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APPELLATE DIVISION.

SEPTEMBER 27TH, 1915.

*REX v. WEST.

Criminal Law—Obstructing Peace Officer—Criminal Code, sec. 169—Summary Conviction by Police Magistrate—Indictable Offence—Option of Crown—Procedure—Mode of Trial—Consent of Accused—Secs. 773 (e) and 778 of Code.

Appeal by the defendant from the order of MIDDLETON, J., ante 9.

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

G. H. Kilmer, K.C., for the appellant.

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

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 28TH, 1915.

*RE MCNEILLY v. BENNETT.

Division Courts—Territorial Jurisdiction—Cause of Action—Place where Arising—Contract—Correspondence—Transfer of Action—Prohibition—Mandamus.

Motion by the plaintiff for an order prohibiting the transfer of this action from the First Division Court in the County of Wentworth to a Division Court (at Orillia) in the County of Simcoe, and for a mandamus to compel the Judge presiding in the Wentworth Division Court to hear and determine the action upon its merits.

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

The plaintiff had an establishment in Hamilton, in the county of Wentworth, and part of his business consisted in reshaping ladies' hats for retailers. On the 2nd March, 1914, he sent from Hamilton to the defendant at Orillia a circular letter which requested the persons receiving it to send in old hat shapes to be reshaped, and quoting prices. In response to this, the defendant sent some hats to be reshaped; the plaintiff said that he reshaped them; the defendant said that the hats returned to her were not those which she had sent for treatment.

The plaintiff sued for the price of the work which he asserted that he had performed; and proceeded in the Hamilton Division Court, upon the theory that the whole cause of action arose there. The Judge in the Division Court took the view that the whole cause of action did not arise in Hamilton—that it arose in part in Orillia.

T. N. Phelan, for the plaintiff.
J. M. Ferguson, for the defendant.

MIDDLETON, J., said that, in his view, the sending of the circular constituted part of the cause of action. The plaintiff initiated the transaction by making a quotation of prices in Orillia; and, although this did not amount to a technical offer—Johnston Brothers v. Rogers Brothers (1899), 30 O.R. 150—it was an essential ingredient in the "cause of action," as that expression has been consistently defined in the cases.

In another aspect of the case, the writing of a letter accompanying the goods from Orillia was in itself a part of the cause of action: In re Hagel v. Dalrymple (1879), 8 P.R. 183. The case of Cowan v. O'Connor (1888), 20 Q.B.D. 640, appears to be in conflict with the Hagel case; but the latter is in accord with the policy of the Division Courts Act, which compels the creditor to seek his remedy in the Court of the residence of the debtor, unless the whole cause of action arises in some other division.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 28TH, 1915.

REX v. HIMMELSPACH.

Liquor License Act—Keeping Liquor for Sale without License—Club—Evidence—Conviction—R.S.O. 1914 *ch.* 215, *sec.* 45 (3) *—House-boat—"Place" or "Premises."*

Motion to quash the convictions of the above named defendant

and two other defendants for unlawfully keeping intoxicating liquor for sale without a license.

H. G. Tucker, for the defendants.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., said that the liquor was alleged to have been kept for sale upon a house-boat on the Saugeen river. Three lager kegs were found, one full, one empty, and one on tap. There were empty bottles, a beer pump, and glasses, the glasses shewing that they had been recently used. The conduct of the defendants was not satisfactory, as the full keg and the empty keg were concealed, and they asserted that the keg on tap was the only liquor they had. A constable deposed to having seen intoxicated men coming from the boat—these men being arrested and fined. The boat was said to be owned by a club, of which the defendants were members.

The contention put forward by the defendants was, that the boat was kept as a place of entertainment, where practically any one might go, and that the individual members of the club bought the beer and presented it to those who desired to consume it. Apparently the magistrate was not convinced of the veracity of this account, even if it was open to him to accept such an explanation, in view of the somewhat stringent provision of sec. 45 (3) of the Liquor License Act, R.S.O. 1914 ch. 215, providing that proof of consumption of liquor in the premises of any incorporated association or club by any member or any person who resorts thereto, "shall be conclusive evidence of sale of such liquor, and the occupant of the premises or any member of the club, association or society . . . shall be taken conclusively to be the person who has or keeps therein such liquor for sale."

The intention of the Legislature is, that it shall be impossible to obtain liquor in an unlicensed club; and this intention can only be effected by legislation not easily circumvented.

