The
Ontario Weekly Notes

VOL. XII. TORONTO, JUNE 29, 1917. No. 15

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 18TH, 1917.

HALCRO v. CLOUGHLEY.

Evidence—Motion to Add Party—Examination of Proposed Party as Witness upon Pending Motion—Unnecessary Party—Useless Proceedings—Costs.

Pursuant to the leave granted by FERGUSON, J.A., in Chambers (see ante 307), the witness Halladay appealed from the order of KELLY, J., in Chambers, directing Halladay to attend and submit to examination as a witness on a motion by the defendant to add Halladay as a party to the action.

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

A. L. Fleming, for the appellant and the plaintiff.

T. N. Phelan, for the defendant, respondent.

At the conclusion of the hearing the judgment of the Court was given by MEREDITH, C.J.C.P., who said that it was plain that the proceedings in question were not only irregular but useless. The action was for specific performance of a contract to purchase land; the defence was fraud on the part of one alleged by the defendant to have been the agent of the plaintiff for the sale of the land. If the defence be proved, the action fails; there is no need for any other party to it. But the defendant says: "I may fail to prove agency, and in that case I want damages from the person if he were *my* agent, as the plaintiff asserts." But what has the plaintiff to do with that? This is his action. The defendant may have an action of his own against the offending agent.

The motion to add the agent as a party to this action should

not succeed, and so the taking of evidence for use upon it should not be sanctioned.

There was no suggestion of a counterclaim against the plaintiff and the agent jointly for damages; the adding of the agent as a party is sought solely for the purpose of making a claim against him alone for damages, if the plaintiff succeed in this action.

But, apart from that, it would have been useless and improper to have examined the agent for the purpose of adding him as a party to the action, because he was willing, and gave his consent, to be so added, and because the plaintiff had no notice of the intended examination of the man, and so the evidence, if taken, would have been improperly taken against him also.

The appeal should be allowed and the order below discharged; the respondent should pay the costs of this appeal and of the proceedings appealed against.

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

ANGUS v. MAITRE.

Deed—Conveyance of Land by Mother to Daughter—Transfer of Chattels—Action to Set aside—Absence of Fraud—Improvidence—Lack of Independent Advice—Registration of Deed—Cancellation—Unnecessary Provision in Judgment.

Appeal by the defendants from the judgment of BRITTON, J., 11 O.W.N. 335.

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

M. K. Cowan, K.C., for the appellants.

D. L. McCarthy, K.C., for the plaintiffs, respondents.

LENNOX, J., in a written judgment, said that BRITTON, J., had set aside a conveyance of land and a transfer of chattels made by the plaintiff Annie R. Angus to her daughter, the defendant Mary J. Maitre, on the 20th July, 1915, and directed that the registration of the deed of the land be vacated. He also directed a reference to take certain accounts. No order as to costs was made.

The land was mortgaged for $5,400; it was worth at least $13,500, and the chattels were worth about $2,500—$16,000 in all. The daughter assumed the mortgage. The net value was thus $10,600. In consideration, although it was not so stated in the deed, the daughter agreed to pay the mother $200 a year. The transaction divested the mother of her home and of all means of living except the $200 a year.

The defendants—Mary J. Maitre and her husband—set up that the former was acting solely in the interest of her mother and to protect her against the improvidence and importunities of the plaintiff William Angus, husband of the plaintiff Annie R. Angus.

The evidence of the solicitor who took the instructions, and in whose office the documents were prepared and executed, put it beyond question that the impeached transactions could not be allowed to stand. The plaintiff Annie R. Angus had no competent and independent professional assistance or advice—the instructions were given by the defendant Mary J. Maitre, and the solicitor was told that the object of the conveyance and transfer was to protect the mother, and that the daughter was to be a trustee for the mother. No provision was made for a home with the daughter, though the daughter was willing to provide a home. There was no doubt as to the improvidence of the arrangement.

After argument, the case stood over to see if some reasonable and judicious arrangement could not be arrived at. If the daughter's dominant idea had been the protection of her mother, this would have been easy to accomplish; that the negotiation had failed afforded strong evidence that the daughter's paramount purpose in the transaction was advantage to herself.

The appeal should be dismissed with costs.

RIDDELL and ROSE, JJ., concurred.

MEREDITH, C.J.C.P., read a judgment in which he said that the transaction was avoidable on the ground of improvidence. Watson v. Watson (1876), 23 Gr. 70; Hagarty v. Bateman (1890), 19 O.R. 381; Vanzant v. Coates (1917), 12 O.W.N. 239; and was properly set aside; but the judgment below went too far in ordering that the deeds should be cancelled and removed from the registry office. Even if there were power to order such removal, it would be quite needless and undesirable. The deeds were set aside on the ground of improvidence; they were not void; and, if they were, the judgment setting them aside could be registered.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

*RE HARMSTON v. WOODS.

