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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 5TH, 1920.

WHITE v. ANDERSON.

Money Lent—Action for, against Executrix of Debtor—Mortgage-security Accepted by Creditor—Right to Sue for Original Debt—Injunction against Removal of Assets from Ontario.

Appeal by the defendant from the judgment of LENNOX, J., 18 O.W.N. 361.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

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

F. E. O'Flynn, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 7TH, 1920.

S. WANDER AND SONS CHEMICAL CO. INCORPORATED v. BRENNAN.

Contract—Sale of Goods—Formation of Contract—Correspondence—Intention of Parties not to be Bound until Formal Agreement Executed.

An appeal by the plaintiffs from the judgment of LENNOX, J., 17 O.W.N. 403.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL and SUTHERLAND, JJ., and FERGUSON, J.A.

W. L. Scott, for the appellants.

I. F. Hellmuth, K.C., and M. G. Powell, for the defendants, respondents.

MULOCK, C.J. Ex., reading the judgment of the Court, said, after setting out the facts and the correspondence between the parties, that parties may be bound by correspondence although intending to sign a formal document. If, however, the correspondence shews the intention of the parties to be that their mutual assent to terms is conditional on those terms being embodied in a formal document to be executed by the parties, then, in the absence of such a document, there is no contract.

Reference to Chinnock v. Marchioness of Ely (1865), 4 DeG. J. & S. 638, 646; May v. Thomson (1882), 20 Ch. D. 705, 716; Williams v. Brisco (1882), 22 Ch. D. 441, 448.

Where parties conduct negotiations by correspondence, if the correspondence shews a common understanding that terms, if reached, are to be embodied in a formal written agreement, the inference is that such negotiations were not in themselves intended to create a contract, but that assent to such terms was a qualified one only, namely, conditional on the contemplated formal written agreement being entered into: Chinnock v. Marchioness of Ely, supra.

From the correspondence in this case it appeared that until the plaintiffs' letter of the 1st November assenting to the changes suggested by the defendants' letter of the 30th October, no common agreement as to terms had been reached. Evidently the plaintiffs were not then of opinion that the correspondence created a contract; for in their letter of the 1st November they in effect assured the defendants that the written agreement executed by the plaintiffs and then in the defendants' hands for execution was valid and binding, and requested the defendants to execute and transmit it to them, when they would affix their corporate seal thereto, and thus beyond all question become bound. They were not taking the ground that a contract had been reached, but pressing for the written contract, indicating their view that the parties were not then bound by the correspondence; and their later letters were to the same effect.

At the commencement of the negotiations the plaintiffs prepared and executed a proposed contract, and on the 11th October sent it to the defendants for execution. The defendants did not execute it, but had another prepared, which they did execute, and which on the 25th October they sent to the plaintiffs. The latter, however, did not execute it, but again prepared and executed another "contract," and on the 28th October sent it to the defendants for execution. On its receipt, the defendants made certain

changes in it, but did not execute it; instead, they wrote to the plaintiffs mentioning the changes and agreeing to execute it on receiving a reply.

The correspondence shewed that the approval by the parties of the various proposals and counter-proposals, which finally resulted in terms being reached, was not intended in itself to create a contract between them, but was intended as a foundation for a contract, and was conditional on the approved terms being embodied in a formal written and binding agreement to be executed by both parties. No such written agreement having been entered into, there was no contract.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J. OCTOBER 5TH, 1920.

HUDSON v. ROYAL BANK OF CANADA.

Banks and Banking—Deposits of Foreign Currency Made by Customer—Bank-notes Accepted by Teller at Par—Mistake—Sum Representing Exchange afterwards Debited to Customer's Account—Unsuccessful Action by Customer to Recover Sum Debited.

The plaintiff sued for $3,121.98, the amount of charges made by the defendants, his bankers, in his account, representing the exchange upon two deposits of $13,440 and $18,000 made by the plaintiff on the 17th and 19th November, 1919.