In the notice of motion it was contended that the house-boat was not a house, building, room, or place, nor could it be described as "premises." This point was not seriously pressed upon the argument, and was clearly untenable. The boat might well be regarded as a house, a building, a room, a place, and premises.

Motion dismissed with costs.

MIDDLETON, J. SEPTEMBER 28TH, 1915.

RE THAMES QUARRY CO. LIMITED AND ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF TORONTO.

Building Contract—Construction—Work to be Done—Amount Payable to Contractor—Arbitration—Award—Appeal—Removal of Material—Interest—Costs.

Appeal by the company from an award made by His Honour Judge Winchester upon a voluntary submission by the parties of their differences in respect of a building contract and the work done under it by the appellants. The submission provided for an appeal.

R. S. Robertson, for the appellants.

T. L. Monahan, for the corporation, the respondent.

MIDDLETON, J., said that the corporation was erecting a church in Toronto. A contract was made with one McNeill for the excavating and brick and stone work. McNeill failed in the execution of the contract, and the corporation entered into negotiations with the appellants, which resulted in an agreement by which the appellants undertook to supply material and perform labour in connection with the building of the foundations, setting steps, construction of basement floor, and grading—"it being intended that we are to do all the work that is required to be done for the purpose of filling the contract of W. A. McNeill in connection with St. Ann's Church." It was contended that the words quoted were meaningless and to be eliminated from the contract; but, MIDDLETON, J., said, he could not so treat them, nor confine the work undertaken to the specific matters firstly enumerated.

The price to be paid for the completion of McNeill's contract was $1,250, and that was paid. The claim now put forward amounted to $1,028.33; and, after a full and careful trial, the arbitrator concluded that this whole claim was substantially unfounded; he allowed only $28. Speaking generally, the conclusions of the arbitrator were right and ought to be supported.

The appellants contended that, upon making the contract, the corporation became bound to remove all material, so that the work could be readily and conveniently executed—relying upon Drew-Bear v. St. Pancras Guardians (1897), Emden on Building Contracts, 4th ed., appendix, p. 681. That case, however, did not justify the position taken; the appellants knew that they

had to enter upon the premises as they were, and work in conjunction with other trades.

The claim for interest was not satisfactorily dealt with by the arbitrator. Interest should be allowed from the 19th July, 1914, when the work was completed, to the 20th May, 1915, when the contract price was paid—$52.

The expense incident to an appeal is out of all proportion to the amount involved.

The appellants substantially failed upon this appeal; they obtained relief in respect of the small sum of interest only; and they must pay the costs of the appeal, less $25 allowed as the costs relating to this one item. This sum and the amount allowed for interest to be set off pro tanto against the costs to be paid.

MIDDLETON, J. SEPTEMBER 28TH, 1915.

RE NORWALK MINING CO.

Company — Mining Company — Winding-up — Directors—Misfeasance—Purchase of Mining Property from Director—Payment by Allotment of Shares—Prospectus—Absence of Concealment and Fraud—Over-issue of Shares—Sale at Discount—No Loss Sustained—Breach of Duty—Trustee Clauses of Limitations Act, R.S.O. 1914 *ch.* 75*—Application of.*

Appeal by the liquidator of a mining company, in liquidation under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, from the finding of an Official Referee, upon a reference to him for the purpose of winding-up, that the directors were not liable for misfeasance in respect of a sum of $117,387.

R. H. Parmenter, for the appellant.
W. E. Raney, K.C., for the respondents.

MIDDLETON, J., said that he agreed with the Referee that the conduct of the directors had throughout been honest; and, although there had been great laxity in the mode of carrying out the transactions, there was nothing which imposed liability on the directors.

The company was organised and incorporated in 1906. The transaction finally consummated and carried out was that evidenced by dealings in 1908, when the mining property was turned over to the company for 175,000 shares. Following this, the prospectus was signed and filed, and it was openly and truly

stated that the property was bought from Dr. Gill, one of the directors, acting as trustee, for $175,000, to be paid for in 175,000 shares of stock—which was the total number of shares sold to the date of the prospectus.

After this completion of the transaction, other advances were made, stock was sold, and the affairs of the company carried on until the final disaster. In all that was done up to this time there was nothing in the nature of concealment or breach of trust; everything was assented to by all concerned; and, although the records were not complete or satisfactory, there was nothing upon which any liability of the directors could be founded.