Appeal — Motion to Extend Time for Appealing from Order of Judge in Chambers Refusing Mandamus to Division Court to Try Action—Unneccessary Appeal—Forum.

Motion by the plaintiff to extend the time for appealing from the order of MIDDLETON, J., ante 23, 39 O.L.R. 105, dismissing an application for a mandamus to compel a County Court Judge to try the action in a Division Court.

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

J. E. Lawson, for the plaintiff.

A. E. Knox, for the defendant.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the plaintiff sued the defendant in a Division Court for unlawfully entering the plaintiff's house and assaulting him. When the case came on for trial, the defendant objected to the jurisdiction of the Court, in so far as the action was for trespass to land, and the Judge, giving effect to the objection, nonsuited—the plaintiff declining to proceed with his action denuded of the claim for trespass to land.

The plaintiff thereupon applied in the High Court Division of the Supreme Court, in Chambers, for a mandamus requiring the Division Court Judge to try the action as brought; but the Judge in Chambers (Middleton, J.), being of opinion that Division Courts have no jurisdiction in actions for trespass to land, whether or not the title to land is involved, dismissed the application on the 10th March, 1917: ante 23, 39 O.L.R. 105.

The decision of the Judge was overruled in McConnell v. McGee (1917), ante 176; but not until after the time for appealing in this case had expired; and the present application to extend the time was accordingly made.

No great length of time had elapsed, and nothing else had happened which would make it unjust to the defendant to be obliged to go to trial now; according to the judgment in the McConnell case, an injustice was done to the plaintiff in preventing him from having his case tried in the Division Court; and the time might

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

well be extended if it were necessary, and if an order could be made in this Court.

But there should be no need of any appeal or motion in either Division of this Court. The Division Court Judge would, doubtless, upon having his attention called to the fact that the Division Court has jurisdiction, and that the ruling to the contrary has been overruled, try the action, if no right or title to land comes in question in it; and, if it do, will have due regard to the provisions of sec. 69 of the Division Courts Act, R.S.O. 1914, ch. 63.

It will be time enough to make this motion after the Division Court Judge has again refused to try the case—which seems improbable. And, should it be necessary again to make such a motion as this, it had better be made where there is power to grant it—in the High Court Division.

No order can be made here except upon an appeal.

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

*REX v. JACKSON.

Appeal—Order of Judge in Chambers Refusing to Discharge Prisoner on Habeas Corpus—Imprisonment under Warrant Founded on Police Magistrate's Conviction—Objections to Jurisdiction—Previous Refusal of Motion to Quash Conviction—Order not Appealed against—Binding Effect of Decision—Vagrancy—Objections to Conviction.

Appeal by the defendant from the order of MIDDLETON, J., ante 191, refusing a motion, made on the return of a habeas corpus, for the discharge of the defendant from custody under a warrant issued pursuant to a police magistrate's conviction for vagrancy.

A motion to quash the conviction had been dismissed by FALCONBRIDGE, C.J.K.B. (ante 77); a motion for leave to appeal from the order dismissing that motion was refused by MULOCK, C.J.Ex. (ante 161), on the ground that no appeal lay. The Chief Justice of the Exchequer, however, did not agree with the view expressed by the Chief Justice of the King's Bench as to the interpretation of sec. 238(*i*) of the Criminal Code; and MIDDLETON, J., held that he was bound by the decision of the Chief Justice of the King's Bench.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., CLUTE, RIDDELL, and ROSE, JJ.

J. B. Mackenzie, for the appellant.

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

MEREDITH, C.J.C.P., read a judgment in which he expressed the view that the Chief Justice of the Exchequer had power to grant leave to appeal on the motion made to him for leave, and that, if the motion were renewed, he should grant such leave; but, if such leave were granted, and the whole case were before this Court, the appellant could not succeed, and therefore the appeal should be dismissed. To shew that the appeal could not succeed, the learned Chief Justice of the Common Pleas examined all the points raised by the appellant, remarking that they all struck at the jurisdiction of the police magistrate, and so might have been raised in habeas corpus proceedings without quashing the conviction. The Chief Justice was of opinion that the appeal should be dismissed.

RIDDELL, J., was of opinion, for reasons stated in writing, that the appellant was concluded by the order dismissing her motion to quash the conviction, there having been no appeal from that order—the doctrine of res judicata applied. The learned Judge was also of opinion that the views expressed by the Chief Justice of the King's Bench were right in all respects.

ROSE, J., was also of opinion, for reasons stated in writing, that the Court could not reconsider the matter decided by the Chief Justice of the King's Bench.

MAGEE, J.A., read a judgment in which he took the opposite view. He was of opinion that the conviction was unsupported by evidence; and, though the conviction was still unquashed, it was the only support for the warrant on which she was held; and, not being founded on evidence, both it and the warrant failed to furnish ground for holding the appellant, who was, therefore, entitled to her discharge.