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

H. H. Davis, for the plaintiff.

H. J. Scott, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the amount of these deposits was the face-value of certain notes issued by the defendant, a Canadian chartered bank, under the provisions of sec. 62 of the Bank Act, 3 & 4 Geo. V. ch. 9 (Dom.), from their branch or agency in Trinidad. The plaintiff's account was kept at one of the Toronto offices of the defendants. The notes were plainly marked "Trinidad, payable Port of Spain, Trinidad."

It was admitted that under the statute these notes were redeemable at Port of Spain, and not elsewhere, and that the defendants would have been entitled to charge exchange upon the notes being tendered for deposit. The contention was, that, by reason of what took place, the defendants were precluded from charging exchange.

The defendants, as a matter of business expediency and courtesy, had been in the habit of cashing these Trinidad notes at par in Toronto, when occasionally presented in small lots; but the rate of exchange, which had been for some time adverse to Trinidad, increased so that it became a matter of importance; and, when the defendants became suspicious that notes were being sent from Trinidad to Toronto for the purpose of enabling a profit to be made out of the courtesy granted, they became chary of further favours. In the meantime the plaintiff had succeeded in having several small deposits of these notes put through at par, and on one occasion, the 10th September, 1919, notes to the amount of $3,000 were accepted without exchange.

It was quite evident that a scheme was evolved to realise a substantial sum by sending from Trinidad large amounts in notes, which the plaintiff expected to have cashed at par. The plaintiff's brother procured these notes and sent them to Toronto, contemporaneously drawing through another bank for an equivalent amount. The deposits of the 17th and 19th November were made up of parcels of these notes, and were, it is said, inadvertently received by the teller. On neither occasion did the plaintiff produce his bank-book for the purpose of having an entry made in it; but on each occasion he received a duplicate deposit-slip initialled by the teller, and on each occasion the face amount of the notes was placed to the plaintiff's credit in the defendants' ledger. When the higher officials of the bank became aware of what had taken place, a communication was at once sent to the plaintiff advising him that the bank had debited him with the sum now in question as representing the discount upon these notes, and this debit entry was put through the bank—this was on the 19th November, the day of the second deposit.

The deposits made by the plaintiff were, to his knowledge, not of actual Canadian money, but were of foreign currency, subject to discount, and the giving to him of credit for the face-amount was a mistake.

The giving of credit in a bank account by error is subject to correction, like any other mistake; and this was really the essence of the case. The plaintiff had no right to receive from the bank anything more than he actually deposited.

He complained that the mistake was unilateral, saying that he knew that what he was depositing might be subject to a discount

if demanded, and, as it was not demanded, he was entitled to assume that the defendants waived their right. That could not be so. He knew that the function of the receiving teller was to receive money, and that the teller would have no right to receive as money in Canada that which was not in truth money in circulation here.

If there was any prejudice or loss to the plaintiff or his brother, it was the result of an unsuccessful experiment to trade in foreign currency, and the loss was not to be attributed to the mistake of the teller in failing to demand exchange when the notes were tendered for deposit.

The plaintiff's case seemed to be without merit or any foundation in law, and the action should be dismissed with costs.

MIDDLETON, J. OCTOBER 5TH, 1920.

AMBLER v. FACTORIES INSURANCE CO.

Insurance (Fire)—Reinsurance of Risks in another Company—Insolvency of Original Insuring Company—Conditions of Policies—Policy Becoming Void or Ceasing—Right to Recover Unearned Portion of Premium Paid to Reinsuring Company—Failure to Cancel Policy—Laches.

Action by the liquidator of the American Union Fire Insurance Company to recover a proportion of a premium paid by that company to the defendant company upon a reinsurance policy with respect to certain risks insured by the company in liquidation.

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

W. K. Fraser, for the plaintiff.

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

MIDDLETON, J., in a written judgment, said that the original policies had this condition endorsed upon them: "This policy shall be cancelled at any time at the request of the insured; or by the company giving 5 days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium."

