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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*HOGLE v. TOWNSHIP OF ERNESTTOWN.

Municipal Corporations—Claim against Corporation for Loss of Sheep—Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, secs. 17, 18—Tender by Council of Amount Awarded by Valuer—Right of Action for Larger Sum—Finding of Trial Judge—Appeal—Costs.

An appeal by the plaintiff from the judgment of the County Court of the County of Lennox and Addington dismissing an action brought in that Court to recover from the Corporation of the Township of Ernesttown the sum of $202.50, alleged to be the amount of damage caused to the plaintiff by reason of some of his sheep, in an enclosed field upon his farm, having been killed and others injured and worried by a dog, the owner of which was unknown.

The plaintiff applied to the council of the defendants, and they appointed a valuer, who estimated the plaintiff's damage at $117.50. That amount was tendered by the defendants to the plaintiff, before action; but he refused it, and brought this action for the larger sum. The defendants brought $117.50 into Court, but admitted no liability.

The Judge in the Court below held that there was nothing in the Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, or elsewhere, to create a liability for the amount of damages sustained by the owner of sheep killed or worried by a dog whose owner is unknown. He was also of opinion that, if the defendants were liable, the valuer's estimate was a fair one, and the plaintiff was not entitled to recover more than the amount paid into Court.

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

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Peter White, K.C., for the appellant.

W. S. Herrington, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., giving judgment at the conclusion of the argument, said, after referring to the language of secs. 17 and 18 of the Dog Tax and Sheep Protection Act, that a claimant has a right of action to compel council and valuer to comply with the provisions of the Act, so far as may be necessary to give effect to a valid claim; but he has no right of action in the nature of an appeal against the determination of the council or the valuation of the valuer; and so the judgment appealed against was right; and, as the defendants' council were always ready and willing to pay according to the valuation, and offered to do so, and paid the money into Court in this action, the costs were properly given against the plaintiff, and he should also pay the costs of this appeal.

RIDDELL, J., agreed. He referred to Re Hogan v. Township of Tudor (1915), 34 O.L.R. 571, explaining the principle upon which it was decided.

LENNOX, J., agreed in the result. He preferred not to be understood as expressing any opinion as to the right of questioning the amount found by the valuer. The finding of the learned Judge in the Court below, that the amount fixed by the valuer was fair, and should not be increased, was not to be disturbed, and was sufficient to warrant the dismissal of the action.

ROSE, J., agreed in the result.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JANUARY 11TH, 1918.

*ARMAND v. NOONAN.

Sale of Goods—Contract—Property Passing—Description of Goods—Time for Execution of Contract—Reasonable Time—Condition—Warranty—Defect in Quality—Diminution in Price—Action for Price—Judgment for Full Purchase-price—Leave Reserved to Purchaser to Sue for Damages for Breach of Contract.

Appeal by the defendant from the judgment of the County Court of the County of Lanark in favour of the plaintiff in an action to recover $640, the balance remaining unpaid of the price of hay sold and delivered by the plaintiff to the defendant.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. J. McLaughlin, K.C., for the appellant.

R. J. Slattery, for the plaintiff, respondent.

RIDDELL, J., in a written judgment, said that the plaintiff, a farmer, in the autumn of 1916, baled 65 tons of hay and placed it, baled and pressed, in his barn. The defendant made an offer of $10 a ton for the hay—he to draw it away; the offer was accepted, and $10 paid on the bargain. This was a few days after the 20th December, 1916. The plaintiff suggested that the defendant should draw the hay away between Christmas and New Year's day; the defendant agreed to draw it "as soon as possible" —and that was acceded to.

Upon the evidence, no time for payment was mentioned.

Early in January, the plaintiff, who was not then living on his farm, asked the defendant if he had begun to take the hay away. The defendant said he had not, and the plaintiff asked him to remove it, and send a cheque for $300 on account. The defendant answered that he would remove the hay soon, or as soon as he could, and would pay the whole amount then.