CLUTE, J., was of opinion, for reasons stated in writing, that the order dismissing the motion to quash, standing as it did unappealed against, whether an appeal was permissible or not, was not an answer to the motion to discharge the prisoner upon habeas corpus. The offence charged did not fall within the class of offences in respect of which the conviction was made. The prisoner should be discharged.

Appeal dismissed; MAGEE, J.A., *and* CLUTE, J., *dissenting.*

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

CHILLINGWORTH v. GRANT.

Contract—Sale of Mining Property—Covenant of Purchaser to Expend Money on Improvements—Breach—Penalty—Exclusive Remedy—Damages—Measure of—Reference—Costs—Order of Revivor—Regularity—Rule 303.

Appeal by the defendant from the judgment of MIDDLETON, J., in favour of the plaintiff for the recovery of $7,500 damages for non-performance by the defendant of a covenant to expend not less than $15,000 in improving a talc mining property in Vermont.

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

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

S. F. Washington, K.C., for the plaintiff by revivor, one Main, respondent.

RIDDELL, J., read a judgment in which, after setting out the facts, he said that it was objected that the plaintiff by revivor was not shewn to have any status; but, the order to continue proceedings not having been moved against under Rule 303, it was prima facie regular: Ardagh v. County of York (1896), 17 P.R. 184.

If Chillingworth, the original plaintiff, had the right to bring an action for the breach of the agreement to expend $15,000, even if he failed to prove substantial damage, he might recover nominal damages, and, if the Court saw fit, his costs: Village of Brighton v. Auston (1892), 19 A.R. 305.

It was argued that the plaintiff had no cause of action because para. 3 of the agreement (14th May, 1912) which contained the covenant provided for a penalty, which was exclusive. But an examination of the whole agreement afforded an answer to this contention. The covenant in para. 2 was not affected by the provisions of para. 3.

It was contended, also, that, the measure of damages being, not the amount unexpended of the $15,000, but the amount of actual damage from such non-expenditure, the plaintiff suffered no damage.

Chillingworth, by an agreement of the 10th July, 1909, was to execute deeds of all the property to Taylor, to be placed in escrow

for delivery over to a trust company as security for mortgage-bonds to be placed with the trust company—these bonds to be collateral to the debt by Taylor to Chillingworth of $62,000, the balance of the purchase-money of the mine. In the result, these bonds were the property of Chillingworth until he should be paid. The deeds going along with the bonds could not be said to have been other than in escrow; and Chillingworth still held the land.

He therefore had the right to sue for damages. But there was no evidence to justify the finding of $7,500 damages. There may have been that amount, less or more, but the evidence was loose, imperfect, and wholly unsatisfactory. There was sufficient evidence to justify a finding that some damage was sustained, but not to fix the amount.

The judgment should be set aside; costs of the appeal should be paid by the respondent; and there should be a reference to the Master in Ordinary to inquire and report what damages the plaintiff had suffered, reserving all other questions of costs and subsequent directions until after the Master's report.

LENNOX and ROSE, JJ., concurred.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

*HOLLIDAY v. BANK OF HAMILTON.

Attachment of Debts—Rent not yet Due—Apportionment Act, R.S.O. 1914 ch. 156, sec. 4—Pro Rata Part not Attachable—Effect of Previous Attaching Order—Effect of Fi. Fi. Lands in Hands of Sheriff—Assignment of Rent by Debtor—Validity of Assignment—Execution Act, R.S.O. 1914 ch. 80, sec. 34—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 10.

Appeal by the defendants from the judgment of SWAYZE, Jun. J. of the County Court of the County of Victoria, finding in favour of the plaintiff an issue arising out of garnishment proceedings.

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

William Laidlaw, K.C., for the appellants.
R. J. McLaughlin, K.C., for the plaintiff, respondent.

RIDDELL, J., in a written judgment, said that the Bank of Hamilton in May, 1914, had judgment against Richman and another for $1,451.92 and interest. Richman was the owner of land which, in April, 1914, he leased to Sheridan for three years from the 1st April, 1914, at a rental of $400 per annum due on the 1st November, 1914, 1915, and 1916. The bank on the 15th May, 1914, issued a writ of fi. fa. goods and lands and placed it in the sheriff's hands. In September, 1915, the bank obtained an attaching order and served it upon Sheridan. On the return of the summons, the Master in Chambers made an order for payment into Court of the rent due to Richman by Sheridan on the 1st November, 1915; and the money was paid into Court and paid out to the bank. In January, 1916, Richman assigned the rent to Holliday, who gave notice of the assignment to Sheridan. In September, 1916, the bank obtained a new attaching order and served it. In January, 1917, Holliday appeared to contest the bank's claim to the rent, and an issue was directed to try the rights of the parties, the tenant having paid the rent-money into Court. The Judge who tried the issue held that Holliday, the plaintiff therein, was entitled as against the bank, the defendants; and the defendants appealed.

