Conviction affirmed.

HODGINS, J.A., IN CHAMBERS. MARCH 10TH, 1919.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Appeal—Settlement of Case on Appeal to Privy Council—Dispute as to what Exhibits and Evidence were before Court at Trial—Conflicting Affidavits—Inference.

Application by the plaintiffs to settle the case on appeal to the Privy Council from the judgment of the Appellate Division, 43 O.L.R. 637, 15 O.W.N. 88.

A previous application for the same purpose had been heard and disposed of by HODGINS, J.A.

J. H. Fraser, for the plaintiffs.

W. N. Tilley, K.C., and H. S. White, for the defendants.

HODGINS, J.A., in a written judgment, said that he had already disposed of the point, now raised again, whether the whole of the proceedings in the Mackell case were put in at the trial, and not merely the printed case which had been before the Privy Council.

On the first application, the learned Judge went carefully over the testimony given at the trial, and concluded that the language used by counsel thereat rendered it almost certain that the additional material and evidence had been in fact put in, though not then at hand or marked. Otherwise much of what was said was meaningless in view of the fact that exhibit 14, the printed case in the Privy Council, had been put in previously without question.

The learned Judge was now asked to receive and act on affidavits made by counsel for the plaintiffs at the trial, the statements in which were distinctly challenged by counsel for the defendants.

In such a case of clear difference between those who ought to know, the learned Judge was compelled to adhere to his former ruling, for he received no assistance from statements made on one side and denied on the other.

Under our practice a Judge of the Appellate Division does not know what papers are before the Divisional Court during the argument, and has to assume that the record of the trial contains specific information shewing what the trial Judge admitted or rejected. If that record is faulty or obscure, the safer way is to admit all that by fair inference can be found to have been before him, and which is not rejected nor clearly inadmissible.

Counsel for the parties always have it in their power to make clear just what exhibits are to form part of the record.

This second application failed, and the costs of it should be to the defendants in the appeal in any event.

HIGH COURT DIVISION.

ROSE, J. MARCH 11TH, 1919

RE BELLEMARE.

Trusts and Trustees—Money Deposited in Bank in Name of Son of Depositor in Trust—Nature and Object of Trust—Evidence—Question whether Money Formed Part of Estate of Depositor at Time of Death—Will—Marriage Contract—Settlement.

Appeal by the widow of Théophile Bellemare from the report of the Local Master at Ottawa, dated the 22nd January, 1919.

The appeal was heard in the Weekly Court, Ottawa.
J. P. Labelle, for Anais Bélanger Bellemare, widow of testator.
Henri Saint-Jacques, for executors and for children of testator.

ROSE, J., in a written judgment, said that, by an ante-nuptial contract made in January, 1904, between the testator and the appellant, it was agreed that, if the appellant survived the testator, she should have during her life, and so long as she continued the widow of the testator, "the full and absolute right to enjoy the rents, profits, and issues of the property belonging to the" testator "and in which he (might) be interested for such interest as" he might have therein at the time of his decease.

The testator died in January, 1918, leaving a will by which he gave to the appellant $600 and the right to the use for life of his dwelling house and the chattels therein, and directed that the gift of the $600 must be accepted by the appellant in lieu of all claims which she might have against his estate, whether for dower or by virtue of the marriage contract.

In October, 1917, the testator withdrew the money which he had on deposit in a savings bank, and deposited it in the Bank of Hochelaga, in the name of his eldest son, Eugene—the executor—in trust.

The widow contended that the balance which remained of this money at the decease of the testator, $4,619.58, was affected by the ante-nuptial contract.

The matter was brought up in May, 1918, by originating notice, before Falconbridge, C.J.K.B., who decided that, notwithstanding the provisions of the will, the widow was, by virtue of the contract, entitled to the income of "both the real and personal property which formed part of the estate of the said deceased at the time of his death," and he referred it to the Master

to inquire and report "what actually formed part of the said estate of the said deceased at the time of his death." The order was affirmed upon an appeal by the executor to the Appellate Division.

The Master reported that the money in question did not form part of the estate of the testator at the time of his death; and the present appeal was from that report.