On the 14th March, 1917, the defendant began to draw, and drew more than 23 tons. Then a bale broke, and the hay in the centre was found to be musty. The defendant examined some 20 more bales, musty on the outside, but did not open them. He drew no more; and by telephone told the plaintiff that he had struck musty hay, offered to cull out such of the hay as he thought would answer his contract, and pay for what he took. The plaintiff refused to discuss the matter, taking the position that the hay was the defendant's.

On the 14th March, the defendant wrote the plaintiff: "I have stopped drawing your hay . . . as there is too much of it musty, so I will send you a cheque by next mail for the amount I have out."

The defendant drew no more, but left about 42 tons in the barn, where it remained and was when this action was tried.

On the 19th March, the defendant sent the plaintiff an account of the hay drawn away by him, 46,346 lbs. and a statement shewing that he owed the plaintiff $221.72, concluding "hope you will be

satisfied." The defendant also offered orally to pay this sum—no tender was made. The plaintiff refused to accept unless the price for the whole should be paid.

The claim in this action was for $640, the price of 65 tons, less $10 paid. The defendant paid into Court $221.72, and defended for the balance. The County Court Judge gave judgment for $640, but reserved leave to the defendant to sue for damages for breach of contract, there having been no counterclaim in this action and no evidence as to damage given.

The property in the hay passed to the defendant on the bargain being made: Gilmour v. Supple (1858), 11 Moo. P.C. 551, 566. The goods were known, both by description and situs.

The defendant contended, however, that the hay was described to him as "No. 1 Timothy," which it was not; but the County Court Judge had found, on evidence amply justifying his finding, that the bargain was for the sale and purchase of 65 tons of pressed hay, which consisted of good Timothy except 2 or 3 tons of clover; that "there was no condition of grading in the plaintiff's representation."

Unless there was must in the hay, it could not, on the evidence, be successfully contended that the goods did not answer the description. As to the must, its presence was not detected until nearly 3 months after the contract—there was nothing to indicate its presence at the time of the contract.

It might well be that the must was wholly absent at the time the defendant should have removed the hay. Where no time is mentioned, the law implies that the contract is to be executed within a reasonable time; and the stipulation that the hay was to be removed "as soon as possible" meant much the same: Attwood v. Emery (1856), 1 C.B.N.S. 110; Hydraulic Engineering Co. v. McHaffie (1878), 4 Q.B.D. 670, 676, 677; Tennant v. Bell (1846), 9 Q.B. 684; Staunton v. Wood (1851), 16 Q.B. 638; Duncan v. Topham (1849), 8 C.B. 225.

The hay became the property of the defendant, and the plaintiff became entitled to the price of it: all question of the right to take part and reject part disappeared.

On the evidence, there was no case for diminution in the price under the rule in Gilmour v. Supple and similar cases; but the County Court Judge had amply protected the defendant if he had such a case.

The appeal should be dismissed with costs.

ROSE, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., was also of opinion, for reasons stated in writing, that the appeal should be dismissed. His view was, that the property in the hay passed to the buyer at the time of the sale, but with a warranty as to quality. For breach of the warranty, the defendant would be entitled to damages by way of reduction of the price to be paid for the goods. The appeal failed; and the only question was, what disposition of the case should be made now—whether the trial should be reopened so that the whole matter might be dealt with, as it should have been, in the one case, or the defendant left to bring a new action upon the warranty. The learned Chief Justice was inclined to the former course; but two of the Judges preferred the latter; and, in order to save the expense of a re-argument, which would be directed if there was an equal division of the Court, the learned Chief Justice agreed that the appeal should be dismissed.

LENNOX, J., dissented, for reasons given in writing. He was of opinion, "as an inference of fact based in the main upon the plaintiff's evidence and conduct in holding the hay and looking for his money, among other things, that it was not intended that the property should pass by the making of the bargain."

Appeal dismissed with costs; LENNOX, J., *dissenting.*

SECOND DIVISIONAL COURT. JANUARY 11TH, 1918.

*BURKETT v. OTT.