The previous attaching order was effete and could have no effect in the present case. The fi. fa. lands had no effect as binding the rent—being an ordinary rent-seck, it was not exigible under the old statutes: Dougall v. Turnbull (1851), 8 U.C.R. 622. Section 34 of the Execution Act, R.S.O. 1914 ch. 80, introducing sec. 10 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, into the definition of "land," is not far-reaching enough to cover rent. That being so, and the rent being free from the operation of the fi. fa., there was no reason why the debtor should not assign it.

Overdue rent is a debt attachable: Mitchell v. Lee (1867), L.R. 2 Q.B. 259. Before the Apportionment Act (now R.S.O. 1914 ch. 156, sec. 4), rent not yet due was not attachable: McLaren v. Sudworth (1858), 4 U.C.L.J. O.S. 233; Commercial Bank v. Jarvis (1859), 5 U.C.L.J. O.S. 66. The general trend of authority in this Province is in favour of the pro rata part of the rent being attachable: Massie v. Toronto Printing Co. (1887), 12 P.R. 12; Patterson v. King (1895), 27 O.R. 56; and other cases. In England it has been held that the rent pro rata is not attachable: Barnett v. Eastman (1898), 67 L.J.N.S. Q.B. 517, by Day, J.

This decision stands alone, but does not appear to have been questioned. None of the Ontario decisions is binding on this Court; and, unless the statutes are substantially different, the English decision should be followed: Trimble v. Hill (1879), 5 App. Cas. 342. There is no sound distinction in the statutes or Rules, and the English decision should be followed.

The appeal should be dismissed with costs.

LENNOX and ROSE, JJ., concurred.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

*LONDON ELECTRIC CO v. ECKERT.

Contract—Sale of Goods at Price per Pound—Estimated Weight—Construction of Contract—Sale of Definite Quantity or of all Goods of the Kind in Vendor's Possession—Absence of Warranty of Quantity—Claim for Quantity actually Delivered at Contract-price—Counterclaim for Damages for Shortage.

Appeal by the plaintiffs from the judgment of BOYD, C., at the trial of the action, without a jury, at Toronto, in November, 1916, in favour of the defendant, in an action to recover $1,277.25 as the balance of the sale-price of a quantity of copper wire, and a counterclaim by the defendant for the same amount as damages for breach of the contract of sale, that is, for a shortage in the quantity of wire.

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

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

Sir George Gibbons, K.C., for the defendant, respondent.

LENNOX, J., in a written judgment, said that the plaintiffs' agreement was, to sell the defendant a quantity of copper wire which the plaintiffs had stored upon their premises at 15, cents per lb., the defendant to take delivery upon the plaintiffs' premises. The wire was scrapped. When it was taken down,

the engineers of the plaintiffs estimated the quantity as about 100 tons. Out of this, the plaintiffs sold 30 tons to one Grant. The defendant negotiated with one Barnes, acting manager for the plaintiffs, for the purchase of the remainder. Barnes informed the defendant that the quantity was estimated at about 70 tons, after the sale to Grant; and gave permission to the defendant to inspect it. Barnes quoted 15 cents as the price, and a bargain was come to, not in writing. The defendant asked for a written warranty that there were no liens or incumbrances upon the wire, and that was given. He did not ask for any warranty as to quantity. It turned out that the weight of the wire was only 100,700 lbs. The defendant paid the plaintiffs $13,827.75, or $1,277.25 less than the quantity delivered, at the contract-price, would amount to. The plaintiffs sued for this balance, and the defendant counterclaimed to recover it against the plaintiffs as damages for breach of contract, that is, for a shortage of 39,300 lbs. at 3¼ cents per pound.

The whole question was, whether the defendant, upon the contract, was entitled to have 70 tons delivered to him or only such quantity as the plaintiffs, at the time of the contract, actually had.

The trial Judge found that the sale was of an estimated or approximate quantity; that the estimate was made by the engineers, and the knowledge of the plaintiffs was founded upon the engineers' statement.

Taking the findings of fact of the trial Judge and the indisputable fact that the subject-matter of the contract was the remainder of the copper wire scrapped by the plaintiffs and on hand after the sale to Grant, the judgment in favour of the defendant was wrong in principle.

In the case of an oral contract such as this, what the parties said and what terms they agreed to are questions of fact—the meaning and effect of the contract, when its terms are ascertained, are questions of law.

Here the sale was based upon an estimate and the defendant should pay the full price for the quantity delivered.

Reference to Halsbury's Laws of England, vol. 7, p. 521, para. 1046; vol. 25, pp. 214, 215, para. 366; and to many decided cases.

The plaintiffs duly performed the contract entered into, and were entitled to recover for the quantity delivered at 15 cents per lb., less the sums paid as set out in the statement of claim with interest on the balance. The counterclaim should be dismissed with costs, and the plaintiffs should have the costs of the action and of the appeal.

RIDDELL and ROSE, JJ., concurred.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

*BALDWIN v. O'BRIEN.