The opening of the account in the name of Eugene Bellemare in trust was the voluntary act of the testator, and the purpose of it was to enable Eugene to divide the money in equal shares amongst the testator's children after his decease. There was, however, some doubt as to whether the testator parted with the whole of his interest, or retained the right to draw such money as he might require, and so to revoke the trust to the extent of the withdrawals. The Master made no finding upon this point, his holding being merely that a trust was created.

The learned Judge was of opinion, upon the evidence, that the trust would be accurately described as a trust to pay to the settlor such amounts as he should from time to time require during his life, and after his death to divide the fund, or what remained of it, amongst his children share and share alike: but, even so, there was a valid transfer of the fund to Eugene in the lifetime of the testator in trust for all the children, and what the testator had not got back for his own needs during his lifetime belonged to the cestuis que trust, and did not form part of the estate of the testator at the time of his death within the meaning of the marriage contract and of the order of reference: the cases as to the invalidity of gifts in their nature testamentary, but not evidenced by a document duly executed as a will, did not apply. See Tompson v. Browne (1835), 3 My. & K. 32, cited by Anglin, J., in Hill v. Hill (1904), 8 O.L.R. 710.

Appeal dismissed with costs.

CLUTE, J. MARCH 13TH, 1919.

RE PARKIN.

Will—Construction—Devise of Life-estate in Farm to Son—Sale of Farm after Death of Life-tenant—Division of Proceeds among Children—Inclusion of Life-tenant by Name—Vested Estate—Right of Personal Representatives to Receive Share of Life-tenant—Share of other Deceased Child of Testator Passing to Issue.

Motion by the executors of John Parkin, deceased, for an order determining certain questions as to the true construction of his will.

D'Arcy Martin, K.C., for the executors.

D. W. Saunders, K.C., for Harold Bailey, William Bailey, and Edith Farrell.

O. H. King, for Harriet A. Bailey.

E. F. Lazier, for Selina Dalgleish, daughter of John Parkin.

C. W. Bell, for executors of William Parkin.

J. J. Maclennan, for Maud Bailey, granddaughter of the testator.

F. W. Harcourt, K.C., Official Guardian, for the infant children of Matthew Bailey.

CLUTE, J., in a written judgment, said that John Parkin died on the 15th February, 1909; Maria Parkin, his widow, died in the year 1910; William Parkin, on the 20th October, 1918; Elizabeth Bailey, in February, 1918; and Matthew Bailey, on the 6th January, 1917. The will, after a provision for the widow and the gift of a farm to William for life, and other gifts not here material, provided:—

"After the death of my said son William I direct that my executors hereinafter named shall sell my said farm and divide the proceeds equally among the following of my children namely James Eliza Elizabeth Maria William and Selina and if any of my said children have died leaving issue then and in every such case such issue shall take his her or their parent's share.

"I give and bequeath to my son William Parkin absolutely all the rest residue and remainder of my property."

The learned Judge was of opinion: (1) that the share of Elizabeth Bailey was payable to her issue; and (2) that the children of her son Matthew, who predeceased her, were entitled to be included as issue per stirpes.

The 3rd question was, whether the estate of William Parkin was entitled to share in the proceeds of the farm.

After the death of William, the farm was sold, and the proceeds were held by the executors for division under the terms of the will. It was upon William's death that the estate was to be divided, and yet he was included by name among those who were entitled to share.

It was contended by the other beneficiaries that he was not entitled to share, as there was no vesting until after his death, and reference was made to Jarman on Wills, 6th ed., p. 1358; Bolton v. Bailey (1878), 26 Gr. 361.

In support of the contention that the estate of William was entitled to share in the proceeds of the sale of the farm, reference was made to In re Coleman and Jarrom (1876), 4 Ch. D. 165; Re Dardis (1917), 11 O.W.N. 331; Re Ward (1915), 33 O.L.R. 262; Re Brown (1913), 4 O.W.N. 1401.