It was alleged that there was misfeasance by an over-issue of stock. Some of the figures appeared to be difficult of explanation; but it was unsatisfactory to attempt to base a claim upon the piecing together of isolated facts and figures where the subject was not in issue and was not brought to the attention of any of the deponents at the hearing. There was no foundation for what was alleged.

It was argued that the whole transaction between Dr. Gill and the company was colourable—entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount. This allegation was not made out in fact. Dr. Gill had a property of absolutely speculative value, and the price in shares of the company was fixed in the mode indicated.

Under the Companies Act, the shares of a mining company may be issued at a discount, if certain statutory requirements are met; and, even if what was alleged had been made out, it was doubtful whether the liability charged would have arisen; for on a misfeasance summons the liability of the directors depends upon the loss sustained by the company by reason of what is complained of. Here no loss was sustained; at the time of the transaction, all concerned understood and approved of it; and none were afterwards misled, for the prospectus stated the facts.

Apart from this, the Limitations Act afforded a complete defence. The allegation against the respondents was, in substance, breach of duty to the company of which they were directors, and this is a liability falling within the trustee clauses of the Act (R.S.O. 1914 ch. 75, secs. 46-48). See cases collected in Lightwood's Time Limit on Actions, pp. 282, 283.

Appeal dismissed with costs, to be paid by the liquidator out of any assets of the company which may have come to his hands.

CLUTE, J. SEPTEMBER 29TH, 1915.

*McKINNON v. DORAN.

Contract—Sale of Bonds—Principal and Agent—Purchase by Agent—Finding of Fact of Trial Judge—Statute of Frauds—Memorandum in Writing—Letters to Third Person—Evidence—Failure to Pay for Bonds—Breach of Contract—Damages.

Action for damages for breach of a contract for the purchase by the defendant from the plaintiffs of certain railway bonds of the face value of $223,700.

The action was tried by CLUTE, J., without a jury, at Toronto.

J. B. Clarke, K.C., for the plaintiffs.

J. S. Fullerton, K.C., and I. F. Hellmuth, K.C., for the defendant.

CLUTE, J., after setting out the facts at length, in a written opinion, said that the defendant pleaded that he was employed by the plaintiffs as an agent to sell the bonds, the plaintiffs agreeing to pay him a commission of $2,500. The learned Judge finds as a fact that the defendant, having secured a purchaser, decided to purchase the bonds himself; the defendant treated the transaction, as in fact it was, as a sale to himself, and acted not as agent but as principal in the transaction.

There was a further defence under the Statute of Frauds, R.S.O. 1914 ch. 102. The learned Judge thinks it clear that the bonds, read in connection with the trust indenture giving a power of sale of the mortgaged property, upon default, came within the statute: Driver v. Broad, [1893] 1 Q.B. 539, 744. Aside from the statute, there was no question that a sale to the defendant was concluded, and what took place met the requirements of the statute. The correspondence between the parties disclosed the vendors and the terms of sale and the fact that the defendant had purchased the bonds.

The correspondence between the defendant and Daudé, his New York associate, through whom he made a sale of the bonds which was not carried out, was admissible as evidence of the bargain: see Gibson v. Holland (1865), L.R. 1 C.P. 1; Sugden's Law of Vendors and Purchasers, 14th ed., p. 139; Welford v. Beazely (1747), 3 Atk. 503; Seagood v. Meale (1721), Prec. Ch. 560; Leroux v. Brown (1852), 12 C.B. 801; Rose v. Cunynghame (1805), 11 Ves. 550; Bailey v. Sweeting (1861), 9 C.B.N.S. 843; Agnew's Statute of Frauds, p. 244, and cases there cited; and

thus a sufficient memorandum in writing to satisfy the statute had been made out.

The plaintiffs were entitled to recover the amount of their actual loss: In re Vic Mill Limited, [1913] 1 Ch. 183.

Judgment for the plaintiffs for $16,911.77, with interest from the 3rd December, 1914, and costs of the action.

BOYD, C. OCTOBER 1ST, 1915.

*BELL v. TOWN OF BURLINGTON.

