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APPELLATE DIVISION.

NOVEMBER 1ST, 1915.

REAL CAKE CONE CO. v. ROBINSON.

Contempt of Court—Disobedience of Injunction—Consent Judgment — Locus Pœnitentiæ — Undertaking to Discontinue Manufacture of Goods in Form Similar to those of Plaintiffs —Costs.

Appeal by the defendants from the order of MIDDLETON, J., 8 O.W.N. 568.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. E. Rose, K.C., for the appellants.

J. M. Ferguson, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

NOVEMBER 4TH, 1915.

*MERRIAM v. KENDERDINE REALTY CO. (No. 1).

Partnership—Syndicate Formed to Buy and Sell Specific Land —Account—Purchase-price of Land—Purchase from Member of Syndicate—Absence of Fraud—Contract—Commission or Salary of Managing Partner—Disallowance—Reference—Appeal—Costs.

Appeal by the defendants from an order of LENNOX, J., 8 O.W.N. 617, dismissing their appeal from the report of an Official Referee.

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

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

A. McLean Macdonell, K.C., for the appellants.

A. Cohen, for the plaintiffs, respondents.

RIDDELL, J., who delivered the judgment of the Court, set out the facts at length. He explained the terms of the judgment at the trial, which directed a reference to the Official Referee to take an account: (1) of the assets, property, and effects, real and personal, of the Welland Industrial Reserve Syndicate, come to the hands of the defendants the Kenderdine Realty Company Limited, as trustees for the syndicate; (2) of the dealings of the defendant company with those assets, property, and effects; (3) of the property, moneys, and securities of the syndicate in the hands of the defendant company or now outstanding and unrealised. In his report the Referee disallowed the following amounts said by the defendant company to have been properly paid by them on account of the syndicate: on account of purchase-price of land $28,500; an overriding commission to W. B. Kenderdine, $5,226.66; office expenses, $1,718.84; rent, $1,259.67; salaries and fees, $2,731.17: total, $39,436.34. The appeal to LENNOX, J., was from the disallowance of these items, and the present appeal from his affirmance of the disallowance.

The ground of disallowance of the first item, $28,500, paid as part of a purchase-price of $40,000, was that the syndicate, being a partnership, of which Kemerer and his wife were members, was entitled to the benefit of their purchase (and option); and, consequently, the real purchase-price should not have been $40,000, but the amount fixed by the option, $11,500.

As to this RIDDELL, J., said that, conceding that the syndicate was a partnership and that Kemerer and his wife were members of it, he could not see that the partnership could insist on taking his or her property at the price paid for it. Cases such as Gluckstein v. Barnes, [1900] A.C. 240, were cases of plain fraud —lying—and had no application here; nor were cases of a member of a partnership buying for the partnership his own property applicable: Bentley v. Craven (1853), 18 Beav. 75; In re Cape Breton Co. (1885), 29 Ch.D. 795; Burton v. Wookey (1822), Madd. & Geld. 367, 368. Here the syndicate was formed to buy this specific land at a specific price; Kemerer had the right to have this price paid for the property—that was the basis of the contract between him and the other members of the syndicate; and there was no duty cast upon him to try to have the price reduced. The same remarks applied to Kemerer's wife

and to Kenderdine and his wife. Nor was it material that the deed of the land was not obtained till after the formation of the syndicate, and was then made out in favour of the Trusts and Guarantee Company.

As to this first item, the appeal should be allowed.

The other items stood on a different basis. The contention, broadly stated, was this: to make a sale of land a success, a sales agent should be employed; such a sales agent would have cost what is charged in the items which are disallowed; therefore, these sums should be allowed. The learned Judge said that that contention was unsound. The articles provided that Kenderdine should be manager, but did not provide a salary or allowance as such. The contract of partnership excluded any implied contract for payment for services rendered the firm by any of its members: Thompson v. Williamson (1831), 7 Bli. N.R. 432; Holmes v. Higgins (1822), 1 B. & C. 74. Moreover, the managing partner or "manager" stands in a different position in this respect from any other partner: Hutcheson v. Smith (1842), 5 Ir. Eq. R. 117; Thornton v. Proctor (1793), 1 Anst. 94; East-India Co. v. Blake (1673), Finch 117; York and North Midland R.W. Co. v. Hudson (1853), 16 Beav. 485, at pp. 499, 500.