Costs—Unnecessary Parties—Claim against Co-defendants—Injury to Reversion—Amendment—Injunction.

By the order of this Court pronounced on the 8th June, 1917, noted ante 256, the plaintiffs' appeal from the judgment of MIDDLETON, J., 10 O.W.N. 304, was allowed and judgment directed to be entered for the plaintiffs with nominal damages and costs on the Supreme Court scale without set-off.

The defendants the North American Life Assurance Company now asked that they be awarded costs of the action and appeal to be paid by their co-defendants, either directly or through the plaintiffs; and the plaintiffs asked leave to amend and to include an injunction in the judgment.

The motions were heard by MEREDITH, C.J.C.P., MAGEE, J.A., LENNOX and ROSE, JJ.

J. A. Paterson, K.C., for the applicants.

E. D. Armour, K.C., and J. W. Carrick, for the plaintiffs.

R. H. Parmenter, for the defendants O'Brien, McLean, and Verral.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the applicants in their pleadings supported the plaintiffs' claim against their co-defendants, and set up a claim of their own against their co-defendants; but there was no known right to make such a claim, and nothing came of it; the only issue tried was between the plaintiffs and the other defendants; so the Court was not concerned with any other question, and dealt with none other.

It was contended that the applicants were proper parties to the action; but the learned Chief Justice could not perceive why. The plaintiffs sued, and could sue, only in respect of their reversionary rights and in respect of the infringement of such rights

by the other defendants. Why then should their tenants be parties to the action? There was no suggestion that the applicants were parties to any infringements upon the plaintiffs' rights. The plaintiffs' tenants might be co-plaintiffs with them if any like infringements of their rights were complained of; but it was said that such rights were dealt with and concluded in the action of Hughes v. United Empire Club, tried by Gwynne, J., in 1877, and so could not be raised here again. But, however that might be, no question between the applicants and their co-defendants was raised or dealt with in this action; consequently these defendants were unnecessary parties, and, if they had disclaimed, might have had costs to that extent from the plaintiffs; but they did not and do not now, and so ought not to have costs from the plaintiffs; and it would be out of the question to say that their co-defendants should be saddled with any additional costs by reason of the applicants being made parties to the action.

The action should be dismissed as to the applicants, and there should be no costs to or against them.

Counsel for the plaintiffs asked leave to amend the statement of claim so as to allege injury to the reversion; no one objected, and no reasonable objection could be raised. The leave should be granted.

Counsel for the plaintiffs also asked that the judgment of the Court should include an injunction against any invasion of their rights by the defendants against whom the plaintiffs had succeeded. This the plaintiffs should have—it might more clearly define the rights of the parties.

No costs of these motions.

HIGH COURT DIVISION.

MULOCK, C.J. Ex. JUNE 20TH, 1917.

*LAMPEL v. BERGER.

Alien Enemy—Subject of Enemy Power Residing and Carrying on Business in Neutral Country—Contract for Sale of Land in Ontario—Purchase by Person Resident in Ontario—Validity of Contract—Disposition of Purchase-money—Intention to Transmit to Enemy Country—Specific Performance of Contract—Costs—Direction to Pay Money into Court to Credit of Defendant, to Remain in Court until after Peace Declared—Criminal Code, sec. 74(i)—Consolidated Orders respecting Trading with the Enemy.

Action for specific performance of a contract dated the 11th December, 1916, whereby the defendant, the owner of land in the

Province of Ontario, agreed to sell it to one Glab for $1,450. Glab purchased on behalf of the plaintiff, and on the 2nd January, 1917, assigned his interest under the contract to the plaintiff.

The defendant, by birth a Hungarian, had been for some years, and still was at the time of the trial, a resident of the State of Michigan, but had retained his Austro-Hungarian nationality, and thus at the date of the contract was an alien enemy subject, resident in neutral territory. Before completion of the contract, the plaintiff ascertained that the defendant had a wife and children resident in Hungary, and was in the habit of remitting money to them there. Being doubtful whether he might lawfully pay over the purchase-money to the defendant, the plaintiff instituted this action.

The defendant admitted that the contract was valid and binding and expressed his willingness to carry it out, provided that he was paid the purchase-money. He also submitted that the plaintiff should not have brought this action, but should have invoked the provisions of sec. 19 of the Privy Council's Consolidated Orders respecting Trading with the Enemy.

On examination for discovery, the defendant stated that he intended to send to his wife, in Hungary, a portion of the purchase-money.

The action was tried without a jury at Sarnia.

M. K. Cowan, K.C., for the plaintiff.

A. I. McKinley, for the defendant.

MULOCK, C.J.Ex., in a written judgment, said that the first question to determine was, whether the contract was valid and binding. The only ground of invalidity alleged was, that the defendant was by nationality an alien enemy subject. His residence and place of business were, however, in the United States, a neutral country at the time of making the contract, and now an ally of Great Britain.