This case, while somewhat similar to Bolton v. Bailey, supra, was distinguishable in this, that there the life-estate was for the life of the widow and not for the life of one of the children to be benefited. Here the clause which fixed the time of distribution, "after the death of William," also expressly mentioned him as one of the persons among whom the proceeds of the farm was to be divided. This made it perfectly clear that the estate given to him vested at the time of the testator's death. Packham v. Gregory (1845), 4 Hare 396, 397, was an authority for holding that a vested estate passed to William, as, "upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate . . . the interest is vested." The Packham case was applied by Boyd, C., in Re Ward, 33 O.L.R. 262, and in Re Brown, 4 O.W.N. 1401, and was applicable to the present case.

Therefore the estate of William Parkin was entitled to share in the proceeds of the farm.

Order declaring accordingly. Costs of all parties out of the estate.

KELLY, J. MARCH 13TH, 1919.

HEARNE v. FLOOD.

Negligence — Surgeon — Malpractice — Evidence — Reasonable Skill and Care—Cause of Bad Condition Following Defendant's Treatment.

Action for damages for malpractice.

The action was tried without a jury at a Toronto sittings.
T. H. Lennox, K.C., and F. Regan, for the plaintiff.
R. McKay, K.C., for the defendant.

KELLY, J., in a written judgment, said that the plaintiff was a marine engineer and the defendant a physician and surgeon. The plaintiff's right hand was severely injured when (August, 1916) he was working an air-pump, and he was treated by the defendant. The plaintiff alleged negligence and want of skill in the treatment. Subsequently the plaintiff consulted another medical man, who recommended an operation. On the 9th January, 1917, the plaintiff underwent an operation.

The learned Judge, after a careful review of the evidence, which was conflicting, found that, in the defendant's treatment of the plaintiff in August and September, 1916, there was neither that lack of the skill which he was bound to possess nor that want of care which it was his duty to exercise.

Reference to Halsbury's Laws of England, vo. 20, para. 815; Rich v. Pierpoint (1862), 3 F. & F. 35, 40; McQuay v. Eastwood (1886), 12 O.R. 402; Town v. Archer (1902), 4 O.L.R. 383; Hodgins v. Banting (1906), 12 O.L.R. 117; Jackson v. Hyde (1869), 28 U.C.R. 294.

Even if the defendant had been wanting either in skill or care, it had not been established that the plaintiff's condition was a consequence thereof; there were other causes to which that condition could as reasonably be attributed; the evidence was as consistent with the absence as with the existence of negligence.

Action dismissed with costs.

MASTEN, J. MARCH 13TH, 1919.

*CITY OF TORONTO v. CANADIAN OIL COMPANIES LIMITED.

Municipal Corporations—Powers of Licensing and Regulating—By-law—"Public Garage"—What Constitutes—Municipal Act, sec. 406a, para. 4 (a) (Municipal Amendment Act, 1914, sec. 13).

Action for a declaration that the defendants are operating a public garage without a license, in contravention of by-laws Nos. 7466 and 7467 of the Corporation of the City of Toronto, the plaintiffs, and for an injunction restraining the defendants from continuing so to operate until a license shall have been obtained.

The action was tried without a jury at a Toronto sittings.

C. M. Colquhoun, for the plaintiffs.

R. H. Parmenter, for the defendants.

MASTEN, J., in a written judgment, said that the power of the plaintiffs to pass by-laws for the purpose named rested upon sec. 406*a* of the Municipal Act, as enacted by the Municipal Amendment Act, 1914, 4 Geo. V. ch. 33, sec. 13, as follows:—

"406*a*. By-laws may be passed by the councils of cities having a population of not less than 200,000,

. . . . . .

"4. For licensing and regulating the owners of public garages, and for fixing the fees for such licenses, and for imposing penalties for breaches of such by-law and for the collection thereof.

"(*a*) For the purpose of this paragraph, a public garage shall include a garage where motor cars are hired or kept or used for hire, or where such cars, or gasoline, oils, or other accessories are stored or kept for sale:"

By-law 7466 enacted "that no person shall carry on the business of a public garage as defined by the Municipal Amendment Act of 1914 unless and until he shall procure a license so to do, and every person so licensed shall be subject to the provisions of this by-law."

