The
Ontario Weekly Notes

VOL. VIII. TORONTO, JULY 23, 1915. No. 19

APPELLATE DIVISION.

JULY 12TH, 1915.

*DOEL v. KERR.

Execution—Leave to Renew—Judicial Act—Judgment—Statute of Limitations.

Appeal by three of the defendants from the order of MIDDLETON, J., 8 O.W.N. 244.

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

C. A. Moss, for the appellants.

C. C. Ross, for Lilian L. Doel, executrix of the deceased plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., who briefly stated the facts and referred to Poucher v. Wilkins (1915), 33 O.L.R. 125, saying that the question which had arisen in this case was left open and untouched by the decision in that case. He saw no reason for differing from the conclusion of Middleton, J., which seemed to be well supported by the cases to which he referred.

Appeal dismissed with costs.

JULY 12TH, 1915.

*RE HUNT AND BELL.

Covenant—Conveyance of Land—Building Restriction—Effect of Tax Sale and Conveyance—Assessment Act, R.S.O. 1914 *ch.* 195, *sec.* 178—*Vendor and Purchaser—Objection to Title* —8 *Edw. VII. ch.* 118, *sec.* 8.

Appeal by the vendors from the order of MIDDLETON, J., ante 424.

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

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

Merritt A. Brown, for the appellants.

J. H. Bone, for the purchaser, respondent.

GARROW, J.A., delivering judgment, said that the vendors' contention was, that the effect of the sale and conveyance for taxes was wholly to eliminate the restrictive covenant as in any way affecting the title; they also relied on the curative effect of 8 Edw. VII. ch. 118 (an Act respecting the Town of Toronto Junction, in which the lands were situate), sec. 18.

The nature and effect of restrictive covenants had been under consideration in many recent cases: London County Council v. Allen, [1914] 3 K.B. 642, 672; In re Nisbet & Potts' Contract, [1905] 1 Ch. 391, [1906] 1 Ch. 386; Milbourn v. Lyons, [1914] 1 Ch. 34, [1914] 2 Ch. 231.

Under these authorities, if there is a dominant tenement, the owner, and he alone, can claim the benefit of the covenant. If there is not such a tenement, the claim upon the covenant, as against subsequent assignees or purchasers, entirely ceases, although the personal claim between the original covenantor and covenantee may still exist. And, if the claim has become a mere personal one against the owner, it cannot form the basis of a valid objection to the title.

The case is unaffected by 8 Edw. VII. ch. 118, sec. 8, which was intended mainly to cure defects in procedure.

In the absence of definite information as to the ownership of the adjoining lands, and assuming that there is land in the position of a dominant tenement giving the owner the right to claim the benefit of the restrictive covenant as creating an equitable interest analogous to an equitable easement in the vendors' lands, the effect of the sale and conveyance for taxes was to convey to the purchaser the land free from any claim under the covenant: Tomlinson v. Hill (1855), 5 Gr. 231; Soper v. City of Windsor (1914), 32 O.L.R. 352; In re J. D. Shier Lumber Co. Assessment (1907), 14 O.L.R. 210, 221; sec. 178 of the Assessment Act, R.S.O. 1914 ch. 195; Essery v. Bell (1908), 18 O.L.R. 76.

The objection upon which the purchaser relied was, therefore, not a valid objection.

MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

KELLY, J., also concurred, giving written reasons.

Appeal allowed.

JULY 12TH, 1915.

*RE WOOD VALLANCE & CO.

Partnership—Death of Partner—Construction of Partnership Articles—Implication of Term—Right of Pre-emption of Surviving Partner—Value of Goodwill—Annual Statements of Account—Right of Representatives of Deceased Partner to Share in Profits after End of Current Year.

Appeal by the executors of William Vallance, deceased, from the order of MIDDLETON, J., ante 267.

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

E. F. B. Johnston, K.C., for the appellants.

S. F. Washington, K.C., and W. N. Tilley, for W. A. Wood, the respondent.

GARROW, J.A., said that the learned Judge below was of opinion: (1) that, while the articles of partnership contained no express agreement giving a right of pre-emption to the surviving partner, such an agreement should, in the circumstances, be implied; (2) that the value of the goodwill should not be taken into account as an asset; (3) that the values set out in the annual statements were binding upon both parties; and (4) that the profits accruing after the end of the current year belonged exclusively to the surviving partner.

In the opinion of GARROW, J.A., (1) upon the proper construction of the articles, there was no right of pre-emption in the surviving partner; (2) the goodwill formed part of the assets of the firm; (3) the annual statements of account and the valuation therein placed upon the properties and assets should be regarded as merely conventional in their nature, and upon the final winding-up should be disregarded; and (4) the representatives of the deceased partner were not entitled to any share in the profits accruing after the end of the current year.

Upon the first three questions, the appeal should be allowed, and upon the fourth dismissed. The appellants should be paid their costs by the respondent.

HODGINS, J.A., was of the same opinion, for reasons stated in writing.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

Appeal allowed in part with costs.

JULY 12TH, 1915.

*KALBFLEISCH v. HURLEY

Mechanics' Liens—Lien of Material-man—Date of Last Delivery —Dispute as to—Finding of Fact of Master—Appeal—Material Delivered on Premises to be Used in Building—Absence of Evidence that Lumber so Used—Mechanics and Wage Earners Lien Act, R.S.O. 1914 *ch.* 140, *sec.* 6.

Appeal by the defendants J. J. Hurley and E. Hurley, the owners, from the judgment of the Local Master at Stratford declaring the plaintiffs and other persons entitled to the enforcement of mechanics' liens against the appellants' lands.

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

R. S. Robertson, for the appellants.

F. R. Blewett, K.C., for the plaintiffs and other lienors, respondents.

The judgment of the Court was delivered by HODGINS, J.A., who said that the first question was, whether the Master was right or wrong in holding that the last delivery of material was on the 21st September, 1914. The articles said to have been delivered on the 21st September, 1914, were twenty pieces of pine lumber of the value of $4.55. The appellate Court should not reverse the Master's finding on a question of fact, unless convinced that he had arrived at a wrong conclusion. It must be taken as established that the delivery of the pine lumber was upon the 21st September, 1914; and, therefore, that the mechanic's lien registered on the 21st October, 1914, was within the 30 days prescribed by the Mechanics and Wage Earners Lien Act.

The second question was, whether the material was furnished or used in such a manner as to entitle the respondents to a lien. The Master found that, although the delivery upon the land now charged was completed on the 21st September, 1914, there was no evidence that the lumber was ever used in the construction of the building. The delivery was made, however, for the purpose of using in the building the materials delivered; and that was sufficient to entitle the respondents to a lien: sec. 6 of the Act referred to, R.S.O. 1914 ch. 140.