Upon the declaration of war it became unlawful for any resident of Canada to trade with the enemy; but the defendant was not an enemy in the sense that he was incapable of entering into a binding contract with a resident of Canada.

With reference to civil rights, "enemy" does not mean a person who is by nationality a subject of a sovereign with whom His Majesty is at war, but a person, of whatever nationality, who resides or carries on business in enemy territory. The prohibition of commercial intercourse is based on public policy which aims at

preventing trade or intercourse that may be to the advantage of the enemy or the disadvantage of His Majesty's Empire.

Reference to Janson v. Driefontein Consolidated Mines Limited, [1902] A.C. 484, 505; Porter v. Freudenberg, [1915] 1 K.B. 857, 868; Daimler Co. Limited v. Continental Tyre and Rubber Co. (Great Britain) Limited, [1916] 2 A.C. 307, 319.

The contract was valid and binding, and the plaintiff was entitled to have it specifically performed.

As to the disposition of the purchase-money, the plaintiff, if, having notice of the defendant's intention to remit a portion of the money to his wife in Hungary, he paid it to the defendant, would be contributing to the financial resources of that country and to the capacity of the enemy to prolong the war. That he must not do. Further, he would be violating sec. 74(*i*) of the Criminal Code, which declares that "assisting any public enemy at war with His Majesty in such war by any means whatsoever" is treason.

It is the duty of the Court, representing His Majesty, actively to intervene by impounding the money and retaining it to the credit of the defendant until after the war.

The case is not covered by sub-sec. (3) of sec. 3 of the Consolidated Orders respecting Trading with the Enemy; that applies only where a person having control of money deals with it for the purpose of enabling the enemy to obtain it.

Section 19 of the Orders applies only where business is being carried on in Canada for the benefit of or under the control of enemy subjects, and where the Secretary of State has made such an order as is contemplated by sec. 17. The defendant could not be said to be carrying on business in Canada; and the Secretary of State had made no order under sec. 17.

Judgment for the plaintiff for specific performance of the contract and for the costs of the action. The purchase-money, after deduction of the plaintiff's costs, to be paid into Court to the credit of the defendant until after the war or until further order of the Court.

FERGUSON, J.A. JUNE 21ST, 1917

RE WHITESELL.

Will—Construction—Devise of Lot of Land not Owned by Testatrix—Erroneous Description—Legal Estate and Beneficial Interest of Testatrix as Mortgagee of another Lot Held to Pass by Devise.

Motion by the executor for an order declaring the true construction of the will of Elizabeth Whitesell.

The motion was heard in the Weekly Court at Toronto.
W. C. Mikel, for the executor and Lena Rustin.
F. W. Harcourt, K.C., for Irvine William Rustin, an infant.

FERGUSON, J.A., in a written judgment, said that the will was as follows: "*I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say* . . . I give Lena Rustin a lease of lot 9 in the 8th concession of Huntingdon until Irvine William Rustin her son is twenty-five years old and then I give it to Irvine William Rustin. In case he dies it goes to Lena Rustin. I wish the balance of my estate to be reduced to money and said money invested, the interest to be paid to Lena Rustin until her son William is twenty-five years old when it goes to him. In case he dies before this age the money goes to Lena Rustin except that the stock on the place goes to Lena Rustin and the household goods and chattels go to Lena Rustin. *All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto* Lena Rustin."

The testatrix did not own lot *9* in the 8th concession of the township of Huntingdon, but at the time of making her will and also at the time of her death was mortgagee in possession of lot *7* in the 8th concession of the township of Huntingdon. It was urged that the testatrix intended to devise lot 7, but erroneously described her land as lot 9.

Reference to Re Clement (1910), 22 O.L.R. 121; Smith v. Smith (1910), 22 O.L.R. 127.

In drawing the will the testatrix here used a printed form, and in the foregoing quotation the printed words are italicised. These were identical with those used in the Smith case. The opinion in that case turned upon the effect given to those printed words. The learned Judge was unable to distinguish that case, and felt bound to follow it, and, following it, to find that the

devise here was intended to and was sufficient to pass the legal estate in lot 7 held by the testatrix.

That conclusion being reached, the further question arose, is the devise good to pass to the devisee not only the legal estate of the testatrix but the beneficial interest in the mortgage-moneys?

Prima facie a devise of land is a devise of such estate or interest therein as the testator has. Here the testatrix was in possession, the land was specifically devised, and no other construction would give effect to the terms of the devise. The devise was therefore sufficient to pass and did pass such interest as the testatrix had in the lands, which was not that of an owner in fee, but was that of a mortgagee: Re Carter, Dodds v. Pearson, [1900] 1 Ch. 801.

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

FERGUSON, J.A. JUNE 22ND, 1917.

RE WINBERG AND KETTLE.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Mortgage—Notice of Sale under Power—Misdescription of Land in Notice—Registration of Notice—Registry Act, R.S.O. 1914 ch. 124, sec. 75—Provision in Mortgage Relieving Purchaser from Inquiry as to Sufficiency of Notice—Foreclosure Proceedings—Parties—Husband of Mortgagor.