Gift—Moneys on Deposit in Bank—Direction to Bank to Hold for Benefit of Depositor and Wife and Daughter and Survivor—Oral Agreement for Maintenance—Validity—Mental Competence of Donor—Absence of Fraud or Duress or Undue Influence—Improvidence—Appeal—Divided Court.

Appeal by the plaintiff from the judgment of BRITTON, J., 12 O.W.N. 309.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. S. Colter, for the appellant.

W. M. German, K.C., for the defendants Catherine Ott and Minerva E. Barrick, respondents.

S. H. Bradford, K.C., for the defendants the Bank of Hamilton.

RIDDELL, J., in a written judgment, after setting out the facts, said that three issues were presented in regard to the bank document of the 6th November, 1916. (This was a direction to the Bank of Hamilton to open a joint account in the names of Joseph A. Ott (since deceased), Catherine Ott (his wife), and Minerva E. Barrick (his daughter), and authorising the bank to pay out moneys deposited to the credit of the account to any one of the three and the survivor, etc. The document was signed by the three. The money deposited to the credit of the account (about $3,200), was that of the deceased; and the plaintiff, the only other child of the deceased, claimed her share of it under the will of the deceased).

The first question was, whether the deceased was induced by fraud, duress, or undue influence, to execute the document. The answer to this question must be against the plaintiff. There was no evidence of fraud or improper conduct of any kind.

The second question was, whether the deceased was competent to understand and did understand the effect of the document. The deceased was of normal capacity. Several trivial matters were alleged against his capacity, but none of them was of more consequence than the trivialities alleged in Empey v. Fick (1907), 13 O.L.R. 178, 15 O.L.R. 19 (C.A.)

The third question was, whether the document was so improvident that it should be set aside. However the case would have stood if the action had been brought by Joseph A. Ott in his lifetime, the law in Empey v. Fick should be accepted as shewing that the plaintiff could not, after her father's death, succeed. The defendant Minerva E. Barrick set up as her defence an agreement which she alleged was made by her father with herself and her husband, that, in consideration of their giving the father a home, he would give them all his property—and the bank document was intended to evidence that agreement. This defence was abundantly supported by the evidence, and the evidence was believed by the trial Judge. The language used in Empey v. Fick, 15 O.L.R. at p. 22, was applicable.

The appeal should be dismissed with costs.

ROSE, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., in a written judgment, after setting out the facts, said that from the testimony two things appeared certain: (1) that there was no concluded contract between the parties; and (2) that, if there had been, it was so manifestly improvident and incomplete that in a Court of Equity it must be considered ineffectual.

This case had no real resemblance to Empey v. Fick.
The appeal should be allowed.

LENNOX, J., was also of opinion that the appeal should be allowed.

The Court being divided, appeal dismissed with costs.

SECOND DIVISIONAL COURT. JANUARY 11TH, 1918

*STARK v. SOMERVILLE.

Contract—Brokers—Dealings in Company-shares for Customer—Account—Limitations Act—Sale of Shares—Credit of Proceeds—Part Payment—Acknowledgment—Starting-point for Statutory Period—Indefinite Provision as to Interest—Rates of Interest Charged—Notification.

Appeal by the defendant from the judgment of CLUTE, J., ante 76.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

D. O. Cameron, for the appellant.

Joshua Denovan, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the plaintiffs were stockbrokers, and the defendant was one of their customers; and their business transactions were begun and carried on under and subject to an agreement in writing respecting them. Under it, when stocks held by the plaintiffs for the defendant were sold, the proceeds were to be applied on the defendant's account; and the defendant was to pay interest at such rate or rates as the plaintiffs might notify the defendant of, from time to time.

The first question was, whether a sale of the defendant's stock and the application of the proceeds towards payment of his account, as provided for in the agreement, saved the plaintiffs' claim out of the provisions of the Limitations Act, under which otherwise it would be barred.

As the payment was made in accordance with the terms of the agreement, it was a payment made by the defendant; and, as it was made on account of a greater debt, it was a part payment which necessarily was an acknowledgment of the existence of the debt from which it was proper to import a promise to pay it; and so the statutory period began to run from the date of the payment, not from the time when the cause of action on the debt first arose; and, therefore, the claim was not barred.