It was said, however, that at a meeting of the syndicate, called under clause 9 of the articles, a majority ratified these payments. RIDDELL, J., said that he could not read an agreement that the meeting might "deliberate and decide on any of the affairs of the syndicate" as justifying such a meeting (by a majority) giving away the funds of the syndicate to one of its members—it would require much stronger language to justify such an interpretation of the powers of the majority.

As to these items, the appeal should be dismissed.

As success was divided, there should be no costs of the appeal to LENNOX, J., or of this appeal.

NOVEMBER 4TH, 1915.

*MERRIAM v. KENDERDINE REALTY CO. (No. 2).

Partnership—Syndicate—Trustee — Judgment Directing Payment of Moneys into Bank—Neglect to Comply with—Misunderstanding of Terms of Judgment—Motion for Appointment of Receiver—Locus Pœnitentiæ—Terms—Costs.

Appeal by the plaintiffs from the order of MIDDLETON, J., *ante* 35.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

A. Cohen, for the appellants.

A. McLean Macdonell, K.C., for the defendants, respondents.

RIDDELL, J., delivering the judgment of the Court, said that the judgment pronounced at the trial directed the defendants the Kenderdine Realty Company Limited to pay all moneys received or to be received by them in connection with the business matters and transactions of the Welland Industrial Reserve Syndicate into a named bank, to the credit of the said company, less all expenses, including proper payments to the Trusts and Guarantee Company Limited, necessary to obtain discharges of mortgages in reference to parcels of land sold, and less all necessary expenses to the collection of such moneys, including agents' commissions, and that the said company should not withdraw any of the said moneys therefrom, or should pay the same into Court. In the endorsement on the writ of summons and in the statement of claim, the appointment of a receiver was asked, but was not directed in the judgment.

The motion before MIDDLETON, J., was made after judgment, reference, and report, and was for the appointment of a receiver; that motion was refused; and RIDDELL, J., said that the Court agreed that no ground for the appointment of a receiver could, in this action, be at present urged which existed at the time of the trial or the commencement of the action.

But it was urged that since the trial the defendants were at fault, because they had (admittedly) failed to pay into the bank the moneys received before the trial.

There is no doubt as to the power of the Court to appoint a receiver at any stage of the action and for any sufficient cause; and the Court will do so in a partnership action upon a proper case being made out: Evans v. Coventry (1854), 3 Drew. 75, 82, 5 D. M. & G. 911; Estwick v. Conningsby (1682), 1 Vern. 118; Young v. Buckett (1882), 30 W.R. 511; Baldwin v. Booth, [1872] W.N. 229; Jefferys v. Smith (1820), 1 J. & W. 298; Chaplin v. Young (1862), 6 L.T.N.S. 97; Hall v. Hall (1850), 3 Macn. & G. 79, 86; Const v. Harris (1824), Turn. & Russ. 496, 253.

If this were a wilful default, the Court would appoint a receiver and manager, notwithstanding the serious effect upon the undertaking; but, as the neglect appeared to have been due to a misunderstanding of the direction of the Court, the defendants should have an opportunity to put themselves right by paying the money into the bank as ordered.

If the defendants, within 10 days, pay the amount into the bank as ordered, filing at the same time a statement under oath verifying the amount, and pay the costs of the motion and appeal, within 10 days after taxation thereof, the appeal will be dismissed; otherwise, the appeal will be allowed with costs here and below.

NOVEMBER 4TH, 1915.

*ANDERSON v. FORT WILLIAM COMMERCIAL CHAMBERS CO.

Mechanics' Liens—Lien of Sub-contractor—Estoppel by Conduct—Mechanics and Wage-Earners Lien Act, sec. 6 — "Abandonment"—Sec. 22 (1).

Appeal by the defendants from the judgment of a County Court Judge in favour of the plaintiff, a sub-contractor for placing heating apparatus in a building which one Stewart contracted to erect for the defendants upon their land. The plaintiff completed the work under his sub-contract, and registered a claim of lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, which he sought in this action to enforce. Stewart did not finish the work under his contract, and it appeared that it would cost $1,500 to finish it. The County Court Judge gave judgment for the plaintiff for $915.18 and $125 costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley, K.C., for the appellants.