This policy was issued on the 18th September, 1912.

The reinsurance policy was issued contemporaneously and was described as a policy for reinsuring in the sum of $— for and during the term of the original policy, "property covered by the policy No.— issued for $— in favour of —." It provided: "This policy is admitted and declared to be subject to the same rates, risks, conditions, valuations, endorsements, privileges, assignments, transfers, and modes of settlement as are or may be assumed or adopted by the said reinsured company, whose policy this follows: loss, if any, and expense of adjustment shall be payable pro rata at the same time and in the same manner as by the said reinsured company."

During the currency of the policy, on the 10th March, 1913, the American company was placed in liquidation in the State of Pennsylvania. The result of this was that those holding policies ranked as creditors in the liquidation for the unearned pro rata portion of the premiums paid. The theory upon which the action was brought was that this entitled the liquidator to claim against the reinsuring company the unearned pro rata proportion of the reinsurance premium.

The risk of the contract having once commenced, there could be no apportionment or return of premium unless this was expressly stipulated for in the contract: Tyrie v. Fletcher (1777), Cowp. 666. If there had been complete failure of consideration, the premium would have been recoverable, not under the policy, but as money had and received, or upon the theory of quasi-contract.

It was admitted that the policy was not cancelled by the action of either party, but it was said that it "became void or ceased" within the meaning of the condition, and therefore the unearned portion of the premium should be returned. As between the original insured and the American company, the original policy did, by reason of the bankruptcy of the insuring company, become void and cease, within the meaning of this clause; but there was no provision in the reinsuring policy which provided for a return of the premium in the event of the original policy becoming void or ceasing. The conditions quoted must be regarded as endorsed on and forming part of the reinsuring contract, and would have become operative had the reinsuring company become insolvent.

The learned Judge knew of no law, and none was cited, which would warrant the holding that a policy became void, and that the insuring company must return the premium, merely because the insured became insolvent.

The contract was an entire contract to insure for the entire period, and no right of apportionment existed unless stipulated for.

The reinsuring company had no knowledge of the insolvency of the original company until long after the expiry of the policy.

The laches of the liquidator in making the claim was sufficient to defeat this action if otherwise it could have been maintained.

The right of the liquidator to cancel the policy existed under the terms of the condition; but he refrained from exercising that right until the policy had expired, and the right could no longer be exercised. In this way he treated the policy as an existing one, on which he could assert liability, and he now sought to treat it as non-existing for the purpose of recovering the premium.

The reinsurance covered the risk upon the original policy, and was not intended to be a reinsurance against liability to refund premiums.

Action dismissed with costs.

MIDDLETON, J. OCTOBER 6TH, 1920.

BARTHELMES v. BICKELL & CO.

Brokers—Transactions on Foreign Exchange for Customer—Profits Payable in Foreign Currency—Benefit of Customer from Depreciation of Canadian Currency—Exchange—Contract—Evidence.

Action against a firm of brokers by a customer to recover $11,344.75, representing the difference in value between Canadian and United States currency, in respect of a sum payable by the defendants to the plaintiff.

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

A. G. Slaght and T. H. Barton, for the plaintiff.

Strachan Johnston, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the question involved in this action was the right of the defendants to discharge themselves from liability to the plaintiff by paying in Canadian currency the balance due to him. The defendants were brokers, carrying on business in Toronto. In June, 1918, the plaintiff began trading with them as his brokers, in the purchase and sale of stocks, the transactions being almost entirely upon the New York Exchange. The trading continued until February, 1920, when the account was closed by the payment of the amount admitted by the defendants to be due and the handing over of a few shares,

the only stock purchased then remaining unrealised, reserving to the plaintiff the right to put forward the claim for exchange.

The defendants had an arrangement with Miller & Co., of New York, who purchased and sold for them upon instructions. An account was kept with a bank in Toronto, and when the defendants desired to make a purchase a deposit was made to the credit of this account. On a sale being made, Miller & Co. would cause a transfer to be made to the defendants' credit of any balance that might be payable. No money was sent to New York for the individual purchases, and no money was sent from New York for individual sales, and it was arranged that exchange should not be payable as between Miller & Co. and the defendants with respect to any of their transactions.