Reference to Waters v. Tompkins (1835), 2 C.M. & R. 723.

The second question was, whether the provision in respect of interest, contained in the agreement, was applicable until payment or judgment.

It was said that the agreement as to interest did not apply post diem; but after what day? The case was not one of a debt payable at a fixed time, with interest in the meantime. The indefiniteness as to the rates of interest was caused by the fact that they really depended upon the rates which the plaintiffs had to pay for the money which they were obliged to borrow to carry the defendant's purchases.

The meaning of the agreement, and the intention of the parties, was, that the defendant should pay such rates from time to time so long as the plaintiffs were carrying the defendant's purchases: and in that manner interest was charged. After the account was closed, and the defendant had been converted into simply a debtor to the plaintiffs, interest was charged at 5 per cent. only. The defendant had no reasonable cause of complaint in this respect.

Lastly, it was urged that there was a binding oral agreement that the plaintiffs should charge no more for interest than one-half of one per cent. more than they had to pay. There was no evidence that more had been charged; and, if there had been any such evidence, the written agreement must prevail.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MASTEN, J. JANUARY 7TH, 1918.

CANADIAN GENERAL SECURITIES CO. LIMITED v. GEORGE.

Contract—Sale of Land—Undertaking by Agent of Vendor-company to Resell at Profit within Specified Period—Promise not Incorporated in Agreement—Authority of Agent—Promise not Binding on Vendor-company—Assignment of Contract by Vendor-company—Rescission or Reformation of Agreement Rendered Impossible—Right of Assignee to Recover on Agreement.

Action to recover the balance of principal, interest, and taxes due under an agreement of the 31st March, 1914, made between Angus F. George, the defendant, and the Port Weller Securities Corporation Limited, which agreement was assigned by that corporation to the plaintiff company on the 5th September, 1917.

The agreement was for the sale by the corporation to the defendant of land in the township of Grantham.

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

G. G. S. Lindsey, K.C., and W. R. Wadsworth, for the plaintiff company.

L. F. Heyd, K.C., for the defendant.

MASTEN, J., in a written judgment, said that the defendant lived at Port Elgin. His cousin, Erle George, was formerly employed by the Port Weller Securities Corporation Limited, as an agent to secure purchasers for the lands of that company. In pursuance of his employment, he sought to induce the defendant to become the purchaser of the land which became the subject of the agreement now sued upon. The defendant, in his testimony at the trial, said that Erle George, acting as agent of the corporation, assured him (the defendant) that the corporation would guarantee the resale of the land by June, and not later than the 1st August, 1914, at a profit of $200, and that this statement induced him (the defendant) to purchase.

There was no evidence that either the corporation or its assignee (the plaintiff company) had any notice or knowledge of the special assurance which had been given by Erle George to the defendant. Nothing was said about it in the written agreement.

The defendant sought rescission of the contract on the ground of a false representation. But there was no false representation of an existing fact. What was really disclosed in the evidence was the promise alleged to have been made by the agent of the vendor-company to the defendant as purchaser that the vendor-company would resell on his behalf within three months at a profit of $200; and the complaint was, that that promise was not inserted in the written agreement.

The defendant signed the agreement, in duplicate, in blank, and sent both parts to Erle George, who filled them up, and returned one to the defendant. The defendant said that he put the agreement into his vault without looking at it, and was unaware that it did not contain the promise until he was served with the writ of summons by which this action was commenced.

The learned Judge finds that the conversation between Erle George and the defendant took place as described; that what was done operated as an appointment by the defendant of Erle George as his agent to fill in the agreement; that, through Erle George, the defendant had constructive notice of what was inserted in the agreement; that, in filling up the agreement, Erle George did not act as the agent of the corporation; that his sole authority was, to procure purchasers of the corporation's lands; and that he had no authority to undertake to resell.

Neither reformation nor rescission of the contract was possible, owing to the transfer to the plaintiff company—the parties could not be restored to their original positions.