Christopher C. Robinson (for C. A. Moss, absent on active service with His Majesty's forces), for the plaintiff, respondent.

RIDDELL, J., who delivered the judgment of the Court, said that it was argued that the plaintiff had estopped himself from claiming a lien by his conduct. Whether or not the conduct disclosed would effect an estoppel was a matter which would require further consideration; but it was not necessary to pass upon that point, because sec. 6 of the Act prevented any such effect following from such conduct—"Unless he signs an express agreeemnt to the contrary . . . any person . . . shall . . . . have a lien . . ." It would emasculate this section to hold that an estoppel in pais would do what the section declares only a signed agreement can do.

It was also contended that the first cessation of work was an "abandonment" under sec. 22 (1); and no claim for lien was registered within 30 days from that time. But what took place was not an abandonment. Where the contractor, knowing or believing that the contract is not completed, declines to go on and complete it, there is an abandonment. Here the plaintiff, on it being decided that he was wrong in thinking that his work was completed, went on and finished it. The contract was not completed or abandoned; and sec. 22 (1) did not apply.

Appeal dismissed with costs.

NOVEMBER 4TH, 1915.

POWELL LUMBER AND DOOR CO. LIMITED v. HARTLEY.

Mechanics' Liens—Amount Due by Owner to Contractor—Liens of Material-men and Wage-Earners—Dismissal of Contractor—Amount Necessary to Complete Work — Findings of Referee—Appeal.

Appeal by the defendant Graham from the judgment of Mr. F. J. Roche, an Official Referee, in a proceeding under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

T. Hislop, for the appellant.

J. P. MacGregor, for Shannon, a lien-holder, and G. H. Shaver, for the plaintiffs and Tijon, a lien-holder, respondents.

KELLY, J., delivering the judgment of the Court, said that the appellant, the owner of land, entered into a contract with the defendant Hartley for the erection by him of a house and repairs to another house thereon; that the plaintiffs and others supplied material to and did work for Hartley in the performance of the contract, and, not having been paid in full, registered claims for liens against the land. Shortly before the registration, the appellant dismissed Hartley from the work, and proceeded to complete it himself. Proceedings were instituted to enforce the liens, and the Referee found that liens had been established by six lien-holders, to the aggregate amount of $1,424.31, exclusive of costs; that certain wage-earners had, with

the consent of all parties, been paid the amount of their liens, aggregating $162, exclusive of costs; and that the six lien-holders and the wage-earners were also entitled to liens for their costs, amounting in all to $345. The appeal was against these findings.

The first matter in dispute was the amount of the contract: Hartley said it was $4,600; the appellant, that it was only $4,275. The Referee apparently found that it was $4,600, and it was admitted that Hartley was entitled to $40 for extras, thus bringing the amount up to $4,640. Payments to the amount of $3,303.25 were made to Hartley during the progress of the work. The Referee did not expressly find what sum was sufficient to complete the work; but the evidence established that at the time of Hartley's dismissal $300 was the utmost that was necessary to complete all the work contracted for. There was no ground for interfering with the Referee's finding as to the amount for which Hartley was primarily liable. It was also established that the appellant had not, at the time he was shewn to have had notice of the liens, paid the contractor up to 80 per cent. of the value of the work and materials actually done, placed, or provided, and he made no payments to Hartley afterwards.

Upon this basis, there remained due to Hartley the sum of $874.75; and the six lien-holders were entitled to liens upon the property aggregating the $874.75 (in addition to the costs allowed by the report, for which they also had liens) in the proportion of the debt and interest (if any) found to be due to them; and the judgment of the Referee should be amended accordingly; the defendant Hartley being primarily liable for the amounts found by the judgment.

Success being divided, there should be no costs of the appeal.

NOVEMBER 4TH, 1915.

MITCHELL v. BUCKNER.

Payment—Chattel Mortgage—Set-off—Assent — Appropriation of Payments—Rights of Assignee.

Appeal by the plaintiff from the judgment of COATSWORTH, Jun. Co.C.J., dismissing an action brought in the County Court of the County Court of the County of York, in detinue, for three horses, and for damages, etc.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. M. Mowat, K.C., for the appellant.
T. N. Phelan, for the defendant, respondent.