Municipal Corporations—Annexation of Part of Township to Village—Order of Ontario Railway and Municipal Board—Postponement of Time for Taking Effect—Erection of Village, including Annexed Territory, into Town—Jurisdiction of Board—Misrecital of Statute—Assessment of Residents of Annexed Territory by Town Council without Representation—Bona Fides—De Facto Council—Ontario Railway and Municipal Board Act, R.S.O. 1914 *ch.* 186, *secs.* 39 (1), 44, 47, 48—*Municipal Act, R.S.O.* 1914 *ch.* 192, *secs.* 20, 93, 230—*Liability for Taxes.*

Action for a declaration that the plaintiff's land was not within the limits of the Town of Burlington, and was not liable to assessment by the defendant town corporation; that certain by-laws of the town and orders made by the Ontario Railway and Municipal Board were illegal and void, and should be set aside; and for an injunction restraining the defendant corporation from proceeding to collect taxes, etc.

The action was tried without a jury at Milton.

W. Laidlaw, K.C., for the plaintiff.

W. Morison, for the defendant corporation.

THE CHANCELLOR said that the plaintiff sought to nullify the action of the Board in annexing part of the township of Nelson to the village of Burlington, and the further action of erecting the village so enlarged into the town of Burlington, and to enjoin the levy of taxes by the defendants upon land owned by the plaintiff in the annexed district.

By the order of the Board of the 10th June, 1914, a defined strip of land adjoining the village was detached from Nelson

and annexed to Burlington, but the annexation was not to take place until the 31st December, 1914. The Board had power to make an order and suspend the operation: Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 39 (1); and jurisdiction, under the Municipal Act, R.S.O. 1914 ch. 192, to make the change in boundaries.

The point that the application of the village council to the Board for the annexation of the strip was not bona fide was taken in the pleadings, but not substantiated in the evidence.

The population of the village before the annexation was 300 more than 2,000.

The order of the Board misrecited the language of sec. 17 of the Municipal Act; but the error in the recital should not vitiate the action of the Board. There was evidence of the proximity of parts of two streets forming part of the strip annexed, which were before the annexation boundaries between Nelson and Burlington, and the effect of the annexation was to incorporate them into the village—upon these parts of the streets public money of the village had been expended. The recital was inofficious and superfluous, and could not be so read as to indicate that the Board disregarded the statutory directions. If the Board had simply made an order declaring and ordering the annexation of the district without more, it would not have been impeachable because not more explicit: Ontario Railway and Municipal Board Act, sec. 44.

Reference to Bath and Mountague's Case (1693), 3 Ch. Ca. 96, as to the effect of a misrecital in a deed, and the benignant interpretation of charters; and to Dwyer v. Town of Port Arthur (1893), 22 S.C.R. 241, as to erroneous recital in the preamble of a statute.

Every assumption should be made in favour of the validity of such an order: see secs. 47 and 48 of the same Act.

The second order made by the Board was on the 9th December, 1914, granting the application of the village council for the erection of the village into a town. This was warranted by sec. 20 of the Municipal Act. The order provided that the existing limits of Burlington, *including the territory annexed thereto by the Board on the 10th June,* 1914, should be the boundaries of the town. Sub-section 3 of sec. 20 provides that the newly erected town shall be divided into wards as the Board may direct. The three wards designated by the Board did not contain or include any part of the annexed territory. The plaintiff's complaint was, that the council elected by the town, on

this subdivision of the wards, had no power to represent, or to levy taxes on, the newly annexed territory. By sub-sec. 7 of sec. 20, the order was conclusive evidence that all conditions precedent to the making of it had been complied with, and that the town had been duly erected in accordance with the provisions of the Act; and a fresh starting-point was thus obtained to deal with the assessment made upon the new territory.

The assessment roll of 1914 for the collection of taxes in 1915 was completed during the year 1914 without reference to the annexed territory; and the plaintiff's contention was that the new territory was not represented in the council of 1915, and that it was illegal to impose taxes upon the residents therein; but the omission of the clerk of the municipality of Burlington to make up a supplementary list of voters containing the names of those entitled to vote in the new territory, under sec. 93 of ch. 192, ought not to affect the bonâ fide conduct of the council as de facto elected to carry on municipal affairs such as the imposition and collection of taxes.

Under sec. 230 of the Act, the council on the 22nd March, 1915, passed a by-law appointing an assessor who assessed the property of the plaintiff and other residents in the new territory; and on the 22nd June, 1915, passed another by-law ratifying the assessment. The plaintiff appealed from his assessment, but it was affirmed by the County Court Judge.