Where the parties make an agreement orally and subsequently reduce it into writing, the writing constitutes the contract, and, if there is any discrepancy, must prevail. The writing, when it was acted upon, became the real contract: Knight v. Barber (1846), 16 M. & W. 66.

Clarke v. Latham (1915), 25 D.L.R. 751, distinguished.

Judgment for the plaintiff company for the amount claimed, with interest and costs.

CLUTE, J. JANUARY 9TH, 1918.

McMILLAN v. CITY OF TORONTO.

Highway—Nonrepair—Ice on Sidewalk—Injury to Pedestrian—Liability of Municipal Corporation—"Gross Negligence"—Municipal Act, sec. 460 (3).

Action against the Corporation of the City of Toronto to recover damages for injury sustained by the plaintiff on the 28th February, 1917, from a fall on the sidewalk of a city street. The accident occurred at 11 o'clock in the morning in front of house No. 993 Gerrard street east.

The action was tried without a jury at Toronto.

E. C. Ironside, for the plaintiff.

Irving S. Fairty, for the defendants.

CLUTE, J., in a written judgment, said that the plaintiff slipped on ice on the sidewalk and received serious injury to her knee and back.

The negligence complained of was, that the sidewalk was in a bad state of repair, being depressed at the point where the accident occurred, and allowing an accumulation of water, from which ice was formed. The evidence was, that the sidewalk was partly covered with ice from Monday morning until the morning of the accident—the following Wednesday. The snow had been cleared from the sidewalk, but some small quantity of water had collected at the place of the accident, and frozen. There was no evidence as to whether or not it had existed earlier than on the Monday before the accident.

It was established by the evidence for the defence that the sidewalk itself was properly laid, and that the accumulation of water and ice was occasioned by there being a slope from the boulevard or land to the sidewalk; the slight inclination of the sidewalk carried the water down and it was detained and frozen.

The sidewalk, at the time of the accident, was out of repair in the sense of being dangerous; but the learned Judge could not find, upon the evidence, that there was gross negligence (Municipal Act, sec. 460 (3)) on the part of the defendants; and upon this ground the plaintiff failed.

The sum of $550 would be a reasonable compensation by way of damages if it should be hereafter held that the plaintiff was entitled to recover.

Action dismissed without costs.

LENNOX, J. JANUARY 10TH, 1918.

MORRAN v. RAILWAY PASSENGERS ASSURANCE CO. OF LONDON ENGLAND.

Insurance (Accident)—Total Disability Claim—Cause of Injury—Assault — "External Force" — Voluntary or Unnecessary Exposure—Change of Occupation—Immateriality in Regard to Risk—Question of Fact—Finding of Trial Judge—Insurance Act, secs. 2 (35), 156 (1), (3), (6), 172—Construction of Policy—Variation by Renewal Receipt.

Action upon a policy insuring the plaintiff against accident; the plaintiff sought to recover for total disability.

The action was tried without a jury at Toronto.

T. N. Phelan, for the plaintiff.

D. L. McCarthy, K.C., and A. W. Langmuir, for the defendants.

LENNOX, J., in a written judgment, found that the plaintiff, prior to the 15th October, 1915, was a healthy, sound, and capable man; that in effecting and continuing the insurance he was not guilty of bad faith, intentional concealment, or conscious misrepresentation as to his state of health; that the disability in respect of which the plaintiff claimed began on the 15th October, 1915; and that the origin or cause of it was the treatment to which he was subjected by the witness Atkinson on that day.

The learned Judge was further of the opinion that the infirmity, disability, bodily injury, or change in physical condition of the plaintiff (Insurance Act, R.S.O. 1914, ch. 183, sec. 2 (35)), had its inception on the 15th October, 1915, and was occasioned by "external force," within the meaning of sec. 172, at the hands of the witness Atkinson, in an encounter in which Atkinson was the aggressor; that this happened and was brought about without the intent of the plaintiff, not as the direct or indirect result of anything done by the plaintiff, and without voluntary or unnecessary exposure on his part, within the meaning of sec. 172; and that the disability was not attributable to the plaintiff's state of health or condition of mind at the time he effected the insurance, within the meaning of the policy.