The effect of this arrangement was, that the profit which might be made by one customer in respect to his individual trading would be set off against the loss payable by another; and the result would be that an arrangement, perfectly fair as between Miller & Co. and the defendants, might be exceedingly unfair as between the defendants and an individual customer. If the individual customer lost on the transaction so that money would have to be sent to New York, there was no reason why the customer should not be called upon to pay the exchange incident to the remitting of funds to New York to pay his loss; and, on the other hand, if a customer had a profit on a transaction, there was no reason why he should not receive payment in New York funds with the incidental advantage caused by the depreciation of Canadian currency.

The contention of the defendants was that throughout their entire business the transactions were all carried out on the basis that money payable by their customers would be received in Canadian currency at par, and money payable by them to their customers should be paid in the same way. There was nothing in writing to indicate that this was the basis of trading between the defendants and Miller & Co., and there was nothing in writing to indicate that this was the basis of trading between the defendants and their Canadian customers.

It was pointed out at an early stage of the examination of C., the defendants' manager, that, if effect were given to their contention, the result would be that a Toronto customer might purchase and pay for New York stock in Canadian currency and take delivery in New York, and sell there, thus making a large profit by reason of the exchange. C. then said that stock would not be delivered in New York without the exaction of the exchange. After the noon adjournment, C., without any explanation, gave testimony diametrically opposed to this; and the learned Judge found it impossible to give credence to his later statement.

The plaintiff was entitled to succeed upon his contention that he should be paid a sum representing the exchange upon $62,445.62, paid to him by the defendants in Canadian currency. Making all proper deductions, the plaintiff should have judgment for $10,105.73.

LENNOX, J. OCTOBER 9TH, 1920.

McLAUGHLIN v. CITY OF TORONTO.

Highway—Nonrepair—Sidewalk in City Street—Injury to Pedestrian by Fall—Cause of Fall—Evidence—Damages—Costs.

Action by a man and his wife to recover damages for an injury to the wife by a fall upon a sidewalk in the city of Toronto, said to be out of repair, and for the husband's loss and expense incurred by reason of the injury.

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

C. B. Henderson, for the plaintiffs.

C. M. Colquhoun, for the defendants.

LENNOX, J., in a written judgment, said that it was necessary and reasonable for the defendants to construct the crossing over the sidewalk on Annette street, at the place where the accident took place. The evidence that the work was properly executed and that the sidewalk, when the work was completed, was safe and reasonably convenient for persons having occasion to use it, was undisputed.

On the 1st January, 1920, the plaintiffs passed over this portion of the sidewalk on Annette street in going to church, and, returning later by the same way, the wife tripped or stumbled and fell. Neither the husband nor the wife noticed anything unusual in the condition of the walk, or that it was, by reason of the crossing or otherwise, unsafe or calculated to occasion injury or out of repair, as they passed along on their way to church. It was much the same as they returned: neither of them noticed the walk at all until after the accident. All that the wife would say on cross-examination was that she saw the planks forming the crossing. She did not say that they caused her to fall, that the sidewalk was out of repair, or attribute her fall to any physical condition existing at that point. In a vague way, her husband said that the end of a plank was above the general level and not sloped off, but did not say towards which walk it was, or that his wife

came in contact with it, or that it was in a place where she would probably come in contact with it, nor did he give it as his opinion that this was the cause of the accident.

The learned Judge said that he could not, upon the whole evidence, find as a fact that the sidewalk was, on the 1st January, in the condition in which the witness Ingoldsby said it was when he examined it after about a week had elapsed. It was not, in the learned Judge's opinion, even at that time, as the witness described it; but, if it could be found that it was, the plaintiffs would still have to prove something upon which it could reasonably be concluded that it was in this dangerous condition on the 1st January, and that the defendants had notice of the condition in time to repair it, or that the want of repair had existed for such a length of time before the accident that notice or knowledge should be implied.