The doings of which the plaintiff complained began in June, 1914; the plaintiff took no action to invalidate them till the 29th July, 1915, and by his inaction had allowed liabilities to be incurred and expenditures to be made by the town which ought not lightly to be interfered with; no substantial injustice had been done to the plaintiff; and there was no satisfactory ground for setting aside the bonâ fide action of the de facto council in regard to the taxes complained of: County of Pontiac v. Ross (1890), 17 S.C.R. 406, 413; Gill v. Jackson (1856), 14 U.C.R. 119, 127.

Action dismissed with costs.

BRITTON, J. OCTOBER 1ST, 1915.

*GARMENT v. CHARLES AUSTIN CO. LIMITED.

Master and Servant—Injury to Servant—Remedy — Action — Application under Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.)—Jurisdiction—Findings of Jury—Negligence —Contributory Negligence—Damages—Judge's Charge.

The plaintiff, who was employed by the defendants, was injured on the 23rd January, 1915, by falling into an elevator shaft in their store or warehouse, and brought this action to recover damages for his injuries.

The defendants, by a defence added at the trial, set up that the Workmen's Compensation Act applied, and that the plaintiff had no right of action—that his remedy, if any, was by an application to the Board under the Act, 4 Geo. V. ch. 25 (O.), as amended by 5 Geo. V. ch. 24.

The action was tried at Chatham with a jury, who found the facts in favour of the plaintiff, and assessed his damages at $500.

R. L. Brackin and B. L. Bedford, for the plaintiff.
O. L. Lewis, K.C., and Ward Stanworth, for the defendants.

BRITTON, J., referred to and considered secs. 5, 15, 69, 105, 106, 107, 108, 109, and clause 36 of schedule I. of the Act; and said that the plaintiff's claim was not one which required him to go before the Board—that the Court had jurisdiction to entertain the action.

The jury found negligence on the part of the defendants and contributory negligence on the part of the plaintiff—no doubt they took the contributory negligence into account in assessing the damages, as they were instructed in the charge.

Judgment for the plaintiff for $500 with costs on the Supreme Court scale.

MIDDLETON, J. OCTOBER 1ST, 1915.

RE BECK TRUSTS.

Trusts and Trustees—Trust Company—Three Separate Trusts —Consolidation—Advances by Trust Company in Respect of one Trust—Balances Due by Trust Company in Respect of other Trusts—Set-off—Insolvency of Trust Company—Rights of Liquidator—Beneficiaries.

Appeal by the liquidator of the Dominion Trust Company from a report of the Master in Ordinary.

The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

N. W. Rowell, K.C., for the appellant.

H. T. Beck, for the adults concerned.

E. C. Cattanach, for the Official Guardian, representing the infant Doris Beck.

MIDDLETON, J., said that it appeared that there were three distinct trust funds: one arising under the will of the late V. S. Beck, which directed one fund to be held and the income to be used for the support of the testator's two daughters until they attained the age of 21 years, and after each daughter attained majority the income to be paid to her for her sole use; and upon the death of the daughter the fund was to be held for the benefit of her children, to be divided on the youngest attaining 21 years. If either child died without issue, then the surviving child and her issue were to take the whole. The insurance moneys were held, $2,500 in trust for Helen Beck, and $500 in trust for Doris Beck. An order was made in the matter of the trusts of the will on the 20th February, 1915, appointing a new trustee and referring to the Master to take an account of the dealings of the trust company with the estate funds. Subsequently an order was made in the matter of the insurance policies, also appointing a new trustee, and referring to the Master to take an account of the dealings of the trust company with the insurance moneys.

Although the three trust funds were separate, the trustees treated them as in truth one fund, and their first accounts brought in before the Master dealt with the trusts on that footing. Subsequently the trustees filed further accounts, in which the trust funds were separated, with the result that it appeared

that there was a large balance due to the trustees with respect to advances made by them to the life-tenants on the estate account; and there were balances due to the insurance trust funds. The Master set these off one against the other, treating the matter as one consolidated fund so far as the trustees were concerned; and with this the beneficiaries were content.