It was alleged that the plaintiff had changed his occupation from that of land-agent (as stated in the policy) to that of cattle-drover; and it appeared to be the fact that he did engage in

handling cattle, though he had not abandoned the other calling; and he was not injured while engaged in handling cattle, nor had his injury any relation to that occupation.

The question of the materialty of the change was a question of fact for the Court: sec. 156 (6); and, having regard to the event and to the provisions of para. 11 of the application for the insurance, limiting the liability of the company "for any injury received in any occupation or exposure classed by this company as more hazardous than as above stated," and assuming (without deciding) that the defendants could rely upon the application, notwithstanding the provisions of sec. 156 (1) and (3) and the latter part of sec. 172 (1), the learned Judge was of opinion that the intermediate change of occupation or the failure to declare it at the date of the renewal was not a circumstance material to the defendants or affecting the extent of the risk they undertook.

The renewal receipt could not be invoked to vary the policy or defeat the specific provisions of sec. 156.

The disability of the plaintiff was total and permanent.

Judgment for the plaintiff directing payment by the defendants of $10 a week from the date of the accident, less 26 weeks' payments already made, with interest from the dates at which the payments fell due according to the terms of the policy, and a declaration as to the plaintiff's future rights under the policy, with costs against the defendants.

KELLY, J. JANUARY 11TH, 1918.

WILES v. WILES.

Husband and Wife—Alimony—Misconduct of Wife—Departure from Husband's House—Offer to Return—Refusal of Husband to Receive her back—Nominal Sum Allowed to Wife—Costs.

An action for alimony, tried without a jury at Toronto.

J. M. Godfrey, for the plaintiff.
W. D. McPherson, K.C., for the defendant.

KELLY, J., in a written judgment, said that the parties were married on the 28th October, 1912, the plaintiff then being a widow with two grown-up children, and the defendant a widower with five children, whose ages at that time ranged from nine years to nine months.

Almost immediately after the marriage, discord developed, due to the plaintiff's bad temper and objectionable behaviour. Her conduct was such as any woman should be ashamed of, and her treatment of her husband (detailed in the judgment) was scandalous.

After about a year of married life, she left the defendant in October, 1913, not because of any conduct of his endangering her or justifying her leaving.

Charges which she made of cruelty or harsh treatment on his part were denied by him or the circumstances so explained as to throw a different light upon the charges. Both before and at the trial, the plaintiff expressed a desire to return to the defendant's house, but he refused to take her back, and at the trial declared his unwillingness to do so.

The sanction of the law cannot be given to the separation of husband and wife because of the disinclination of one or both to live together.

Reference to Evans v. Evans (1790), 1 Hagg. Con. 35.

Any allowance to the plaintiff for alimony should be at the lowest possible rate. The plaintiff has some means; the defendant is without means except what he earns by working as a carpenter at 50 cents an hour.

With the husband's limited earning power, and his obligation to support his children, and having in view the plaintiff's misconduct, and such of her circumstances financially as can properly be taken into account, a substantial allowance should not be made. An allowance of $1 per month, payable quarterly, is all that can be justified.

Judgment for the plaintiff accordingly, with costs, fixed at $75.

SUTHERLAND, J., IN CHAMBERS. JANUARY 12TH, 1918

RE McALLISTER AND TORONTO AND SUBURBAN R. W. CO.

Appeal to Privy Council—Order of Appellate Division Increasing Amount of Award of Compensation for Land Expropriated—Application for Enforcement of Award—Money in Court—Application for Payment out—Security Given on Appeal—Effect of—Stay of Proceedings—Privy Council Appeals Act, sec. 4—"Payment of Money."

Motion by McAllister, the claimant, for an order for the enforcement of an award made on the 2nd October, 1916, as varied by an order of the First Divisional Court of the Appellate Division of the 4th July, 1917: Re McAllister and Toronto and Suburban R. W. Co. (1917), 12 O.W.N. 359, 40 O.L.R. 252; and directing the payment out of Court to the claimant of the money paid in, to the credit of this matter.