The action failed; but the learned Judge assessed the damages contingently at $700 to the wife and $250 to the husband.

Action dismissed without costs.

LENNOX, J. OCTOBER 9TH, 1920.

CLARKSON v. DAVIES.

Company—Directors—Transfer of Assets to another Company—Secret Consideration Received by Directors—Concealment from Shareholders — Conspiracy — Fraudulent Representation — Approval of Shareholders—Sanction of Attorney-General—Evidence—Corroboration—Claim against Executors of Deceased Director—Constitution of Actions—Res Judicata—Continued Existence of Company — Position of Directors — Agents — Trustees—Limitations Act, sec. 47 (2)—Joint Tort-feasors—Judgment against—Costs—Amendments.

Two actions, brought by Clarkson and others against Davies, Deacon, Dunn, Crawford, and the executors of Galbraith, to recover the sum of $30,000, alleged to have been misappropriated by the defendants.

In the first action, Clarkson sued as liquidator of the Dominion Permanent Loan Company, and his co-plaintiff, Kathleen A. Hancock, on behalf of herself and all other shareholders of the Provincial Building and Loan Association.

In the second action, the plaintiffs were Clarkson (as liquidator) and the loan company and John R. Young, suing on behalf of himself and all other shareholders of the association.

The actions were tried together, without a jury, at a Toronto sittings.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiffs.

A. C. McMaster and J. M. Bullen, for the defendants Crawford and Dunn.

J. J. Maclennan, for the defendants the executors of Galbraith.

LENNOX, J., in a written judgment, said that he was of opinion that the plaintiffs in the second action had a legal status to maintain it.

In 1902, Davies, Deacon, Dunn, Crawford, and Galbraith were the directors of the association and negotiated and consummated the sale and transfer of the assets of the association to the loan company. The consideration stated in the deed of transfer was not the full or true consideration for the sale and transfer of the assets and rights of the association and its shareholders: there was an additional consideration of $30,000 secretly bargained for and obtained by the five directors. Knowledge of the true consideration was intentionally and studiously concealed from the shareholders of the association; and the approval of the other shareholders and the sanction of the Attorney-General for Ontario were obtained by the false and fraudulent representation of these directors as to the nature and character of the transaction. The directors were thereby enabled to obtain and did secretly obtain and appropriate to themselves the sum of $30,000, the property of the shareholders of the association. In entering upon and carrying out the transaction the directors conspired together wrongfully and secretly to divert and appropriate to themselves, and did in fact and in law, and in breach of their duty as agents of the association, wrongfully appropriate, the entire cash consideration paid by the loan company for the transfer, namely, the sum of $30,000.

It was contended that there was a lack of corroboration as to the actual receipt by the deceased Galbraith of his share of the money; but, if he united with his co-directors in a scheme to defraud the shareholders—and of this there was undoubted corroboration—they became joint tort-feasors, and it did not matter who got the money. The consummated agreement to make the wrongful diversion, not the division, was the matter of consequence.

The learned Judge was also of opinion that the second action now before him was not barred by settlements or compromises of previous actions.

It was argued that the association had ceased to exist; but all the credits, rights of action, etc., that the association and its shareholders had when the transfer was consummated, were now

possessed by the loan company, its liquidator, and the shareholders of the association at the time of the transfer; and the rights in question could be enforced in the second action.

The learned Judge could not see that the Limitations Act helped the defendants.

It would be a mistake to regard these directors as trustees only in the ordinary sense of that term: they were the elected and statutory stewards and agents of the association. The arm of the Court is still as powerful to compel a fraudulent, conniving agent to disgorge his secret, ill-gotten gains as in 1844, when Charter v. Trevelyan, 11 Cl. & F. 714, was decided. Even if these directors were to be regarded as trustees and nothing more, and whether express or by construction or implication of law, sec. 47 of the Limitations Act recognises the continuance of the principles enunciated in that case, and expressly excepts, by sub-sec. 2, all cases of fraudulent breach of trust.