Motion by Winberg, the vendor, under the Vendors and Purchasers Act, for an order declaring that the objection of Kettle, the purchaser, to the vendor's title, upon a contract for sale of land, had been satisfactorily answered.

The motion was heard in the Weekly Court at Toronto.

A. Cohen, for the vendor.

J. Singer, for the purchaser.

FERGUSON, J.A., in a written judgment, said that the first objection was as to the sufficiency of a notice of sale, registered on the 19th October, 1904, it being contended that the mortgaged premises were inaccurately or improperly described. The description in the mortgage was, "*lot No. 6 of* lot No. 8 on the south side of Queen street in section 'C' of the Military Reserve in . . . Toronto as laid down on a plan of building lots on said lot No. 8 registered and numbered 165." In the notice of sale, the words and figure "lot No. 6 of" were omitted. The mort-

gage was made in pursuance of the Short Forms Act, and contained the power of sale provided for therein, but did not contain a power enabling a sale to be made without notice. The mortgage also provided that no purchaser under the powers of sale therein contained should be bound to inquire into the sufficiency or regularity of the notice given or into the legality or regularity of any such sale or to see to the application of the purchase-money.

The learned Judge said that he could not bring his mind to the conclusion that a Court might be of opinion that a person receiving the notice of sale could not have notice that the mortgagee intended to proceed to sell the mortgaged premises. The mortgaged premises were a part of the land actually described in the notice; and the vendor was entitled to rely on the provision of the mortgage relieving purchasers from inquiry as to the sufficiency or regularity of the notice given or of a sale thereunder.

The purchaser urged that the registration of the notice was, under sec. 75 of the Registry Act, R.S.O. 1914 ch. 124, notice to him of the misdescription or defect. The Act says that registration shall be notice of the instrument. The notice of sale was registered on lot 6, and to anybody looking at the abstract was a notice of sale affecting lot 6, plan 165. To give effect to the vendor's objection, it must be held that the registration was notice that the registered notice of sale did not affect lot 6, plan 165.

Reference to Abell v. Morrison (1890), 19 O.R. 669, 676.

In the case at bar, the learned Judge felt that he could not, as a conclusion of law, say that the purchaser from the mortgagee had actual notice that the mortgagee was not regularly or legally exercising the power of sale so as to deprive him of the protection of the provision of the mortgage relieving him from inquiry.

Reference to Dicker v. Angerstein (1876), 3 Ch. D. 600; Life Interest and Reversionary Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society, [1898] 2 Ch. 230; Campbell v. Imperial Loan Co. (1908), 18 Man. R. 144.

Proof of the registration of the notice is not in itself notice of every imperfection or slip in the instrument, so as to take away the protection afforded by the express agreement of the parties to the mortgage.

The other question raised on the application was as to the sufficiency of certain foreclosure proceedings. A mortgage was made by Fanny G., the registered owner of the property, and her husband; but the husband was not joined as a defendant in the

foreclosure action. Held, that he was not a necessary party to the action, and that the evidence furnished on behalf of the vendor shewed that the husband had no interest in the property.

Order declaring that the vendor had sufficiently answered the requisitions of the purchaser.

LAPOINTE v. ABITIBI POWER AND PAPER CO.—KELLY, J.—JUNE 18.

Water—Navigable River—Obstruction by Logs—Opening of Boom—Failure to Close—Breach of Duty—Saw Logs Driving Act, R.S.O. 1914 ch. 131, sec. 3—Negligence—Contributory Negligence—Fisherman Lawfully Navigating River—Damages.]—Action for damages for loss alleged to have been caused to the plaintiff, a fisherman, by the defendants blocking navigation at the mouth of the Okikodosic River and on Lake Abitibi. The action was tried without a jury at North Bay. In a written judgment, LATCHFORD, J., said that the defendants were negligent in not maintaining closed the tail-boom behind their logs in the lake at the mouth of the river, and that their failure so to maintain the boom caused damage to the plaintiff. The duty which the defendants owed to the plaintiff, as a person lawfully navigating the river, is stated in sec. 3 of the Saw Logs Driving Act, R.S.O. 1914 ch. 131, which requires persons driving logs down a river so to drive the same as not unnecessarily to obstruct navigation. That the plaintiff himself opened the tail-boom, on his return from the "lift" made from his nets in the lake on the 25th May, was no bar to his right to recover. The defendants' employees, whose duty it was both to open the tail-boom to allow the plaintiff's boat to pass up the river and to close it after he had passed, were absent from their posts. The plaintiff endeavoured to cross the boom by running his boat over it, or "riding" it; and, being unable to pass by this means, tried to open the boom near the shore. This he was unable to do, and he was obliged to open the boom near the centre of the river. It was urged that, had he waited a short time, the defendants' men, whom he passed a few miles up-stream on their return-journey, would have been present to operate the winch provided by the defendants, and thus properly open and close the boom. But it was impossible