J. W. Pickup, for the claimant.

R. B. Henderson, for the railway company, contestant.

SUTHERLAND, J., in a written judgment, said that the contestant had paid $5,000 into Court, upon taking possession of the property expropriated. The original award was for $4,573.70, which was increased to $9,437.70 by the order of the Divisional Court. Of the sum paid into Court, $4,000 had, by arrangement, been paid out to the claimant. It was the remaining $1,000 and accrued interest that the claimant now sought to have paid out. But the contestant was appealing to the Privy Council, and had given the usual security in $2,000 to prosecute effectually the appeal and to pay such costs and damages as might be awarded in case the order appealed from should be affirmed.

It was contended by the contestant that the giving of the security operated as a stay, under sec. 4 of the Privy Council Appeals Act, R.S.O. 1914 ch. 54—the award not being a judgment or order for the payment of money so as to bring the case within the exception contained in sec. 4 (*d*), and not coming within the other exceptions.

The learned Judge thought that this contention was well-founded.

Motion dismissed with costs.

SUTHERLAND, J. JANUARY 12TH, 1918.

BRYMER & WEBSTER v. WELLINGTON MUTUAL FIRE INSURANCE CO.

Insurance (Fire)—Stock of Jewellery—"Precious Stones"—Reasonable Care—Evidence of Value—Exaggerated Claim—Exaggeration not Amounting to Fraud—"Implements"—Models—Assessment of Loss—Costs—Test Action.

Action upon a fire insurance policy covering the stock and machinery of the plaintiffs, who were manufacturing jewellers.

The plaintiffs had insured in seven companies under policies for various sums, amounting in all to $15,000. The defendant company's policy was for $1,500. A fire occurred upon the premises occupied by the plaintiffs on the 16th December, 1916. The plaintiffs alleged that they sustained damage to the extent of upwards of $7,000; the proportionate share which they claimed from the defendant company was $699.76.

The action was transferred from the County Court of the County of York to the Supreme Court of Ontario—it was said to be a test case.

The action was tried without a jury at Toronto.

A. C. McMaster and F. J. Hughes, for the plaintiffs.

Hamilton Cassels, K.C., and R. S. Cassels, K.C., for the defendant company.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that the policy read, "on stock of jewellery, manufactured, unmanufactured, and in process thereof, and materials not more hazardous, including precious stones and gold." He could not think that "pearls and half-pearls" were not included in and covered by the term "precious stones," nor that they could properly be considered as materials of a more hazardous character than other precious stones.

The learned Judge was not able to come to the conclusion that keeping the stones in parcels tied up and deposited in a cupboard was not taking ordinary and reasonable care.

The evidence in support of the plaintiffs' claim at the sum sued for was not satisfactory. There could not have been as large a stock of stones on hand at the time of the fire as was asserted by the plaintiffs.

Upon the item of the claim "stones" the finding must be that the amount on hand at the time of the fire did not represent more than $2,500 in value. But the stock which was on hand had increased in value, between the time it was purchased and the time of the fire, to the extent of 30 per cent. The total loss under this item of the claim should be fixed at $3,105.48, in place of $6,312.44 as claimed.

On the whole evidence, it could not be said that the plaintiffs were guilty of fraud in exaggerating their claim. Their inability to make from their books and papers a proper statement of their actual loss, and their desire to make a claim large enough to cover all possible loss, had led them to place too high a value on their chattels: Adams v. Glen Falls Insurance Co. (1916), 37 O.L.R. 1, 16.

The second item of the claim, "plant and equipment" was put at $1,075. This consisted of models for rings, brooches, pins, and the like, said to have cost originally $1,535. No such sum as $1,075 should be allowed: some of the models were admittedly out of date, and some were uninjured.

There was no such term as "plant and equipment" in the policy, but those models should be regarded as covered by the word "implements."

The sum of $300 should be allowed on this head.

Upon the item "furniture and fixtures" $100 should be allowed.

The total loss being fixed at $3,505.48, the defendant company's proportion was $221.95.