Brooks-Sanford Co. v. Theodore Telier Construction Co. (1910), 22 O.L.R. 176, distinguished.

Larkin v. Larkin (1900), 32 O.R. 80, and Ludlam-Ainslie Lumber Co. v. Fallis (1909), 19 O.L.R. 419, considered.

The language of sec. 6 is very wide—"Any person . . . who furnishes any material to be used . . . for any owner, contractor, or sub-contractor, shall by virtue thereof have a lien." The views expressed by Moss, C.J.O., in the Brooks-Sanford case, at p. 181, were not the basis of the judgment, and were not necessary for the decision of the case.

The statute is wide enough to cover the case in hand—any other construction would result in confusion in registering and realising the liens of material-man.

Appeal dismissed with costs.

JULY 12TH, 1915.

*DELDO v. GOUGH SELLERS INVESTMENTS LIMITED.

Mechanics' Liens — Claim of Material-men — Amount "justly Owing" by Owner to Contractor—Payment in Advance—Entire Completion of Work under Contract not a Condition Precedent to Payment—Deduction for Non-completion of whole Contract—Drawback—Costs.

Appeal by the Builders and Contractors Supplies Limited, claimants, from the judgment of an Official Referee dismissing the appellants' claim to enforce a lien under the Mechanics and Wage Earners Lien Act for material supplied for a building erected by the defendant Morris, contractor, for the defendant Lembke, owner.

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

W. Proudfoot, K.C., and W. H. Grant, for the appellants.

W. R. Cavell, for the defendant Lembke.

HODGINS, J.A., delivering the judgment of the Court, said that the appellants' lien was filed in time, and was established; the only remaining question was, to what amount did the lien entitle them as against the owner?

The contract between Lembke and Morris was dated the 22nd June, 1914. It provided for the building of a pair of solid brick houses for $3,850—"the same to be completed in two months from the date of starting." Then followed specifications as to material and quality, ending with: "All work and material to be first class; the same to be paid for 80 per cent. as the work proceeds, and the builder allowed five draws, $300 on completion of stone work, and then $400 when roof is on, $1,600 when plastering is all finished, and $700 when complete, and balance within 30 days upon shewing all receipts paid and work satisfactory."

The owner admitted that the stone work was completed, and that 100 was paid on the 27th June, 1914. The appellants contended that their rights were not limited to the 20 per cent. drawback on the value of the work done, but included the balance of $200 to which the contractor became entitled upon the finishing of the stone work.

Under the Act, and apart from the 20 per cent. drawback, the rights of lien-holders are measured by the amount "justly owing" by the owner to the contractor, and the owner is not liable for a greater sum than is payable to the contractor.

The contract does not make entire completion a condition precedent to payment, but expressly divides the contract-price, $3,850, into five sums, one of which has become "payable" under the terms of the contract.

Reference to Terry v. Duntze (1795), 2 H. Bl. 389; Government of Newfoundland v. Newfoundland R.W. Co. (1888), 13 App. Cas. 199; Workman Clark & Co. Limited v. Lloyd Brazileño, [1908] 1 K.B. 968.

The amount payable or justly due was primâ facie $200—subject to any deduction which the owner can establish by reason of the non-completion of the whole contract, for it contemplates entire performance, although providing for payment in advance.

Sherlock v. Powell (1899), 26 A.R. 407, considered.

The judgment of the Referee reversed, and the appellants declared entitled to a lien. The amount payable will be the $200, subject to the owner's right to shew that, by reason of non-completion or otherwise, it is not justly due and owing, or to reduce it. Other lien-holders will be entitled to share if their rights are affected by this judgment. The Referee must ascertain the value of the work done so as to calculate the 20 per cent. drawback.

The appellants may add their costs to their lien, subject to the provisions of the Act as to the percentage of costs recoverable.

JULY 12TH, 1915.

TRUSTS AND GUARANTEE CO. LIMITED v. SMITH.

Gift—Evidence—Estate of Deceased Intestate—Corroboration—Trial—Jury——Discretion of Trial Judge—Appeal.

Appeal by the defendant from the judgment of BRITTON, J., at the trial at Chatham without a jury, in favour of the plaintiff company, as administrator of the estate of William Webb, deceased, to recover from the defendant moneys which admittedly had belonged to the intestate, but which the defendant, in whose house the intestate died, took possession of and claimed as his own by virtue of a gift thereof to him by the intestate a few hours before he died.

The main contest was as to two sums in cash: the first being the proceeds of cheques received from the solicitor of the intestate, amounting to $3,647.55; and the second, the purchase-money of the intestate's farm, which had been sold to one French, amounting to $3,600. Both sums were received by the intestate in cash on the day of his death.

BRITTON, J., held that the defendant had failed to satisfy the onus resting upon him of proving by satisfactory evidence the allegation of gift.

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

J. S. Fraser, K.C., for the appellant.

O. L. Lewis, K.C., and R. L. Brackin, for the plaintiff company, respondent.

GARROW, J.A., delivering the judgment of the Court, said that he agreed with the conclusion of the trial Judge; and, the main story of the gift, as deposed to by the defendant, not having been believed, it was needless to refer in detail to the evidence relied on as the corroboration required by statute. It consisted of circumstances designed to shew: (1) a friendliness of the deceased to the defendant; (2) the deceased's loneliness and lack of blood relatives; (3) the unusual gathering together of a large sum in cash as if for some special purpose; and (4) a remark made by the defendant to his wife and deposed to by her as well as by him, after the money had been handed over to the

defendant, as he said. The remark was, "Uncle Webb gave me that money"—in a voice loud enough to be heard by the deceased.

The evidence as to the absence of relatives was objected to, and was admitted subject to objection. It was strictly admissible as one of the surrounding circumstances; but the result of the whole evidence was, that it was not shewn that the deceased had no relatives.

The necessary statutory corroboration of the defendant's testimony was entirely lacking—a fatal defect even if his own evidence had been accepted and believed.

The trial Judge had power in his discretion to dispense with a jury; and his refusal to try the case with a jury was not the proper subject of an appeal.

Appeal dismissed with costs.

JULY 12TH, 1915.

RE CASCI AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land — Compensation—Arbitration and Award—Value of Land—Prospective Use—Deductions from Value—Appeal.

Appeal by the land-owner from the award of Mr. P. H. Drayton, K.C., Official Arbitrator, of the 19th April, 1915, fixing at $21,915 the compensation to be paid for the land of the appellant expropriated by the Corporation of the City of Toronto, the respondent.

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

W. Proudfoot, K.C., and K. F. Mackenzie, for the appellant.

C. M. Colquhoun, for the respondent corporation.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the land was a long narrow strip, and the compensation was based upon its value in view of its adaptability for being divided into lots and sold for manufacturing sites and for building purposes.