for the plaintiff to estimate when the men would return, or whether they would return at all, and his valuable cargo was perishable. After passing the boom, he tried to close it, but failed in his efforts. While passing the defendants' employees, he shouted to them that the boom was open—they may not have heard or understood. But that the boom was open was obvious to them when they came to the river-mouth on the way to their camp; and their plain duty was to close it. They had the proper appliances; but they chose to leave the boom open; and, when the plaintiff came down the river a day or two later, the boom was still open. While he was out visiting his nets, a south wind prevailed. Owing to the fact that the tail-boom was allowed to remain open, the defendants' logs, which would have been held in the lake had the boom been closed, were blown back up the dead water at the mouth of the river, blocking the stream to such an extent that only by great effort, after long delay, the exhaustion of his supply of gasoline, no little damage to the planking of his launch, and the transfer of his cargo to a skiff, was the plaintiff able to reach the railway station, the point where he packed and shipped his fish. The defendants, though notified by the plaintiff of the condition which existed, allowed the river to remain blocked for 8 or 10 days. In addition to the damage to his launch, the plaintiff lost at least three "lifts" of fish at the season when the fishing was at its best. Judgment for the plaintiff for $850 with costs on the Supreme Court scale. A. G. Slaght, for the plaintiff. H. H. Davis, for the defendants.

LIVINGSTONE v. BRITISH AMERICA ASSURANCE CO.—LIVINGSTONE v. ACADIA FIRE INSURANCE CO.—LIVINGSTONE v. FIREMEN'S FUND INSURANCE CO.—LATCHFORD, J.—JUNE 19.

Insurance—Fire Insurance—Damage to Stock of Goods and Fixtures — Extent of — Evidence.]—Actions to recover the amount of the plaintiffs' loss by fire, insured against by the three defendant companies. The actions were tried without a jury at Toronto. LATCHFORD, J., in a written judgment, said that the actions were the result of a disagreement between the plaintiffs and the three defendant insurance companies, in regard to the appraisement of the loss sustained by the plaintiffs owing to a fire which occurred in their retail premises in Yonge

street, Toronto, on the night of the 26th February, 1917, damaging their stock-in-trade and fixtures. The defendants were promptly notified of the loss, and every opportunity was afforded to them for determining the amount of it. An agreement for an appraisement was signed by the parties; but, owing to differences between their respective representatives as to the third arbitrator, and not, as pleaded, to any refusal made by the plaintiffs fraudulently or in bad faith, the agreement proved abortive, and no appraisement was made under it. The plaintiffs then put in their proofs of loss, giving as particular an account of the damage as the nature of the case permitted. The claims were not accepted; hence the actions. There was little dispute regarding the damage to the fixtures—so little that counsel for the plaintiffs did not press their claim that its extent was greater than the defendants' estimate—$395. Apart from certain defences, based on matters of law, the only substantial dispute between the parties was in regard to the extent of the damage to the stock-in-trade. The learned Judge finds as a fact that all the stock-in-trade was damaged sensibly and appreciably by fire or smoke. In many cases, especially where the goods were dark in colour, the damage could not be seen; but the odour of smoke or soot was present in the least visibly affected articles, for weeks after the fire, and greatly diminished their selling value. Where all was damaged, the statutory requirement that damaged property shall be separated from undamaged is without application. At the trial it was found that there was no fraud on the part of the plaintiffs in presenting their claims against the defendants. The only difficulty was in determining how far the experts who estimated the damages on behalf of the respective parties were right or wrong. It was a matter about which there could well be an honest difference of opinion. But the experts called on behalf of the plaintiffs were more entitled to credit than those called by the defendants. The plaintiffs' experts were earlier on the ground, and made much the more careful examination of the goods. Their testimony was supported by witnesses who were employed in the shop before the fire, and afterwards during the sale. Yet, having regard to all the evidence as to value, the loss, placed at 75 per cent. by the witnesses for the plaintiffs, was too high, as the loss, fixed at 25 per cent. by the witnesses for the defendants, was undoubtedly far too low. Having regard to the conflict of testimony, and the peculiar nature of the goods injured, it was difficult to arrive at an accurate determination of the plaintiffs'

loss; but it would not be far wrong to place it at 60 per cent. On that basis, the plaintiffs were entitled, in addition to costs, to judgment as follows: against the British America Assurance Company, to $1,122 on stock and $102 on fixtures, or a total of $1,224; against the Acadia Fire Insurance Company, to $1,215 on stock and $88 on fixtures, or a total of $1,303; and against the Firemen's Fund Insurance Company, to $1,303 on stock and $205 on fixtures, or a total of $1,508. R. McKay, K.C., and J. Y. Murdoch, for the plaintiffs. D. L. McCarthy, K.C., for the defendants.