The learned Judge discussed the meaning of "public garage," remarking that clause (*a*) quoted above did not indicate what kind of a building or what kind of a business constituted a garage. He quoted definitions from dictionaries, and referred to Smith v. O'Brien (1905), 94 N.Y. Supp. (128 N.Y. St. Repr.) 673, and Diocese of Trenton v. Toman (1908), 74 N.J. Eq. 702.

The evidence established, and it should be found as a fact, that the business carried on by the defendants consisted in supplying, to persons using automobiles, gasoline and air, and the defendants' building did not and could not afford storage for automobiles.

No building or business can properly be designated as a garage unless it is adapted to the storage of automobiles and is used for that purpose.

The defendants did not conduct or carry on the business of a public garage.

Action dismissed with costs.

FALCONBRIDGE, C.J.K.B. MARCH 14TH, 1919.

LAMBERT v. LAMBERT.

Husband and Wife—Action for Alimony—Plaintiff Leaving Defendant's House without Cause—Refusal to Return—Unfounded Charge against Defendant—Dismissal of Action—Costs—Cash Disbursements—Rule 388.

Action for alimony, tried without a jury at St. Catharines.

M. J. McCarron, for the plaintiff.
G. F. Peterson, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff's charge that the defendant was in the habit of "abusing and terrorising" the plaintiff was not proved.

The plaintiff was not deserted by the defendant. She deserted him, without sufficient cause, in 1903, removing the household furniture and the defendant's wearing apparel from the defendant's house. She refused to return the said wearing apparel and refused to live with the defendant, although requested so to do.

He repeated this latter request in Court. She said she would not go back—she would "die first"—assigning the reason that he had "too many women."

The "too many women" were resolved into one very respectable person, who had been housekeeper for years in the lifetime of the defendant's mother. There was obviously no ground for the plaintiff's malicious suggestions—but the defendant, in answer to the Chief Justice, said that he would even dismiss this housekeeper if necessary.

The plaintiff was entirely in the wrong, and her action must be dismissed. Under Rule 388 her solicitor was entitled to the "cash disbursements actually and properly made by" him.

KELLY, J. MARCH 14TH, 1919.

KARN v. ONTARIO GARAGE AND MOTOR SALES LIMITED.

Negligence—Injury by Fire to Automobile Left for Repairs in Garage—Evidence—Findings of Trial Judge—Cause of Fire—Escape of Gasoline from Automobile of Third Person—Liability of Owner of Garage—Proper Construction of Building and Proper Care Taken—Duty of Bailee—Efficient Discharge of—Liability of Owner of other Automobile—Accidental Breaking of Tank.

Action against the above named company and S. W. Nicholas for damages for injury by fire to the plaintiff's motor-car while in the defendant company's garage (in the city of London) for repairs.

The defendant Nicholas was the owner of another car which was in the garage and from which gasoline escaped, by reason of the tank in the car breaking, which, the plaintiff alleged, caused an explosion, from which the fire which burned the garage and injured the plaintiff's car originated.

The plaintiff charged negligence on the part of the defendants and each of them and their servants and agents.

The action was tried without a jury at London.

G. S. Gibbons and J. C. Elliott, for the plaintiff.

H. H. Dewart, K.C., and W. R. Meredith, for the defendant company.

T. G. Meredith, K.C., for the defendant Nicholas.

KELLY, J., in a written judgment, said that the plaintiff's case was based mainly on the theory that the explosion and the fire were due to the presence of a furnace in the basement of the garage premises and the fire in it at that time; that its location in relation to the gasoline-pump on the ground-floor of the premises was in itself a source of danger; that gasoline which escaped from the tank of Nicholas's car on to the floor found its way through the floor into the furnace-room; and that, by reason of the action upon it of the fire in the furnace, the explosion and fire resulted.

The learned Judge, after a careful review of the evidence, found that the damage complained of was not the result of defect in or want of proper construction of the building for the purposes for which it was used; that the fire was not caused either by gasoline finding its way into the furnace-room or by the furnace itself.