Applying the rule laid down by the Supreme Court of Canada in the recent and as yet unreported cases of Re C. M.

Billings and Canadian Northern R.W. Co., Re Muir and Lake Erie and Northern R.W. Co., and Re Ruddy and Toronto Eastern R.W. Co., no case was made for reversing the award.

While there was no direct evidence that 25 per cent. would be a reasonable deduction from the value of the lots, when prepared for sale, for the cost of surveying the lots, the expenses of sale, and the carrying charges, there was evidence that warranted the arbitrator in fixing the value of the land at the sum allowed; and there was evidence which supported the propriety of a deduction made for an intersecting street. There was also evidence which supported the arbitrator's deduction of a sum for the cost of grading the streets, although there was other evidence which would have warranted the deduction of a smaller sum. No case had been made for disturbing the conclusion of the arbitrator in regard to the value of a lot on Gerrard street.

Appeal dismissed with costs.

JULY 12TH, 1915.

*RE SCHOOLEY AND LAKE ERIE AND NORTHERN R.W. CO.

Railway—Expropriation of Land—Compensation—Arbitration and Award—Special Value of Land for Business Carried on by Claimants — Business Disturbance — Elements of Damage.

Appeal by the railway company from the award of three arbitrators fixing at $49,000 the money-compensation to be paid to the claimants for lands in the city of Brantford taken for the railway. The lands bordered on the Grand river, and had upon them buildings, machinery, and plant used in connection with the business of cutting and selling ice.

The appeal was in regard to two items: (1) "Sawdust in ice-house for covering ice, $800;" and "for the extra cost of harvesting ice in any other place in the city of Brantford or what may be termed special adaptability interest in the lands."

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

W. S. Brewster, K.C., for the appellants.

M. K. Cowan, K.C., and J. W. Pickup, for the respondents, the claimants.

HODGINS, J.A., delivering judgment, said that the arbitrators might have adopted the simpler and clearer method followed by the Official Arbitrator in Toronto in Re Meyer and City of Toronto (1914), 30 O.L.R. 426, namely, arrive at the value of the land, including in that the element of fitness for the business carried on upon it, and then allow three years' profits for disturbance. But the reasons of the arbitrators in this case shewed that the $20,000 allowed was intended to cover this special value as well as business disturbance. "Special value" refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit; while "special or exceptional adaptability" refers to an apparent and future use to which the property may be but is not now put, and for which it is particularly adapted. The $20,000 should be dealt with as allowed for special value and damages for disturbance: Commissioners of Inland Revenue v. Glasgow and South-Western R.W. Co. (1887), 12 App. Cas. 315, 323.

The principle of Pastoral Finance Association Limited v. The Minister, [1914] A.C. 1083, applied; and reference also to the Burrow case, cited in Re Brantford Golf and Country Club and Lake Erie and Northern R.W. Co. (1914), 32 O.L.R. 141; Chertsey Union Assessment Commission v. Metropolitan Water Board (1914), 78 J.P. 436; and New River Co. v. Hertford Union, [1902] 2 K.B. 597.

The item of $800 for sawdust cannot be supported, and should be disallowed.

With this deduction, the award should be affirmed, and the appeal dismissed with costs.

GARROW, J.A., concurred.

MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., agreed in the result.

Judgment accordingly.

JULY 12TH, 1915.

LESTER v. CITY OF OTTAWA.

Negligence—Removal by City Firemen of Dangerous Substance from Burning Building—Explosion after Removal—Injury to Person — Liability — Agency of Firemen for Owner of Building—Findings of Jury—Liability of City Corporation —Evidence.

Appeal by the defendant Brunton from the judgment of LENNOX, J., ante 295; and appeal by the plaintiffs from the same judgment, in so far as it dismissed the action as against the defendant the Corporation of the City of Ottawa.

The infant plaintiff was injured by the explosion of chemicals in a pail, which a fireman had set down upon a lawn near a highway upon which the infant plaintiff was walking. The fireman had taken the pail from a laboratory in the house of the defendant Brunton, where that fireman had gone with others, employed by the defendant city corporation, upon an alarm of fire.

The action was tried by a jury, who found that the infant plaintiff's injuries were caused by the negligence of the two defendants; that Brunton's negligence was, "that he failed in keeping water in the pails which contained the chemicals, and that he did not impress more strongly the contents of the room to the firemen;" and that the corporation's negligence was "in not exercising proper judgment in placing the pail on the lawn in close contact with the public and not warning them to keep back from it when they were not positive of what it contained, and when they were warned to some extent of the contents of the room," i.e., the laboratory.

The trial Judge, on the finding of negligence against Brunton, gave judgment for the plaintiffs against him for $1,100; but dismissed the action as against the corporation.

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

I. F. Hellmuth, K.C., and George F. Macdonnell, for the defendant Brunton.

A. E. Fripp, K.C., for the plaintiffs.

F. B. Proctor, for the defendant corporation.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the findings of the jury were somewhat self-contradictory—it seemed paradoxical to say that the accident was due to Brunton's failure sufficiently to warn, and to the fireman neglecting to act upon a warning which, ex hypothesi, had not been sufficiently given.

The action was rightly dismissed as against the corporation. There was no evidence of negligence causing the accident on the part of the chief of the fire brigade or any member of it. The fireman who removed the pail, seeing smoke coming from it, did what was natural when he removed it; and there was no negligence in his not putting the pail on a vacant lot at a distance from the sidewalk. But for the fact, unknown to him, that the contents were, for some unexplained reason, explosive, there was no danger to be apprehended either to persons or property from the placing of the pail where he put it.

There was no evidence proper to be submitted to the jury against the appellant Brunton, There was no negligence in having the pail and its contents in the laboratory, although the water in it had evaporated. There they were not a source of danger to any one; and, if they had been left there, no harm would have come to any one. They were not removed by his direction or with his knowledge. The fireman who removed them was in no sense his agent, nor was he subject to his orders or directions. Brunton had no reason to think that the pail would be removed from the room and placed where the fireman put it.

The plaintiffs' appeal was dismissed, Brunton's appeal was allowed, and the action was dismissed with costs throughout, if costs were asked.

JULY 12TH, 1915.

*REX v. NERLICH.

Criminal Law—Conspiracy—Indictment—Parties—"Others"—Inciting and Assisting Alien Enemy to Leave Canada and Join Enemy's Forces—Evidence—Verdict.

Emil Nerlich and his wife were indicted for that they did "maliciously and traitorously conspire confederate and agree with each other and with others to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public

enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces," etc.

At the close of the case for the Crown, the trial Judge directed the jury that there was no evidence on which Mrs. Nerlich could be convicted of conspiracy, and the jury accordingly rendered a verdict of "not guilty" as to her.