Judgment for the plaintiffs for that sum, with costs on the Supreme Court scale.

WENTWORTH RANCH LIMITED v. NATIONAL LIVE STOCK ASSOCIATION—CAMERON, MASTER IN CHAMBERS—JAN. 9.

Partnership—Unincorporated Association—Service of Process on Individuals as Partners—Appearances under Protest—Denial of Status as Partners—Separate Service on Association—Statement of Claim—Particulars.]—Motions on behalf of two sets of defendants, Monteith and others and McKeown and others, for particulars of the statement of claim. The learned Master, in a written judgment, said that the applicants were served, as partners, with the writ of summons by which this action was commenced, and entered appearances. In their appearances they all denied that they were partners in the defendant association. The fact that the writ was served on the applicants personally, on the supposition that they were partners, did not preclude the plaintiffs from otherwise serving the writ on the defendant association; nor, in the event of default of appearance—provided no partner had entered an appearance in the ordinary form—would it prevent the plaintiffs from signing judgment by default. The applicants denied that they were partners in the defendant association; and this issue, as the action was at present constituted, was the main one to try. At this stage, and taking into consideration the fact that the appearances were entered under protest, particulars should not be ordered, as they are not required fo the purpose of pleading. Motions dismissed with costs. A. J. Anderson, for the defendants Montieth et al. G. S. Hodson, for the defendants McKeown et al. S. F. Washington, K.C., and L. F. Stevens, for the plaintiffs.

ANNETT v. HOMEWOOD SANITARIUM—RE REX v. A.B.—LENNOX, J.—JAN. 10.

Courts—London Weekly Court—Jurisdiction—Forum—Rule 239.]—Motion by Annett, the plaintiff in the action, for a mandatory order to the Police Magistrate for the City of Guelph to proceed with the investigation of a criminal charge laid by the applicant against A.B. The motion was brought on at the Weekly Court at London, and there heard. LENNOX, J., in a written judgment, said that the application was closely connected with or incidental to a civil action pending against the Homewood Sanitarium in which the applicant was claiming damages for illegal imprisonment. The case came before the Police Magistrate on the 3rd October, 1917, and the charge was dismissed. There might be other difficulties in the applicant's way; but there was a fatal objection of want of jurisdiction. The motion was made in the Weekly Court at London; it was not ex parte; the solicitors for all parties did not reside in the county in which the sittings was held; there was no consent to the motion being heard at the sittings; and no direction of a Judge that it should be there heard: Rule 239. No order should be made. The applicant in person. Hodgins, for the defendant.

CARTER v. WEES—MULOCK, C.J. EX., IN CHAMBERS—JAN. 12.

Practice—Claim Specially Endorsed upon Writ of Summons—Affidavit of Merits Filed with Appearance—Failure to Meet Requirements of Rule 56—Order under Rule 57 for Summary Judgment—Appeal—Defendant Allowed to File Better Affidavit nunc pro tunc—Costs.]—An appeal by the defendant from an order of the Local Judge of the District of Rainy River (under Rule 57), striking out the defendant's affidavit of merits and granting the plaintiff liberty to sign judgment for the amount claimed by him in an action upon a covenant; particulars of the claim were specially endorsed upon the writ of summons. MULOCK, C.J. EX., in a written judgment, said that the defendant's affidavit of merits, filed with his appearance, did not meet the requirements of Rule 56. On the argument of the appeal, leave was granted to the defendant to submit a further affidavit of merits. This he had done, and the new affidavit complied with the requirements

of the Rule. The defendant should have leave to file it nunc pro tunc; and, upon its being filed, the judgment, if entered, is to be set aside. Costs of the judgment, if entered, and of the motion before the Local Judge and of this appeal, to be costs in the cause to the plaintiff. A. A. Macdonald, for the defendant. C. M. Garvey, for the plaintiff.

CORRECTION.

In Taylor v. Davies, ante 323, the name of M. H. Ludwig, K.C., was by error omitted in giving the names of the counsel. He was one of the counsel for the appellants.