If the fire originated, as contended, from the gasoline which

escaped from the broken tank of Nicholas's car, it was not the direct result of any act or omission of the defendant company.

Upon the evidence as to the character of the building, the management of the business, and the care exercised by the defendant company in providing protection against possible dangers from the use of gasoline, the case did not fall within the rule laid down in Rylands v. Fletcher (1868), L.R. 3 H.L. 330.

Reference to Musgrove v. Pandelis (1918), 35 Times L.R. 202, distinguishing it.

The plaintiff's position was not advanced by appeal to clause 142 of the building by-law of the City of London.

It was suggested that, as bailee of the car, the defendant company was liable for damages, under Sharp v. Powell (1872), L.R. 7 C.P. 253, and Searle v. Laverick (1874), L.R. 9 Q.B. 122.

The learned Judge referred on this point to Halsbury's Laws of England, vol. 1, p. 544; Morison v. Walton (1909), in the House of Lords, unreported, but cited by Buckley, L.J., in Joseph Travers & Sons Limited v. Cooper, [1915] 1 K.B. 73, 87, and referred to in Coldman v. Hill (1918), 35 Times L.R. 146.

On that authority, the defendant company's duty was to take reasonable and proper care for the due security and proper delivery of the plaintiff's car, and there was also imposed upon it the onus of shewing that its had fulfilled that duty. On the evidence, that obligation had been discharged. That conclusion was reached without reference to the evidence that notices were conspicuously displayed in the defendant company's premises giving warning that cars were left there at the risk of the owners.

The plaintiff could not succeed against the defendant company.

As to the defendant Nicholas, he could not be found liable on the ground of incompetence. His explanation that the breaking of his tank was due to accident could not be discredited; it could not be found that the occurrence was not accidental, or that it was due to any negligence of his which would render him liable.

The action, as against both defendants, should be dismissed with costs.

CLUTE, J., IN CHAMBERS. MARCH 15TH, 1919.

*REX v. MERCIER.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1)—Having Intoxicating Liquor upon Unlicensed Hotel Premises—Conviction as for Second Offence—Admission of Evidence of Previous Conviction during Course of Trial—Violation of sec. 96—Imperative Enactment—Effect of Improper Admission of Evidence—Prejudice—Conviction Quashed.

Motion to quash the conviction of the defendant, by the Police Magistrate for the City of Windsor, for that the defendant unlawfully had in his possession intoxicating liquor in a public place, to wit, the Royal Hotel, unlicensed, contrary to the provisions of the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 41 (1). The conviction was for a second offence against the Act.

The grounds of the motion were: (1) that there was no evidence to justify a conviction; and (2) that evidence of a previous conviction was admitted, and ought not to have been admitted, previous to the finding of guilt, and that such admission tended to prejudice the fair trial of the defendant.

J. M. Bullen, for the defendant.

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

CLUTE, J., said that a careful reading of the evidence shewed that there was some evidence upon which a conviction could be sustained.

As to the second objection: it appeared that the defendant was examined before the magistrate as a witness on his own behalf, and was asked on cross-examination whether he had been previously convicted of having intoxicating liquor on his hotel premises, and answered that he had.

It was clear that the procedure laid down in sec. 96 of the Act had not been followed; and the question was, whether that section was imperative or merely directory.

The learned Judge referred to Rex v. Coote (1910), 22 O.L.R. 269; Rex v. Hanley (1917), 41 O.L.R. 177; Rex v. McDevitt (1917), 39 O.L.R. 138; and said that the real point decided in the Coote case was that the magistrate was entitled to proceed in the absence of the accused; and the views expressed in regard to sec. 101 of the Liquor License Act (which is similar to sec. 96 of the Temperance Act) were obiter.

In the learned Judge's view, the reception of evidence of the previous conviction during the course of the trial, and before

adjudication on the charge then pending, was in direct contravention of sec. 96, and rendered the subsequent conviction illegal. Aside from the statute, the case being a criminal or quasi-criminal one, the evidence of a previous conviction tended to prejudice the mind of the magistrate in regard to the charge before him, and ought not to have been received: Rex v. Melvin (1916), 38 O.L.R. 231. Section 96 clearly states that the magistrate "shall in the first instance inquire concerning such subsequent offence *only*." That is imperative, and the conviction cannot stand.