A number of objections were then raised on behalf of Emil Nerlich, which were overruled by the trial Judge, and the case went to the jury, who found the accused "guilty."

At the request of counsel for the accused, eleven questions of law were reserved for the Court.

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

G. F. Shepley, K.C., I. F. Hellmuth, K.C., and G. W. Mason, for Emil Nerlich.

J. R. Cartwright, K.C., E. E. A. DuVernet, K.C., and Edward Bayly, K.C., for the Crown.

MACLAREN, J.A., read a judgment in which MEREDITH, C.J.O., and GARROW, J.A., concurred. He said that the 8th question was fundamental: "Should I (the trial Judge) have given effect to the objection of counsel for the accused Emil Nerlich that the accused Emil Nerlich could not under the indictment be guilty of conspiring with Arthur Zirzow to leave Canada to rejoin the German army?"

If only Nerlich and his wife had been indicted for conspiracy, her discharge would necessarily have been followed by his: Regina v. Manning (1883), 12 Q.B.D. 241; Rex v. Plummer, [1902] 2 K.B. 339; Archbold's Criminal Pleading, 24th ed., p. 1420. The word "others" in the indictment cannot be construed to mean more than "persons unknown." Good faith on the part of the Crown required that the names of all the persons known, and respecting whose part in the conspiracy evidence is to be tendered, should be given in the indictment or in the particulars. If it had been intended to include Zirzow as one of the conspirators, his name should have been given in the indictment as a party to the conspiracy.

Reference to Rex v. Johnston (1902), 6 Can. Crim. Cas. 232.

The Nerlichs and the "others" referred to in the indictment were charged with conspiring to aid the enemy by inciting and assisting Zirzow to leave Canada and join the enemy's forces. The idea of a man conspiring with others to incite himself seemed absured. In imputing or charging a crime the language of the indictment should be clear and unmistakable.

The 8th question should be answered in the affirmative.

In the argument it was not asserted by counsel for the Crown that there was any evidence of Emil Nerlich having conspired with any other person than Zirzow, and there was no such evidence in the stated case. The second question—"Was there evidence (admissible and sufficient) against the accused Emil Nerlich on which he could properly be convicted on the said indictment?"—should be answered in the negative; and it was unnecessary to answer any of the other questions.

MAGEE, J.A., read a brief judgment to the same effect.

HODGINS, J.A., read a dissenting judgment.

Conviction quashed; HODGINS, J.A., *dissenting.*

JULY 12TH, 1915.

*REX v. SNYDER.

Criminal Law—Treason—Attempt to Commit—Evidence—Criminal Code, secs. 72, 74—"Assisting" Enemies to Leave Canada—Overt Acts—Trap-evidence—Enemies not Desiring to Leave Canada—Jury—Verdict—Form of.

Case stated by BOYD, C., after the conclusion of the trial of the prisoner at the sittings at Welland on the 7th April, 1915.

The prisoner was indicted for treason, the indictment charging him with the offence mentioned in clause (i) of sec. 74 of the Criminal Code, by inciting and assisting certain subjects of the Emperor of Austria, a public enemy now at war with the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the enemy, etc.

Counsel for the Crown did not ask for a conviction for treason, but for "an attempt to commit the treason with which he was charged."

The jury found the prisoner "guilty of attempting to commit treason but did not realise the seriousness of his act."

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

A. C. Kingstone, for the prisoner.

J. R. Cartwright, K.C., and Edward Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, C.J.O., who said that the verdict of the jury was not a verdict of "not guilty." The rider meant that the prisoner attempted to do the act with which he was charged without realising that the offence he was committing was as serious as it in fact is.

In certain kinds of treason, the attempt or even less than the attempt is treason, e.g., under clauses (b) and (d) of sec. 74; but in the case of the statutory offence defined by clause (i), the treason consists in "assisting;" and the forming and manifesting by any overt act of an intention to assist is, under the Code, not treason, but an indictable offence under sec. 72 (attempt to commit an offence).

The acts done by the prisoner amounted to an attempt to commit the offence charged in the indictment—what was done by the prisoner had passed the stage of mere preparation.

Reference to Stephen's Digest of the Criminal Law, 1st ed., art. 49; Rex v. Linneker, [1906] 2 K.B. 99; Regina v. Taylor (1859), 1 F. & F. 511.

There was evidence that the prisoner intended to take the Austrians named in the indictment across the river to the United States for the purpose mentioned in the indictment, and evidence from which the jury might properly conclude that if the prisoner had not been arrested he would have carried out that intention. The bargain which he made with one Bugarski, and his acts with reference to the four men who were brought to his farm for the ostensible purpose of being taken over to the United States, were overt acts forming part of a series of acts which if not interrupted would have ended in the commission of the actual offence.

It appeared that the men whom the prisoner was charged with having incited and assisted had no intention of leaving Canada. The whole affair was a sham, arranged by the military authorities for the purpose of confirming the suspicions they had that the prisoner was engaged in the work of assisting Austrians to cross the river. The prisoner, no doubt, thought that the thing was real, especially when he received $10 in cash for each of the men brought to him.

There was no evidence that the prisoner incited the men or any of them to leave Canada, and it could not be said that the prisoner assisted them to leave or attempted to do so. To assist another involves the idea of a desire or willingness to be assisted on the part of the person said to have been assisted.

Therefore, there was no evidence proper to be submitted to the jury of the offence charged in the indictment or of the attempt to commit it.

Conviction quashed.

JULY 12TH, 1915.

*MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Constitutional Law—Roman Catholic Separate Schools—Use of French Language—Regulation 17 of Department of Education—Validation by 5 Geo. V. ch. 45 (O.)—Provincial Legislation Authorising School Regulations — Intra Vires — British North America Act, secs. 93, 133—Treaty Obligations—Natural Rights—Provision for Use of French Language in Parliament and Courts of Justice.

Appeal by the defendants from the judgment of LENNOX, J., 32 O.L.R. 245.

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

N. A. Belcourt, K.C., A. C. McMaster, and J. H. Fraser, for the appellants.

W. N. Tilley, for the plaintiffs, respondents.

McGregor Young, K.C., for the Minister of Education.

MEREDITH, C.J.O., delivering judgment, said that the appellants attacked the validity of regulation 17 of the Department of Education upon two grounds: (1) that it was ultra vires the Department; and (2) that, if authorised by provincial legislation, the legislation itself was ultra vires.

The first objection was not open to the appellants, because of the declaratory Act passed at the last session of the Provincial Legislature, intituled "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45.

In support of the second ground of objection it was argued that the legislation is ultra vires because it prejudicially affects a right or privilege of the French-speaking people, contrary to the provisions of sec. 93 of the British North America Act.