RIDDELL, J., delivering the judgment of the Court, said that one Williamson had given a chattel mortgage upon some horses; the mortgagee seized on non-payment; Williamson thereupon borrowed $400 from one Breckon, and gave him a chattel mortgage for $410 upon his eight horses, five waggons, and some harness, on the 9th August, 1913. Williamson got into straits again in 1914, and made an arrangement with the defendant (Buckner) whereby, for valuable consideration, the defendant got three of the horses. Breckon thereupon assigned the chattel mortgage to the plaintiff, who sued in detinue for the three horses and also for damages, etc.

Some time in April, 1914, Williamson had an account against Breckon: Breckon asked him "to get these accounts straightened out;" Williamson wanted to "get the mortgage squared off," and told Breckon so. A statement was made up shewing Williamson's account slightly in excess of the amount of the chattel mortgage, and, "as the result of the figuring" by and between the mortgagor and mortgagee, Williamson says, "the mortgage was paid." Breckon admitted that he called on Williamson for his account, that he asked him to get the accounts straightened out; but he denied that the account of Williamson was arranged to go on any particular advance. There were two independent witnesses who said that what was said by one or other of the parties at this meeting was, "This straightens us out," or words to that effect.

The County Court Judge did not discredit these witnesses, and RIDDELL, J., saw no reason for doing so. It was true that the Judge said: "No appropriation of the credits has been made by or on behalf of Breckon;" but it was not necessary that Breckon should have expressly made an appropriation. If Williamson set his account off against the chattel mortgage, and this was assented to by the mortgagee, no actual appropriation on the part of Breckon was necessary. The position of the plaintiff was no higher than that of Breckon. When one buys a chattel mortgage, he takes what his assignor can give him.

The chattel mortgage was paid off and satisfied, and so came to an end; and the judgment of the Court below was right.

Appeal dismissed with costs.

HIGH COURT DIVISION.

BOYD, C. NOVEMBER 2ND, 1915.

VILLAGE OF FORT ERIE v. FORT ERIE AND BUFFALO FERRY CO.

Contract — Ferry — Commutation Tickets—Regulations — Construction—"Family."

Motion by the plaintiffs for judgment on the pleadings in an action for the construction of an agreement between the parties and for a penalty.

The agreement related to the running of a ferry across the Niagara river between Fort Erie and Buffalo, according to certain regulations set forth, No. 7 of which related to the tariff, and provided that the company should issue commutation tickets to bonâ fide residents of Fort Erie, as follows: (a) a book of 40 tickets for $1, these tickets to be used only by *the person* to whom issued *or his family*, and to be good until used, between 6 a.m. and 8 p.m.; (b) a book of 10 tickets for 50 cents, to be used only by *the person* to whom issued *or his family*, good for 30 days from date of issue, for passage between 8 p.m. and midnight. Under the heading "Miscellaneous Tariff" was this: "The company shall sell commutation book containing 50 tickets for light one-horse vehicles with a driver and available for *purchaser, his family and servants.*"

The motion was heard in the Weekly Court at Toronto.

W. M. German, K.C., for the plaintiffs.

W. M. Douglas, K.C., for the defendants.

THE CHANCELLOR said that the contention of the defendants was that a commutation ticket was available for no more than one passenger lawfully using the ticket in one passage; while the plaintiffs argued that the ticket might properly be used on one trip for several members of the same family till the limit of the book should be reached.

If the provisions as to the scope and function of a ticket were ambiguous, the construction should be in favour of the purchaser, and not of the company. But it did not appear to the learned Chancellor that the language as to the rights of the holder was other than reasonably clear. A ticket is to be used

by the person to whom issued individually or by his family collectively. The second definition of "family" in the Oxford Dictionary is cited: "The body of persons who live in one house or under one head, including parents, children, servants, etc." The word has a flexible meaning, coloured by the context. In this connection it means the heads of the family and their children. The whole family of a purchaser of a ticket may travel at one time on the same ticket till the limit per capita is exhausted. The word does not, as used, include servants.

The defendants may take such means as are fitting to define, by name or otherwise, the persons who are to be included in each family, so as to guard against personation.

Judgment for the plaintiffs with costs.

BOYD, C., IN CHAMBERS. NOVEMBER 4TH, 1915.

*LUCZYCKI v. SPANISH RIVER PULP AND PAPER MILLS CO.