Order quashing the conviction, but without costs, and with protection to the magistrate and officers concerned; the property taken away to be returned to the defendant.

CLUTE, J., IN CHAMBERS. MARCH 15TH, 1919.

*REX v. BAIRD.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1)—"Private Dwelling House"—Suite in Apartment Block in City—Defendant Living alone in Suite with Servant Coming in to Prepare Meals—"Family"—Sec. 2 (i) (ii).

Motion to quash a conviction of the defendant, by the Police Magistrate for the City of Hamilton, for that the defendant "did unlawfully have" intoxicating "liquor in his possession in the Commercial Apartments, 41 Park Street North, in the City of Hamilton, in contravention of the Ontario Temperance Act."

Section 41 (1) of the Act, 6 Geo. V. ch. 50, provides that no person shall have liquor in any place other than in the private dwelling house in which he resides. The definition of "private dwelling house" is found in sec. 2 (*i*) of the Act; and clause (ii) enacts that "private dwelling house" shall include a suite of rooms in an apartment block, in a city, "in which suite there are facilities for cooking, and *a family* actually residing, cooking, sleeping, and taking their meals."

M. J. O'Reilly, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

CLUTE, J., in a written judgment, said that the evidence shewed that the defendant was unmarried, and occupied a suite or apartment in an apartment block, in a city. It was not disputed that the apartment fell within the general description

of a "private dwelling house" in the statute, but it was contended that the facts did not bring it within clause (ii) of sec. 2 (*i*). The defendant was a clerk in a hotel. He occupied and slept in the apartment and took his dinner and supper in it. No one else slept in the apartment, but a servant came in during the day, and prepared dinner and supper for him.

The magistrate, in effect, found that the defendant, with his servant, did not constitute "a family actually residing, cooking, sleeping, and taking their meals."

No authority directly in point was cited.

A considerable quantity of liquor was found upon the premises.

With some hesitation, the learned Judge had come to the conclusion that the establishment was a private dwelling house where a family actually resided etc., within the meaning of clause (ii).

The conviction should be quashed, but without costs; the magistrate and officers should be protected; and, if any property was removed, it should be returned.

ROSE, J., IN CHAMBERS. MARCH 15TH, 1919.

*RE NEW YORK LIFE INSURANCE CO. AND FULLERTON.

Insurance (Life)—Death of Assured—Rival Claims to Policy-moneys—Execution Creditors of Assured—Moneys Payable to Executors or Administrators or Assigns or to Designated Beneficiary of Assured—Designation of Sister as Beneficiary after Execution Placed in Sheriff's Hands—Application of Fraudulent Conveyances Act, R.S.O. 1914 ch. 105, to Revocable Designation of Beneficiary—Execution Act, R.S.O. 1914 ch. 80, sec. 20—"Security"—"Security for Money"—Equitable Execution—"Personal Property"—"Conveyance"—Insurance Act, R.S.O. 1914 ch. 183, secs. 155, 171 (1).

Motion by Elizabeth Fullerton, the beneficiary designated by an endorsement upon a policy of life insurance, for payment out of Court to her of the policy-moneys, which were paid into Court by the insurers when a dispute as to the person entitled to receive them arose; and cross-motion by W. L. McKinnon & Co., execution creditors of the deceased insured, for payment out to the Sheriff.

J. E. Lawson, for Elizabeth Fullerton.

J. B. Clarke, K.C., for W. L. McKinnon & Co.

ROSE, J., in a written judgment, said that the policy referred to was issued by the company to J. J. Doran on the 21st October, 1905. By it the insurers, in consideration of the payment of 20 annual premiums, contracted to pay, upon the death of the assured, $2,000 to the executors, administrators, or assigns of the assured, or to such beneficiary as might be designated by written notice to the company and by endorsement on the policy.