The learned Chief Justice referred to an Act passed in 1863, intituled "An Act to restore to Roman Catholics in Upper

Canada certain Rights in respect to Separate Schools,'' 26 Vict. ch. 5; C.S.U.C. ch. 64, sec. 114; 39 Vict. ch. 16; and the Separate Schools Act, R.S.O. 1877 ch. 206.

The effect, he said, of sub-sec. 1 of sec. 93, was, so far as the Province of Ontario was concerned, to restrict the exclusive authority to make laws in relation to education to the extent of prohibiting the making of any such law which would prejudicially affect the rights or privileges with respect to denominational schools which are conferred by the Act of 1863, and to that extent only; and, subject to that limitation, the legislative authority of the Province as to education is ''as plenary and ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow:'' per Sir Barnes Peacock in Hodge v. The Queen (1883), 9 App. Cas. 117, 132. That it is only rights or privileges which exist as legal rights or privileges (''have by law'') that are preserved, is plain: City of Winnipeg v. Barrett, [1892] A.C. 445; Brophy v. Attorney-General of Manitoba, [1895] A.C. 202.

The learned Chief Justice also referred to the contention of the appellants that the right to use the French language in the separate schools of the Province was guaranteed by treaty or otherwise to the French-speaking people, and the contention that it was a natural right pertaining to them which the Legislature was powerless to impair or destroy, and said that he could find nothing to support these contentions; and, even if it had been shewn that, by the terms of the treaty which resulted in the cession of Quebec to Great Britain, this right had been guaranteed to the French-speaking people of the ceded territory, the new constitution for Canada provided by the British North America Act would have abrogated those rights, except in so far, if at all, as they are granted by it.

Counsel for the appellants also argued that sec, 133 of the British North America Act supported their contention; but, so far from supporting it, an intention was indicated that, except as to the matters dealt with by the section, the plenary power of the Legislature, within the ambit of its legislative authority, was to be unlimited as to what it should ordain as to the use of the French language.

GARROW, J.A., read a judgment to the same effect.

MACLAREN, MAGEE, and HODGINS, JJ.A., concurred.

Appeal dismissed with costs.

JULY 12TH, 1915.

*McDONALD v. LANCASTER SEPARATE SCHOOL TRUSTEES.

Schools—Separate Schools—Use of French as Language of Instruction in School not Designated as English-French School —Breach of Regulations of Department of Education.

Appeal by the defendants the Board of Trustees of Roman Catholic Separate School Section No. 14, Lancaster, and the individual trustees, from the judgment of FALCONBRIDGE, C.J. K.B., 31 O.L.R. 360.

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

N. A. Belcourt, K.C., A. C. McMaster, and J. H. Fraser, for the appellants.

J. A. Macdonell, K.C., for the plaintiff, respondent.

McGregor Young, K.C., for the Province of Ontario.

HODGINS, J.A., delivering the judgment of the Court, said that the appellants did not attack that part of the judgment which enjoined them from continuing to employ the defendant Sénécal as a teacher, so long as she was disqualified under the regulations of the Department of Education, nor the award of damages and costs against the trustees personally; and it was admitted by all parties that the formal judgment should be varied by confining the award of damages and costs, as was evidently the learned trial Judge's intention, to the appealing defendants.

Paragraph 4 of the formal judgment was the only part now in question: it restrained the defendants from using or allowing the use of French as the language of instruction or communication in the school "so long as the same shall not be permissible under the said regulations."

As to this clause it was obvious that, while the regulations stood (and they were not attacked in this case as ultra vires), no objection could be taken to its language, nor, in view of the fact, to its propriety, and this was admitted by counsel for the appellants. But both they and the other counsel concerned united in asking that the Court indicate what was, in its opinion, the particular breach or breaches of the regulations arrived at, and the extent of that breach, so that all parties might govern them-

selves accordingly. The Court, complying with that request, so far as was proper, was not to be understood as sanctioning the idea that the form of the injunction was otherwise than proper and usual.

The learned Judge referred to the Department of Education Act, R.S.O. 1914 ch. 265, secs. 4, 5, 26, 27; the Separate Schools Act, R.S.O. 1914 ch. 270, secs. 19, 24(7), (33), (35), 45(d), (m), (n), 48, 78; the Public Schools Act, R.S.O. 1914 ch. 266, sec. 6; the "Regulations and Courses of Study of the Public Schools, 1911," sec. 15; "Instruction" 17 of 1912; "Instruction" 17 of 1913.

The breach of the regulations which has taken place is the teaching of French either under clause 3(1) or clause 4 of "Instruction" 17 of 1913, without the fulfilment of the conditions embodied in them, in a school not designated by the Minister of Education as an English-French school.

The formal judgment should be corrected as above, and the appeal dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. JULY 13TH, 1915.

RE MARTIN INTERNATIONAL TRAP ROCK CO. LIMITED.

Company—Winding-up—Claim of Mortgagee for Bondholders—Application for Leave to Proceed to Enforce, notwithstanding Winding-up Order—Winding-up Act, R.S.C. 1906 *ch.* 144, *sec.* 22—*Discretion—Delay to Enable Liquidator to Sell Assets—Costs.*

Motion by the National Trust Company Limited, mortgagees in trust for bondholders of the International Trap Rock Company Limited, of all the estate and effects and the undertaking of the company, for an order allowing the applicants to proceed to enforce their mortgage, notwithstanding that an order has been made for the winding-up of the company and a liquidator appointed..

On the 26th September, 1914, the company made a general assignment for the benefit of creditors, under the Assignments and Preferences Act, to one Stevenson, who advertised all the property of the company to be sold at auction on the 15th May,

1915. This sale was stopped by order of the Court; and the winding-up order was made on the 26th May, 1915.

R. C. H. Cassels, for the applicants.
J. A. Macintosh, for the liquidator.
S. H. Bradford, K.C., for J. B. Martin, a creditor.

LENNOX, J., said that the operative words of sec. 22 of the Winding-up Act, R.S.C. 1906 ch. 144, under which Act the order for winding-up was made, were the same as the words of sec. 87 of the English Companies Act, 1862. He referred to In re David Lloyd & Co. (1877), 6 Ch. D. 339, cited by counsel for the applicants, and said that under that decision he had no discretion, and the applicants were entitled to the order asked as a matter of right. But he did not feel bound to follow that case. He adopted the decision and reasoning of Kay, J., in In re Henry Pound Son & Hutchins Limited (1889), 1 Megone's Company Cases 279, and held that he had a discretion to refuse leave to proceed to enforce the mortgage.

The motion should not be dismissed—a reasonable time should be allowed to the liquidator to effect a sale.

Order allowing the applicants to proceed to enforce their mortgage after the expiration of three months, subject to the right of the liquidator or an unsecured creditor or shareholder to apply to a Judge in Chambers to extend the time.