Alien Enemy—Action by, Begun before War—Stay of Action until after Restoration of Peace—Judicature Act, sec. 16 (f)—Plaintiff Resident in Enemy Country—Security for Costs—Stay of Proceedings without Order—Costs.

Appeal by the plaintiff from the order of Mr. Holmested, Senior Registrar, sitting in lieu of the Master in Chambers, dismissing the action, brought by an alien enemy, without prejudice to a fresh action after the restoration of peace: 8 O.W.N. 616.

Oscar H. King, for the plaintiff.

B. Holford Ardagh, for the defendants.

THE CHANCELLOR said that the action was in tort—an action under the Fatal Accidents Act; the plaintiff lived in Galicia; the action was begun in June, 1913. On the 27th June, 1913, an order for security for costs was obtained, and on the 3rd September, 1913, the sum of $200 was paid into Court in response thereto. On the 13th September, 1913, issue was joined; and in December, 1913, an application was made by the plaintiff for the issue of a commission to take evidence in Austria. In February, 1914, the commission was issued, and sent, through the Austrian Consul, to the local Court in Galicia; but, it was

said, owing to the outbreak of hostilities in August, 1914, no return had been made.

The learned Registrar had followed Dumenko v. Swift Canadian Co. Limited (1914), 32 O.L.R. 87, and Le Bret v. Papillon (1804), 4 East 502; but, the Chancellor said, owing to conflicting earlier English decisions, the uncertain state of the practice, and the distinctive facts of this case, he was not bound to follow or extend the Dumenko case. A clear line of distinction was to be marked as to cases where the alien plaintiff was rightly in Court and had a vested right of action as an alien friend before that character had been transformed by war to that of an alien enemy.

The learned Chancellor distinguished Le Bret v. Papillon and Brandon v. Nesbitt (1794), 6 T.R.23. He referred to and relied on Shepeler v. Durant (1854), 14 C.B. 582, 583; Porter v. Freudenberg, [1915] 1 K.B. 857, 866, 873, 877, 880, 884; Harman v. Kingston (1811), 2 Camp. 150; Flindt v. Waters (1812), 15 East 260.

Dilatory pleas having become obsolete and being abolished in this country, the convenient remedy now applicable is a stay of proceedings under sec. 16(*f*) of the Judicature Act, R.S.O. 1914 ch. 56, "either generally or so far as may be necessary for the purposes of justice."

He also referred to Bullen & Leake's Precedents, 7th ed. (1915), p. 496; Daniell's Chancery Practice, 8th ed. (1914), vol. 1, p. 83; Trotter's Law of Contract during War, 1914, p. 54, and supplement of 1915, p. 66; Craig Line Steamship Co. Limited v. North British Storage Co., [1914] 2 Scots L.T. 326; Orenstein & Koppel v. Egyptian Phosphate Co. Limited, [1914] 2 Scots L.T. 293, 297; De Kozarijouk v. B. & A. Asbestos Co. (1914), 16 Q.P.R. 213, 218; Levine v. Taylor (1815), 12 Mass. 7, 9, 10; Hutchinson v. Brock (1814), 11 Mass. 119; Law Quarterly Review, vol. 31, p. 167 (April, 1915).

So long as the plaintiff remained quiescent during the war, no order to stay proceedings till the close of the war was really needed. If the plaintiff ventured to make any move in the case, it was at her own risk. Should any intervention of the Court be asked, it is not to be by way of dismissal (when everything is tied up by the war), but, at most, by way of staying proceedings till the termination of the war, and this without costs, or, as in the Scottish case, with costs reserved.

The present appeal should succeed, and, owing to the state of the authorities, with costs to the plaintiff in any event; and it

does not appear fitting that any other order should be made. The case, so far as it has developed, will remain in statu quo, to be taken up and continued after the war is over.

If either party chooses to take out an order to stay proceedings till the war ends, it may be issued—but it is only expressing what the law declares.

BOYD, C., IN CHAMBERS. NOVEMBER 4TH, 1915.

JARVIS v. KEITH.

Discovery — Production of Documents and Examination of Parties—Action for Possession and Mesne Profits—Preliminary Issue as to Right to Possession—Postponement of Discovery as to Measure of Mesne Profits—Rule 352—Costs.