There was no evidence as to where or how the policy was delivered by the company to Doran; but the case was argued upon the assumption that the delivery was in Ontario and that the provisions of the Ontario Insurance Act, R.S.O. 1914 ch. 183, were applicable to it (see sec. 155).

In September, 1915, McKinnon & Co. recovered judgment against the assured for a large sum of money, and in January, 1916, they placed an execution in the hands of the Sheriff, who, at a later date, made a return of nulla bona. The judgment was affirmed by the Supreme Court of Canada in June, 1916.

By an endorsement on the policy, dated the 30th October, 1916, Elizabeth Fullerton, the sister of the assured was designated beneficiary.

The assured died on the 10th September, 1917.

There was no suggestion that consideration was given by Elizabeth Fullerton to the assured, or that the designation of her as beneficiary was anything other than the purely voluntary act of the assured. But it was argued that it was not established that the assured, at the time of the endorsement, was unable to pay his debts in full. In the view which the learned Judge took of the case, it was not necessary to decide the question of solvency or insolvency, for, even assuming insolvency, the contention of the creditors that the designation of the beneficiary was fraudulent and void as against creditors, because of the statute 13 Eliz. ch. 5 (R.S.O. 1914 ch. 105, sec. 3), could not be sustained.

The question whether an assignment of a policy of insurance upon the assignor's life comes within the statute has been considered in several cases; but apparently this was the first case in which it had been sought to apply the statute to a revocable designation of a person as the beneficiary to receive the money which is to become payable on the death of the assured.

The learned Judge, after referring to the Execution Act, R.S.O. 1914 ch. 80, sec. 20, the Fraudulent Conveyances Act, R.S.O. 1914 ch. 105, secs. 2 (*a*) and 3, and to several cases decided in England and Ontario, said that, in his opinion, the policy was not a "security for money" within the meaning of the Execution Act, nor a "security" within the meaning of the Fraudulent Conveyances Act—it was not under seal, and could not be called a specialty.

The learned Judge was also of opinion that the interest of Doran in the policy was not shewn to have been something which could have been reached by the process of equitable execution in his lifetime; and it was not exigible under the writ of execution; therefore it was not "personal property" to which the Fraudulent Conveyances Act applied; and so the claim of the execution creditors failed, even if there was any "conveyance" of it, or of his interest in it, by Doran, within the meaning of that Act—and there was no such conveyance, in the view of the learned Judge.

There was no attempt to shew any fraudulent payment of premiums, and the amount paid after the recovery of the judgment was trifling; therefore sec. 171 (1) of the Insurance Act was another answer to the creditors' claim.

There should be an order for payment of the money out of Court to Elizabeth Fullerton; her costs of the motion to be paid by W. L. McKinnon & Co.

MASTEN, J. MARCH 15TH, 1919.

CANADIAN STEAM BOILER EQUIPMENT CO. v. MACGILCHRIST.

Patent for Invention—Patentable Combination—Definite Result—Validity — Infringement — Injunction — Claim for Conspiracy—Restraint of Trade—Covenant of Servant not to Engage in Specified Business for 5 Years after Termination of Employment—Prohibition too Wide as to Territory—Refusal to Enforce.

Action against Robert MacGilchrist and John Collins to enforce the plaintiffs' rights in respect of a patent for an alleged new and useful improvement in shaking and dumping grates, and for other relief.

Against the defendant MacGilchrist the plaintiffs alleged infringement, and sought an account of profits, damages, and an injunction.

Against both defendants the plaintiffs sought damages for conspiracy.

Against the defendant Collins the plaintiffs claimed damages for breach of a covenant, entered into at the time of Collins's employment by the plaintiffs, by which Collins undertook not to enter into the grate-bar business for 5 years after leaving the plaintiffs' employment.

The action was tried without a jury at a Toronto sittings.