Costs of the applicants to be added to their mortgage-claim; costs of the liquidator to be paid out of the company's estate; no costs to the creditor Martin.

The constitutionality of sec. 22 as affecting property and civil rights within the Province was not questioned.

SUTHERLAND, J. JULY 14TH, 1915.

REX v. PERKINS.

Criminal Law—Motion to Quash Indictment—Refusal—Renewal after Disagreement of Jury—Criminal Code, secs. 216, 872, 873, 898.

At the assizes at Port Arthur, SUTHERLAND, J., presiding, the defendant was indicted for an offence against sec. 216 of the Criminal Code. After the jury had been called and sworn, the

defendant's counsel moved, under sec. 898 of the Code, to quash the indictment on several grounds. Counsel for the Crown pointed out that he had, under sec. 872 of the Code, preferred the bill of indictment for the charge to answer which the defendant had been committed, and, under sec. 873, had obtained the learned Judge's written consent to do so. In these circumstances, the learned Judge declined to accede to the motion, and the trial proceeded, with the result that the jury disagreed. The case was again called, and the application to quash the indictment was renewed, the trial being adjourned till the next assizes.

R. J. Byrnes, for the defendant.
N. F. Davidson, K.C., for the Crown.

SUTHERLAND, J., after consideration, said that he was unable to see that, in the circumstances, and having regard to the scope of sec. 872 and the proceedings taken thereunder, he could alter the view he had already expressed.

Motion refused.

SUTHERLAND, J., IN CHAMBERS. JULY 14TH, 1915.

RE BORROR'S CONVICTION.

Municipal Corporations—Transient Traders' By-law—Excessive License Fee—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 420, *para.* 7(c)—*Motion to Quash Conviction—Irregularities—Costs.*

Motion to quash the conviction of C. L. Borror by the Police Magistrate for the Village of Creemore for carrying on the business of a transient trader within the village, not having a license therefor, as required by a by-law of the village.

G. S. Gibbons, for the applicant.
W. A. J. Bell, K.C., for the informant and the magistrate.

SUTHERLAND, J., said that there were certain preliminary objections with regard to the service of the notice of motion; but, when the motion came on for final hearing, all parties had been served with the necessary notice.

By sec. 420, para. 7(c), of the Municipal Act, R.S.O. 1914

ch. 192, the fee to be paid for a transient trader's license shall not exceed in a city or town $250, in a village in unorganised territory $200, and in other local municipalities $100. The by-law under which the applicant was convicted provided for a fee of $150—Creemore not being a village in unorganised territory—and on this account the by-law was bad, and the conviction must be quashed.

No costs, in view of the irregularities. Usual order for the protection of the magistrate.

MIDDLETON, J. JULY 15TH, 1915.

O'NEILL v. LONDON JOCKEY CLUB.

Company—Incorporated Racing Association—Dominion Charter — Construction — Powers — "Operations throughout the Dominion and elsewhere"—Places for Holding Race-meetings.

Action by a shareholder in the defendant club for an injunction to restrain the defendant club, an incorporated company, from taking for the purposes of a race-course a lease of land in or near the city of Hamilton.

The action was tried without a jury at Hamilton.

W. S. McBrayne, for the plaintiff.

S. F. Washington, K.C., for the defendant club.

G. Lynch-Staunton, K.C., for the Attorney-General.

MIDDLETON, J., said that the defendant club was incorporated under the Dominion Companies Act "to establish, maintain, and carry on horse-racing, the holding of race-meetings, and the business of a jockey club in all its branches, at the city of London in the Province of Ontario, the city of Winnipeg in the Province of Manitoba, and the city of Montreal in the Province of Quebec." After this general provision in the letters patent, certain subsidiary powers were given; and then followed this clause—"the operations of the company to be carried on throughout the Dominion of Canada and elsewhere." This, it was said, authorised the holding of race-meetings, not only at the three places named, but anywhere within the Dominion of Canada and else-

where. But no such wide effect could be given to the words quoted. The object of the company was the holding of race-meetings at the three named places—whatever operations might be necessary to carry out those objects might take place anywhere in Canada or anywhere else.

By sec. 235 of the Criminal Code, as amended in 1912 by 2 Geo. V. ch. 19, special immunity from the laws against gaming was granted in respect of betting upon the race-courses of any corporation incorporated before the 20th March, 1912. This association was incorporated on the 18th March, 1912—and, if the association's construction of the charter was right, it had a valuable privilege.

The plaintiff, however, was right in contending that no such power was granted, and an injunction should be awarded accordingly.

BRITTON, J. JULY 15TH, 1915.

HALSTEAD v. SONSHINE.

Mortgage—Instrument Covering two Parcels—Conveyances of Equities of Redemption by Mortgagor to Different Purchasers—Release of one Parcel from Mortgage—Giving Time to Mortgagor—Principal and Surety—Marshalling Securities—Reference—Costs.

On the 24th October, 1912, the defendant Sonshine executed a mortgage in favour of James A. Halstead upon two parcels of land (A. and B.) for $1,100 and interest as collateral security to a promissory note of the same amount. Parcel A. was subject to two prior mortgages. Subsequently, the defendant Sonshine sold the equity of redemption in each of these parcels—A. to the defendants Morris and Rose Shapiro, and B. to one X. The Shapiros did not search the title to A. and did not know of Halstead's mortgage until after their purchase was completed; they then notified Halstead of their purchase. The sale to X. of the equity in parcel B. was after this; and Halstead, upon payment to him of $400, released parcel B. from his mortgage. The Shapiros were not notified of this, and did not consent.

This action was brought by the executors of Halstead to recover $700, the balance due upon the mortgage, with interest. The defendant Sonshine did not defend, and judgment against

him for the amount claimed was entered by the plaintiffs. Against the defendants the Shapiros the plaintiffs asked for immediate possession and foreclosure.

The action was tried without a jury at Toronto.
F. J. Hughes, for the plaintiffs.
A. Cohen, for the defendants the Shapiros.

BRITTON, J., said that two questions arose: (1) Did the giving of time by Halstead to the principal debtor operate as a release of the Shapiros' land from the mortgage? (2) Did the release by Halstead of parcel B. from the mortgage have the effect of releasing the Shapiros' land?

The case of Forster v. Ivey (1901), 2 O.L.R. 180, was not in point: the Shapiros were not personally sureties for Sonshine to Halstead for the debt represented by the note to which the mortgage was collateral.

The mortgage contained this clause: "Provided that no extension of time given by the mortgagee to the mortgagor or any one claiming under him, nor any other dealing by the mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the mortgagee against the mortgagor, or any other person entitled, for the payment of the moneys hereby secured." The mortgage was registered on the 25th October, 1912. The Shapiros did not buy until the 9th August, 1913. Time was given by Halstead to Sonshine; but, having regard to the clause quoted, it should be taken that Halstead reserved all rights as against the mortgagor and his assigns.