The liquidator of the trust company now appealed and desired to have the three accounts kept separate. If the trust company was insolvent, the effect of this was obvious. The right of the liquidator would be to compel payment to the company in full of the balance due by the beneficiaries in respect of overdrawn income; and, on the other hand, these same beneficiaries would have to rank upon the estate and obtain a dividend only, if the company should turn out to be insolvent.

It was suggested that, so far as this Province was concerned, such security is held by the Government that there would not in the end be any possibility of insolvency.

The learned Judge said that his conclusion was, that the set-off ought to be allowed, to the extent that all moneys which were due to the trust, by either of the two daughters, for advances made to them, could be set off against moneys held by the trustees for these two daughters respectively. The Master's report had not gone beyond this. The appeal ought therefore to be dismissed with costs.

If the Master had allowed a set-off of the balance due to one daughter against the amount due the other, the report should be varied.

The cases cited in Halsbury's Laws of England, vol. 25, p. 503, shewed that there was a wider right of set-off than was asserted by the appellant.

PALTER v. SHER—MIDDLETON, J., IN CHAMBERS—SEPT. 28.

Practice—Writ of Summons—Specially Endorsed Writ—Mortgage—Foreclosure—Parties—Owner of Equity of Redemption—Appearance without Affidavit—Rules of Court.]—Appeal by the plaintiff from an order of the Master in Chambers refusing the application of the defendant Kemp to dismiss the action as against him, but allowing him to appear without filing an affidavit of merits, and directing the plaintiff to pay the costs of the application in any event. The action was for foreclosure in respect of a mortgage upon two parcels of land. The writ of summons

was specially endorsed. MIDDLETON, J., said that the writ was properly endorsed in accordance with the Rules; and the only remedy sought against Kemp was foreclosure. He was in equity the owner of the equity of redemption, and undoubtedly a necessary and proper defendant, and properly made a defendant in the first instance; for the parties to be added in the Master's office are subsequent incumbrancers. As there are subsequent incumbrancers, there will have to be a reference; and the defendants the Shers having appeared and disputed the amount of the plaintiff's claim, there must be a reference. If Kemp desires to raise any issue, he ought to file an affidavit disclosing what that issue is. Apart from this, no jurisdiction is conferred upon the Master to dispense with an affidavit where the writ is specially endorsed. If the writ is irregular, it may be set aside; but where, as here, it is proper, it must be obeyed, or the consequences pointed out in the Rules will follow. Appeal allowed, with costs here and below to be paid by the defendant Kemp to the plaintiff in any event of the cause. The defendant Kemp may have 5 days further in which to enter an appearance, filing an affidavit shewing his defence, if he so desires. Any appearance entered under the Master's order must be vacated. G. T. Walsh, for the plaintiff. J. Singer, for the defendant Kemp.

REX v. RISPA—MIDDLETON, J., IN CHAMBERS.—SEPT. 28.

Evidence—Foreign Commission—Criminal Cause.]—Motion by the accused for the issue of a commission to take the evidence of certain witnesses said to be at Hoboken, New Jersey, who, it was said, would not attend in Canada for the purpose of giving evidence. MIDDLETON, J., said that the charge against the accused was serious. His defence was an alibi. It was most unsatisfactory that evidence on an issue of this kind should be given on commission; but to deprive the accused of the commission might prevent his being able to obtain the evidence at all; and nothing could be worse than to have it supposed that there was in New Jersey evidence which might support the defence of the accused, and that he had been denied the opportunity of placing it before the Court. It was better to make the order sought, leaving it to the Crown counsel and the Judge at the trial to comment as might appear desirable upon the evidence given on the commission. J. M. Ferguson for the accused. J. R. Cartwright, K.C., for the Crown.

MINING INDUSTRY CO. v. GODSON CONTRACTING CO.—MIDDLETON, J.—SEPT. 30.