The defendants were joint wrong-doers, and consequently each became responsible for himself and his associates. There was no right to judgment against them separately in addition to the ordinary judgment against persons joining in a tort.

There should be judgment for the plaintiffs in the second action against the defendants for $30,000, with interest upon the several instalments thereof at 7 per cent. from the dates of payment of the instalments to Davies, and the costs of the second action, including the costs of the evidence of witnesses called in the first action (subsequently made to apply in both actions), except that nothing should be added in respect of the attendance of the plaintiff Hancock prior to the 21st June, 1920, and the plaintiffs must not tax counsel fees for the hearings prior to that date. Subject to any specific directions as to costs, if any were given on interlocutory motions, the costs should be taxed as if there were only one action.

The first action should be dismissed, with costs of all proceedings therein, and including the fees, if any, paid to witnesses necessary to the defence throughout, and with counsel fees to the close of the hearing on the 21st March. These costs, too, should be taxed as if there were only one action.

All the amendments asked for in either action should be allowed.

LENNOX, J. OCTOBER 9TH, 1920.

*TROST v. COOK.

Trusts and Trustees—Breach of Trust—Administrator Allowing Large Sum of Money to Remain on Deposit with Private Bankers for nearly one Year after Death of Intestate—Money so Deposited at Time of Death—Loss by Insolvency of Bankers—Personal Liability of Administrator—Trustee Act, sec. 37—Administrator Acting Honestly and Reasonably—Breach Excused.

Action by the only child of Matthew Trost, deceased, against the administrator of his father's estate, to recover a sum of money lost to the estate by the administrator, the plaintiff alleging negligence and breach of trust.

The action was tried without a jury at Port Arthur.

M. J. Kenny, for the plaintiff.

W. F. Langworthy, for the defendant.

LENNOX, J., in a written judgment, said that Matthew Trost died on the 8th September, 1913, intestate, leaving him surviving his wife, Catherine Trost, and the plaintiff, his only child, then an infant of about 15 years of age, and leaving real estate of the value of about $1,500 and $12,000 on deposit, at interest, in the hands of Ray Street & Co., private bankers in the city of Port Arthur. At the instance of the widow, who was the natural guardian of the plaintiff, letters of administration were granted to the defendant on the 31st December, 1913. Thereafter, the sum of $12,000, less a comparatively small sum withdrawn for the payment of debts and other purposes, remained on deposit, at interest, with the bankers named, in the name of the defendant as administrator, until the bankers suspended payment on the 29th August, 1914. When the bankers failed, they were indebted to the estate in the sum of $10,592.40. A dividend of 25 or 30 per cent. had been paid on this amount, and the balance could not be recovered. The plaintiff, having come of age, claimed to recover from the defendant the amount of the loss.

The learned Judge said that the rule of law that a trustee must not, in the absence of special circumstances, voluntarily leave the trust funds outstanding upon personal security for an undue length of time, was of general application.

After a review of the authorities and a statement of some of the relevant facts, the learned Judge said that it was not suggested and could not be fairly argued that the defendant did not act honestly and with the utmost good faith; and, having regard to

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

all the circumstances, the learned Judge was of opinion that the defendant also acted reasonably, and that, in the words of sec. 37 of the Trustee Act, R.S.O. 1914 ch. 121, he "ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court," and should be wholly relieved from personal liability accordingly.

Action dismissed without costs.

KELLY, J. OCTOBER 9TH, 1920.

RE ROWELL AND FORBES.

Vendor and Purchaser—Agreement for Sale of Land—Charge under Tile Drainage Act, R.S.O. 1914 ch. 44—Whether Borne by Vendor or Purchaser—Incumbrance or Rate.

An application by a vendor of land, under the Vendors and Purchasers Act, for an order determining whether a certain charge upon the land should be borne by the vendor or the purchaser.