Upon the question how far the land purchased by the Shapiros was surety for the debt, the learned Judge referred to Brandt on Suretyship, 3rd ed., p. 103.

Apart from the rules as to principal and surety, and upon equitable grounds, the Shapiros should be entitled to some relief —and it must be from the plaintiffs. The owner of the equity in parcel B. could not be brought in. He was under no personal liability to the creditor, and his property had been discharged by the creditor.

The only relief that the Shapiros could have was to leave it open to the Master to compel the plaintiffs to marshall their securities; and, if it should turn out that the amount accepted by Halstead was less than he should have received, having regard to the respective values of parcels A. and B., it should be so reported, and the matter dealt with on further directions.

The third party notice is to be struck out, and the judgment to be without prejudice to any claim by the Shapiros against Sonshine.

Judgment for the plaintiffs for foreclosure and possession, with a reference to the Master to take the account and ascertain the values as above. The plaintiffs to have costs against the defendants the Shapiros up to and including the trial, fixed at $100, to be added to their claim; no execution to issue for these costs. Further directions and subsequent costs reserved.

MEREDITH, C.J.C.P. JULY 15TH, 1915.

MATTE v. MATTE.

Will—Construction—Bequest of Mortgage to Daughter "for her sole Use during her Lifetime"—Bequest to Others after her Decease—Right of Daughter to Expend Corpus as well as Interest—Parties—Costs.

Action by a legatee under a will to recover $1,093.75, and motion by the plaintiff, upon originating notice, for an order determining questions arising as to the construction of the will.

The action was in part tried at L'Orignal; the trial was continued at Ottawa, and the motion was there heard.

J. P. Labelle, for the plaintiff.

A. C. T. Lewis, for the Official Guardian, representing persons with a possible future interest.

C. G. O'Brian, K.C., and L. Coté, for the defendants the executors and the defendant Calixte Matte.

MEREDITH, C.J.C.P., said that by the will the testator's land and a mortgage were given to the plaintiff "for her sole use during her lifetime;" the mortgage only was now in question; then followed a gift of them to her heirs, in these words, "and upon her decease to her legitimate heirs born of her lawful marriage;" a gift which, however, was cut down by these words, which immediately followed it: "and in default of child or children upon her decease from her lawful marriage . . . the property to be divided equally between her husband if any such living and my son Calixte Matte or to his heirs upon his decease born of his lawful marriage." So that all question of

an estate tail was gone, and the plaintiff, so far, had a life estate only. But in the words omitted from the last quotation, that estate was intended to be enlarged to some extent, the omitted words being: "the property known as my and all that my freehold with buildings and appurtenances thereto belonging and any sum of money remaining after the payment of her debts and funeral expenses," to be divided as mentioned in the quotation from which the last quoted words were omitted. So that the remainder given to husband and son was of the land, but not of the mortgage; as to that the gift is only of any sum of money remaining after payment of debts and funeral expenses of the plaintiff. Thus the gift of the mortgage-money to the plaintiff for life was extended so as to make it answerable for her debts and funeral expenses, in so far as they should exceed the life interest; and, reasonably construed, that additions to the life interest included a right to the plaintiff to expend the corpus in any necessary or reasonable manner.

A gift of that character is valid: British and Foreign Bible Society v. Shapton (1915), 7 O.W.N. 658; Re McDonald (1903), 35 N.S.R. 500; McLaren v. Coombs (1869), 16 Gr. 602.

There should be judgment declaring that the plaintiff is entitled to expend the principal, as well as the interest, of the mortgage for any necessary or reasonable purpose; that the executors are bound to pay over to her so much thereof as may be required for such purpose, or to pay out of it her debts incurred for any such purpose; but that the plaintiff is not entitled to anything but the income from the mortgage for her own unrestricted use—the right to expend the principal does not include the right to give it away or to expend it for the purpose of depriving those who may be entitled to the remainder, of any share in the testator's bounty.

The widow of the testator to be added as a party and to be bound by this judgment.

The plaintiff and the defendant Calixte Matte to pay his and her own costs, each out of his or her own fund. The executors to have their costs, fixed at $20, out of the mortgage-moneys. The Official Guardian to have his costs, fixed at $10, paid by the plaintiff, to be added to her own.

MEREDITH, C.J.C.P. JULY 15TH, 1915.

*TWIN CITY ICE CO. v. CITY OF OTTAWA.

Water — Rideau River — Navigable or Unnavigable — Riparian Rights—Assertion of Right of Access in Winter to Cut Ice—Possession of Municipal Corporation — Limitations Act, R.S.O. 1914 ch. 75, sec. 35—Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—Acquiescence—Dump-made Lands—Accretion.

Action for a declaration that the plaintiffs are the owners of all the land between the shore-line of the Rideau river, as it stood in 1866, and the middle of the main channel of the river, for a certain distance opposite their land, and for possession, an injunction, and damages.

The action was tried without a jury at Ottawa.

R. A. Pringle, K.C., and L. Coté, for the plaintiffs.

F. B. Proctor, for the defendants.

MEREDITH, C.J.C.P., said that the plaintiffs at the trial took the position, and endeavoured to prove, that the stream was not a navigable one, and confined their claims to riparian rights upon a stream not navigable. Only one witness was called upon this branch of the case, and he was a witness for the plaintiffs; if his view of the question were to be accepted, the plaintiffs had succeeded in proof of their contention that the stream, at the place in question, was not a navigable one. And, as the only proof of injury to the plaintiffs, and the only claim made by them at the trial, was in respect of access to the stream, as a highway, in winter, when frozen over, the action failed, because, not being a navigable stream, there was no such right of passage over it.

But, if a claim and proof in respect of other riparian rights had been made, the plaintiffs could not succeed in this action, whether the stream was or was not navigable. Assuming that it was not navigable, and that the plaintiffs' predecessors in title owned the land to the centre of the stream—which was doubtful—then they lost title to it by the defendants' length of possession of it.

If possession gives title to the land itself, no claim can be made regarding riparian rights, because they are effectually cut

off by the acts of the defendants in acquiring title—just as if the bed of the stream had been sold to them by the plaintiffs with the right to do as they had done, that is, fill up the stream, and make land, reclaimed land.

The learned Chief Justice finds also that all such rights as are or might be involved in this case have been lost to the owners of the land now owned by the plaintiffs and acquired by the defendants by length of possession and under the provisions of sec. 35 of the Limitations Act, R.S.O. 1914 ch. 75.