Sale of Goods—Refusal to Accept—Contract—Parties not ad Idem—Written Order—Quantity not Specified—Statute of Frauds—Untenable Defences—Costs.]—Action to recover $1,062, the price of goods sold and delivered; tried without a jury at Toronto. MIDDLETON, J., said that the action was misconceived in form, as the goods were never delivered; the action must be regarded as one for damages for failure to accept delivery. The plaintiff company was a Swiss concern, producing high-grade tool steel. The officers of the defendant company were canvassed for orders; they had no knowledge of the plaintiff company's steel; but they finally consented to place a sample order, and gave a written order for 33 bars of steel, 3 bars of each of 11 dimensions shewn to the plaintiff company's agents. The order contained no specification as to the length of the bars to be supplied. The original order was sent to Switzerland; it was produced at the trial, and was then found to contain, in addition to what was originally written, the words "fifteen feet long." No explanation was given as to how, when, or where these words were added. The steel sent forward from Switzerland was in accordance with this altered order. The defendant company refused to accept, and repudiated the giving of any such order—the principal officer's idea of a sample order being an order for about $100 worth of steel. The quantity sent was greatly in excess of any possible requirement of the business. The idea of the principal officer of the defendant company was that short sample bars would be sent, not over two feet in length. He said—and his was the only evidence—that the length of the bars to be sent was not discussed. In these circumstances, the plaintiff company failed: the parties were never ad idem as to the quantity of goods sold; and the quantity of goods sold did not appear in the memorandum relied upon to take the case out of the Statute of Frauds. The action should be dismissed; but, the defendant company having at first raised untenable defences, should have no costs. Action dismissed without costs. A. N. Morine and A. R. Cochrane, for the plaintiff company. G. H. Watson, K.C., for the defendant company.

RE ELLIOTT & SON LIMITED—BRITTON, J., IN CHAMBERS—OCT. 1.

Company—Winding-up—Petition for—Dismissal—Leave to Appeal—Refusal of — Winding-up Act, R.S.C. 1906 *ch.* 144, *sec.* 101 (*a*), (*b*).]—Application by the Martin Secour Company Limited, creditors, for leave to appeal from an order of Middle-

ton, J., refusing the petition of the applicants for an order for the winding-up of Elliott & Son Limited. The applicants expressed the belief that proceedings under the Winding-up Act were necessary to get to the bottom of certain transactions not in the interest of creditors generally and prejudicial to the petitioners. No reasons for that belief were stated in the petition, but counsel spoke plainly enough in the argument. BRITTON, J., said that all these matters were fully considered by MIDDLETON, J., when he refused to make the order. The questions to be raised on appeal did not involve future rights; nor was the order or decision likely to affect other cases of a similar nature in applications for winding-up orders. This application for leave did not come within sec. 101 (*a*) or (*b*) of the Winding-up Act, R.S.C. 1906 ch. 144. That section refers to leave to appeal in cases after winding-up order, and to decisions as to claims etc. in winding-up. Owing to what was said upon the argument as to how it came that an assignment was made, and to whom, and particularly as to what was stated by one Bernbaum in his affidavit, the learned Judge had given the matter a good deal of consideration; and, with some hesitation, had come to the conclusion that leave to appeal should not be granted. Motion dismissed without costs. Grayson Smith, for the applicants. R. McKay, K.C., for the company.

RE KNICKERBOCKER v. UNION TRUST CO.—MIDDLETON, J., IN CHAMBERS—OCT. 1.

Division Courts—Jurisdiction—Action against Liquidator of Company for Wages—Necessity for Leave of Court—Question of Law—Determination by Division Court Judge—Right to Review—Motion for Prohibition—Costs.]—Motion by the defendants for prohibition to the 2nd Division Court in the County of Grey. The defendants were the liquidators of the Superior Portland Cement Company Limited. The plaintiff was an employee. The plaintiff sued the defendants to recover wages after the date of the liquidation, upon the theory that he was employed by the defendants, the liquidators. The motion for prohibition was based upon the contention that there was no right to sue the liquidators without the leave of the Court. MIDDLETON, J., said that, if the liquidators in point of fact made a contract, they were liable to an action upon that contract. Even if that were not so, the question was one of law, to be determined

by the Division Court Judge. His findings, even if erroneous, could not be reviewed. Upon the argument it was apparently thought that the action was with respect to wages prior to the date of the liquidation; and there was much confusion in the affidavits made by the plaintiff. Apparently there was $110 due before the liquidation, and this was the amount claimed for wages subsequent to the liquidation. This amount was evidently erroneous, for the wages after liquidation began on the 11th November and ended on the 23rd November, and would amount to $53.43 only, instead of $110. The plaintiff now consented to reduce his claim to this amount, with costs in the Division Court; and this consent might be recited in the order. The motion failed; but costs should not be awarded, as the motion was provoked by the fact that the judgment was apparently for wages prior to the date of the liquidation. D. C. Ross, for the defendants. C. B. Jackes, for the plaintiff.