W. J. McLarty, for the plaintiffs.

R. G. Agnew and W. H. Kirkpatrick, for the defendants.

MASTEN, J., in a written judgment, after setting out the facts, dealt first with the claim against Collins. If the covenant was valid, Collins had committed a breach of it. The covenant, however, was unlimited in space or area. That did not make it bad; but, having regard to the nature of the plaintiffs' business, as disclosed by the evidence, the prohibition was too wide as to territory, was not reasonably necessary for the plaintiffs' protection in their business, and should not be enforced: Allen Manufacturing Co. v. Murphy (1911), 23 O.L.R. 467; Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, at p. 565.

In reference to the patent, the learned Judge referred to Frost on Patents, 4th ed., p. 73, and Walker on Patents, 5th ed., sec. 32, for the principles to be applied in determining whether or not a combination is patentable, and said that those principles had been fully adopted in our own jurisprudence: Smith v. Goldie (1883), 9 Can. S.C.R. 46; Toronto Telephone Manufacturing Co. v. Bell Telephone Co. of Canada (1885), 2 Can. Ex. C.R. 495; Mitchell v. Hancock Inspirator Co. (1886), 2 Can. Ex. C.R. 539; Dansereau v. Bellemare (1889), 16 Can. S.C.R. 180.

In the present case there was a collocation of inter-communicating parts, which, in virtue of such inter-communication, produced a definite and specific result not hitherto attained, that object being to shake and jolt the ashes and clinkers from the middle part of the top of the grate-bar. The simultaneous action of the three movements, namely, the revolving movement of the grate, its lateral or horizontal movement, and its vertical movement, coupled with the jarring or jolting of the bar against the shoulder of the bearing slot in which it sits, produces the definite and specific result of shaking the ashes and clinkers from the top of the bar when otherwise they would not be removed. This is a valid combination and patentable, and adequately covered by the 5th claim of the patent.

The case was presented and argued at large without special reference to the different claims set forth in the patent, and the learned Judge expressed no opinion whatever as to the validity of claims 6, 8, and 9, mentioned in the expert evidence of the plaintiffs.

In the result there should be judgment, in the usual form, for an injunction, but without any award of damages, and without a reference as to profits, no case having been made on that score. The other claims of the plaintiffs were dismissed.

Having regard to the divided success in the action, in the exercise of the Judge's discretion, no costs should be awarded.

MORRISEY v. THOMPSON—FALCONBRIDGE, C.J.K.B.—MARCH 13.

Contract—Money Due under—Account—Reference—Lien on Land.]—Action for an account of moneys due to the plaintiff under an agreement between the defendant and one Howard, who had assigned to the plaintiff, for payment of the amount which might be found due, and for a declaration of the plaintiff's right to a lien upon the defendant's land therefor. The action was tried without a jury at Sandwich. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he agreed with the contentions of the plaintiff's counsel, and directed judgment to be entered after 15 days for the plaintiff as prayed, with costs up to judgment, and a reference to take the account. Further directions and subsequent costs reserved until after the Master shall have made his report. A. R. Bartlet and H. L. Barnes, for the plaintiff. F. D. Davis, for the defendant.

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LIMITED—MASTEN, J.—MARCH 15.

Negligence—Injury to Infant by Electric Shock upon Premises of Power Company—Evidence—Nonsuit.]—Action by an infant, suing by his next friend, for damages for injuries sustained from an electric shock upon the defendants' pipe-line. The plaintiff alleged negligence on the part of the defendants. The action was tried with a jury at Haileybury. MASTEN, J., in a written judgment, said that, at the close of the plaintiff's case, counsel for the defence moved for a nonsuit, and the hearing of that motion was enlarged until after the evidence for the defence had been put in and the case had gone to the jury. The motion was then renewed. The learned Judge said that, notwithstanding the very able argument of counsel for the plaintiff in answer to the motion for a nonsuit, the motion must succeed. Without determining whether the plaintiff was a trespasser or a licensee when walking upon the pipe-line of the defendants, the learned Judge found that the evidence adduced failed to disclose any duty owing to the plaintiff by the defendants which they failed to observe and perform. There was no evidence proper to be submitted to the jury in support of question No. 7, or upon which they could find as they had. Consequently the action must be dismissed, and with costs, if demanded. W. A. Gordon and J. S. Allan, for the plaintiff. R. S. Robertson, for the defendants.