The application was heard in the Weekly Court, Toronto.
A. W. Langmuir, for the vendor.
W. Lawr, for the purchaser.

KELLY, J., in a written judgment, said that the contract between the parties, dated the 10th November, 1919, was for the sale of 50 acres of land in the township of Sarnia, at a specified price, the purchaser covenanting to pay the purchase-money and "all taxes, rates, and assessments wherewith the said land may be rated and charged from and after the 31st December, 1919;" and the vendor covenanting, on payment of these moneys, to convey the lands to the purchaser in fee simple, subject to the conditions and reservations expressed in the original grant from the Crown. The contract, which was prepared on a printed form, contained a further provision, that unearned fire insurance premiums, taxes, interest, rentals, and all local improvement rates and water rates should be apportioned and allowed to the date thereof.

The purchaser raised the objection that the charge under the Tile Drainage Act, R.S.O. 1914 ch. 44, as amended, upon the land, or the part of it still unpaid, should be borne by the vendor; while the vendor contended that under the contract the charge was apportionable in the same manner as taxes and local improvement rates.

The Act makes provision for a person assessed as and being the actual owner of land in a municipality making application to the municipal council to borrow money for the purpose of tile, stone, or timber drainage, and for the council lending money to such applicant for that purpose. Throughout the Act the transaction was treated as a loan upon the security of the land itself, repayable by instalments, with the privilege to the borrower to obtain at any time a discharge, on payment of the unpaid portion of the amount borrowed and interest. That the council is given power to levy and collect an annual sum in repayment of the amount lent and interest does not take from the transaction its character of a loan which has become an incumbrance upon the land. In the absence of an express provision to the contrary, this must be regarded as an incumbrance to be borne by the vendor, who expressly covenanted, on payment of the purchase-money, to convey to the purchaser in fee simple, subject only to the conditions and reservations expressed in the original Crown grant.

Costs of the application should be borne by the vendor, if exacted.

KELLY, J. OCTOBER 9TH, 1920.

MERRILL v. WADDELL.

Damages—Breach of Warranty—Sale of Hay—Quantum of Damages—Evidence—Costs.

An action for damages for breach of a warranty upon the sale of hay.

The action was first tried by KELLY, J., without a jury, at Brantford, in 1919. He found in favour of the plaintiff and assessed the damages. Upon appeal, his finding that the defendant was liable for damages was upheld, but a new trial, limited to the question of the amount of damages, was directed: Merrill v. Waddell (1920), 47 O L.R. 572, 18 O.W.N. 279.

The new trial took place before KELLY, J., without a jury, at Brantford.

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

F. H. Thompson, K. C., and J. C. Makins, K. C., for the defendant.

KELLY, J., in a written judgment, said that the appellate Court had directed that the damages should be measured by the difference between what the hay was actually worth when it arrived in Brantford and what it would have been worth at that time had it been in the state in which it should have been.

In the presentation of the case at the former trial so little attention was paid to the manner of arriving at the quantum of damages that the assumption that serious objection was not taken to the amount claimed, if liability were established, was not unreasonable.

The question now to be determined was the amount of damages on the principle laid down and directed by the Divisional Court.

The evidence which had been submitted to that end was extremely unsatisfactory and much of it indefinite.

On any and every test applicable to the whole evidence, the conclusion that the learned Judge had come to was, that the plaintiff's damages, measured on the principle above laid down, amounted to $1,115, which included also damages representing any interest to which the plaintiff was legally entitled.

There should be judgment for the plaintiff for that amount, with costs from and after the judgment of the Divisional Court.

PIGEON RIVER LUMBER CO. v. PULPWOOD CO. AND RUSSELL TIMBER CO.—LENNOX, J.—OCT. 9.