Assuming that the stream was a navigable one: prior to the year 1911, the bed of the stream was the property of the owner of the land on its bank; and prior to that year the defendants had acquired title by length of possession, a title which cut off riparian rights. The Act of 1911—the Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—gave the Crown the bed of the stream, but it did not restore the riparian rights to land which had legally, as well as in fact, ceased to extend to the river. There was such deprivation of all such rights as, under sec. 35 of the Limitations Act, precluded all claims in this action. And, if that were not so, there was acquiescence, which had the same effect.

The claim of the plaintiffs to the dump-made lands as an accretion was without foundation in fact or law.

Other questions raised were considered, at the request of the parties, but without effect upon the result.

Action dismissed without costs.

RE WOODARD—LENNOX, J., IN CHAMBERS—JULY 13.

Insurance — Life Insurance — Death of Insured and Wife (Beneficiary) and Child in same Disaster—Evidence—Presumption of Survivorship—Payment of Insurance Moneys to Administrators of Insured.]—Application by the Mercantile Trust Company, administrators of the estate of Walter Woodard, deceased, for an order determining the question who are the persons entitled to the proceeds of a policy of insurance upon the life of the deceased, and for payment out of Court of the amount paid in by the insurance company. Eliza Woodard, wife of the deceased, was the beneficiary named in the policy. She and her husband and their only child perished in the same disaster. Service of the notice of this application was made

upon eleven persons said to be the next of kin of Eliza Woodard. There was no affidavit to shew who were the next of kin or that these were all the next of kin of Eliza Woodard. LENNOX, J., said that it appeared to be impossible, in the circumstances, to shew as a matter of fact the order in point of time in which the husband, wife, and child died. In the absence of any evidence as to the physical condition, or the ages of husband and wife, it was not unnatural to presume that the husband and father survived his wife and child—the weakest may be presumed to perish first. Order made for payment out of the moneys in Court to the applicants, upon an affidavit being filed shewing that the eleven persons served are the only next of kin of Eliza Woodard. The applicants to have the costs of the application, including the costs of the order for service out of the jurisdiction and of effecting service, out of the estate of Walter Woodard. C. W. Livingston, for the applicants. No one contra.

SMITH v. WRIGHT—LENNOX, J.—JULY 13.

Mortgage—Assumption by Purchaser of Mortgaged Land—Obligation to Pay—Assignment to Mortgagee—Action against Mortgagor and Purchaser to Recover Mortgage-moneys—Judgment—Relief over—Indemnity—Stay of Proceedings.]—Action by Frederick J. D. Smith against Charles F. Wright and Thomas H. Wilson upon a mortgage of land executed by the defendant Wilson in favour of the plaintiff. In handling the property, Wilson associated with him three men, who joined him in conveying the mortgaged property to the defendant Wright, who assumed the payment of the balance of the Smith mortgage, then amounting to $63,000. The defendant Wright agreed to pay the mortgage-money, and he executed the deed in which he was named as grantee. Wilson and the other three men, the grantors in the deed, assigned to the plaintiff, before action, Wright's obligation to pay the mortgage-money. The action was tried without a jury at Toronto. At the trial, the three men referred to were added as plaintiffs. The defendant Wilson did not at the trial dispute the right of the original Smith to recover against him. The defendant Wright pleaded that he had no notice in writing of the assignment to the plaintiff of his obligation to pay the mortgage-money. LENNOX, J., said that all the defences raised were open to the double objection that they did not affect the plaintiffs' rights and were not substantiated. The

plaintiff Smith was entitled to judgment for $4,000 with interest on $2,000 from the 10th September, 1914, and the costs of the action, against both defendants. Wilson asked for judgment over against his co-defendant by way of indemnity. No case for this was made upon the pleadings. No stay of execution. W. A. Skeans, for the plaintiffs. J. J. Gray, for the defendant Wright. The defendant Wilson, in person.

RE O'CONNOR AND HAMILTON PROVIDENT AND LOAN SOCIETY—LENNOX, J., IN CHAMBERS—JULY 13.

Mortgage—Sale under Power in First Mortgage—Payment of Surplus into Court—Motion by Second Mortgagee for Payment out—Notice to Persons Interested.]—Motion by Annie O'Connor for payment out of Court to her of $452.91 paid in by the Hamilton Provident and Loan Society, being the surplus proceeds of a sale made by the society under a first mortgage of land from Peter J. O'Connor, deceased. The applicant had a second mortgage upon the land for $1,944 and interest, and she swore that nothing had been paid upon it. She was also one of the heiresses-at-law or next of kin of the deceased, and the only others were her two sisters, who were both served with notice of the motion, and did not appear. The order allowing the society to pay the money into Court provided for service thereof upon the applicant and her two sisters. It was not shewn whether service had been made upon the sisters. LENNOX, J., said that, upon this being shewn, an order should issue for payment out to the applicant of the money in Court. No order as to costs. D. Inglis Grant, for the applicant.

CROCKER V. GALUSHA—SUTHERLAND, J.—JULY 14.

Contract—Sale of Company-shares and Money-claim—Terms of Payment—Promissory Note—Written Agreement—Variation by Oral Agreement—Findings of Fact of Trial Judge.]—The plaintiff and the defendants Galusha and Acason were in 1909 shareholders in the Walkerville Carriage Goods Company Limited. The plaintiff held 91 shares of the par value of $100 each. He had also lent $7,200 to the company. On the 11th September, 1909, he sold to Galusha and Acason all his shares for $11,375,

and his claim for money lent for its face value. The two defendants were to pay the plaintiff in instalments, and they made a promissory note in his favour for $18,575. The note was payable in the manner and on the days and times mentioned in a written agreement of the same date as the note—the 11th September, 1909. This action was brought to recover $16,015.61, the balance alleged to be due under the note and the agreement, and for other relief. The Walkerville Carriage Goods Company and the Gramm Motor Truck Company of Canada Limited were made defendants as well as the two individuals; but the defendant Galusha alone defended. The action was tried without a jury at Sandwich. The learned Judge, in a considered judgment, dealt with the questions of fact arising in the action, and concluded: The plaintiff is asking for a judgment for so much money as against the defendants Galusha and Acason. The defendant Galusha is setting up a verbal bargain, made subsequent to the written agreement, to the effect that so long as interest is paid the plaintiff cannot demand payment of the principal until such time as dividends have been earned and are payable on the stock of the Gramm Motor Truck Company of Canada Limited. Upon the evidence of the plaintiff and Acason, I am unable to find that the verbal agreement went further than this, that so long as the interest was paid the plaintiff would not be urgent for the payment of the principal, but that, nevertheless, he was still to have the right to ask for advances on account thereof from time to time as he should need them; and, if required at any time, to call for payment of the whole. The only relief that I can see my way to grant is that with respect to the money claim. The plaintiff will, therefore, have judgment against the defendants Galusha and Acason for $16,015.61, with interest and costs. J. H. Coburn, for the plaintiff. F. D. Davis, for the defendant Galusha.