Water—Floatable Stream—Obstruction by Logs of two Timber Companies—Preventing Use of Stream by another Company—Right of Action—Remedy by Arbitration—Saw Logs Driving Act, R.S.O. 1914 ch. 131, sec. 16—Damages.]—Action to recover damages for the obstruction of the Black Sturgeon river, a floatable tributary of Lake Superior, and for preventing the plaintiffs from floating pulpwood and other timber thereon. The action was tried without a jury at Port Arthur. LENNOX, J., in a written judgment, said that the Court had jurisdiction to entertain the action, notwithstanding the Saw Logs Driving Act, R.S.O. 1914 ch. 131, sec. 16. On the 28th April, 1919, the plaintiffs notified the defendants of their need and desire to use this waterway during the spring freshets, and requested the defendants to discontinue the use of the mouth of this river as a storage basin for their pulpwood, ties, and lumber, and permit the plaintiffs to have access to Lake Superior. The defendants undertook to accede to the plaintiffs' request, and probably at the time intended to act reasonably, but in the end applied themselves to the removal of other pulpwood, and, owing to this and other causes, all going to a consideration of

their own interests and gain, and to a disregard of the convenience and interest of the plaintiffs, continued to monopolise and obstruct the river, and prevent the plaintiffs from using it—as the plaintiffs had a right to do—for many months. The plaintiffs' claim for damages was somewhat extravagant; but they had sustained very serious inconvenience and heavy financial loss through the wrongful acts and omissions of the defendants. There should be judgment for the plaintiffs for $6,500 and costs of the action. H. J. Scott, K.C., for the plaintiffs. W. F. Langworthy, for the defendants the Pulpwood Company. F. H. Keefer, K.C., for the defendants the Russell Timber Company.

STANDARD DAIRY CO. v. MUTUAL DAIRY AND CREAMERY CO.—LENNOX, J.—OCT. 9.

Contract—Formation—Document in Evidence not Amounting to Contract—Completed Agreement not Established.]—Action for the recovery of $4,500 said to be owing to the plaintiffs, a partnership firm, under a written agreement for the sale and purchase of a dairy plant, and alternatively for the recovery of the same sum as damages for breach of the contract. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, set out the facts, and stated his conclusions, that the document relied on did not amount to a contract, but was merely the initial step towards making a contract, and that there never was in fact a concluded or completed agreement. The action was dismissed with costs. J. J. Maclennan, for the plaintiffs. F. J. Hughes, for the defendants.

HOLMES v. SIFTON—KELLY, J.—OCT. 9.

Pleading—Statement of Claim—Examination of Plaintiff for Discovery—No Cause of Action Shewn—Summary Dismissal of Action.]—Motion by the defendant for a summary judgment dismissing the action, on the ground that the statement of claim and the plaintiff's examination for discovery did not disclose any cause of action. The motion was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the grounds on which the plaintiff claimed were set forth in his pleading and depositions. On his own admissions, taken with his pleading, the action was not maintainable in law, and should now be dismissed with costs. J. M. Godfrey, for the defendant. Keith Lennox, for the plaintiff.

RE DOUGHTY—KELLY, J.—OCT. 9.

Absentee—Declaration—Absentee Act, 10 & 11 Geo. V. ch. 36 (O.)—Appointment of Committee—Motion to Commit—Costs.]—Motion by Constance Doughty for an order declaring John Doughty an absentee within the meaning of the Absentee Act, 10 & 11 Geo. V. ch. 36 (O.), and also for an order for the committal of a person who failed to attend for examination. The motion was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the material submitted established beyond any reasonable doubt that John Doughty was an absentee within the meaning of the Act, and that it was a proper case for the appointment of a committee to administer the absentee's property. There should be an order declaring Doughty an absentee and appointing the Chartered Trust and Executor Company committee on their filing a consent to act. The applicant's costs of the application should be paid out of the absentee's property. It was unnecessary to proceed further with the motion to commit, which should therefore be considered at an end. There should be no order as to the costs of that motion, except that out of pocket disbursements should be paid out of the absentee's property. G. T. Walsh, for the applicant. Clara Brett Martin, for Jean Doughty and others.