Appeal by the defendant A. Keith from an order of the Master in Chambers requiring the appellant to file a better affidavit on production of documents and to attend for further examination for discovery.

H. S. White, for the appellant.

E. D. Armour, K.C., for the plaintiff, respondent.

THE CHANCELLOR said that the action was for possession and mesne profits; and all the controversy on the pleadings was as to whether or not the plaintiff elected to renew a lease to the defendants at the expiry of the term. The defendants alleged an election to renew. This was traversed by the plaintiff, who said that there was no valid election, and that there were other circumstances which estopped the defendants from shewing that there was an election. If this issue should be determined adversely to the defendants, there would be no further controversy as to the right to possession and mesne profits. It seemed eminently proper first to determine this outstanding question of fact and law before investigating the amount of mesne profits. That would be a matter of course consequence if the defence should fail; and, if a reference should be needed or directed, the costs would be given against the party to blame. Rule 352 might well be invoked to stop the discovery as to the measure of mesne profits.

To this extent the appeal should be allowed; as to the other matters mentioned at the argument the order of the Master should be affirmed; costs in the cause.

LENNOX, J., IN CHAMBERS. NOVEMBER 5TH, 1915.

FOORD v. FOORD.

Husband and Wife—Action for Alimony — Interim Disbursements—Counsel Fee—Agency Fees—Undertaking of Plaintiff's Solicitors—Practice.

Appeal by the plaintiff from an order of the Senior Local Judge of the Supreme Court at Hamilton, in an action for alimony, fixing $100.20 as the amount to be paid by the defendant in respect of the plaintiff's interim disbursements.

A. W. Langmuir, for the plaintiff.
H. Cleaver, for the defendant.

LENNOX, J., said that the items of disbursement were set out in an affidavit of one of the solicitors for the plaintiff as amounting to $200.17, and were estimated by a local taxing officer (upon request) at $199.37. Of this total, $100 was for counsel fee at the trial, as to which the solicitor swore that he had retained counsel, outside his own firm, and become liable to him for payment of $100. There was also included an item of $39.17, for which the plaintiff's solicitors had become liable to their Toronto agents for services rendered in this action. The learned Local Judge, receiving the estimate of the taxing officer, was apparently of opinion that only $40 should be allowed for counsel fee and that the $39.17 should not be allowed at all.

LENNOX, J., said that, with very great respect, he was of opinion that the agency fees and a counsel fee of $100 should be allowed. The $39.17 was an actual disbursement—the actual net amount for which the solicitors had become liable to their agents.

The cases relied upon by the defendant were Cowie v. Cowie (1908), 17 O.L.R. 44, and Gallagher v. Gallagher (1897), 17 P.R. 575. LENNOX, J., entirely concurred in all that was said in those cases. It was true that in the Cowie case a counsel fee of $40 only was allowed; but each case must be decided on its own facts. The question was, what was right in this instance; and, having regard to the fees usually paid now to efficient and experienced counsel, and it being shewn that this was a liability bona fide and actually incurred by the plaintiff's solicitors, the $100 fee was a disbursement proper to be allowed.

The plaintiff's solicitors must give an undertaking to account

for any portion of the $100 counsel fee not actually paid out to a counsel who is not a member of the firm of the solicitors for the plaintiff; and, upon this being done, the appeal will be allowed, and the order will be that the defendant forthwith pay to the plaintiff's solicitors $199.37 as her disbursements; if the undertaking is not given, the order will be for payment of $139.37. Costs of the appeal to be costs to the plaintiff in the cause.

BOYD, C. NOVEMBER 5TH, 1915.

WILLSON v. THOMSON.

Mortgage—Foreclosure — Final Order — Judgment of Supreme Court of Canada—Proof of Default—Entry of Judgment in Supreme Court of Ontario—Practice—Issue of Order—Mortgagors and Purchasers Relief Act.

Motion by the plaintiff for judgment of foreclosure.

See Willson v. Thomson, 30 O.L.R. 502, 31 O.L.R. 471; Thomson v. Willson, 51 S.C.R. 307.

The motion was heard in the Weekly Court.

K. Lennox, for the plaintiff.

T. Hislop, for the defendants.

THE CHANCELLOR said that the case was carried by the defendants to the Supreme Court of Canada, and that Court on the 15th March, 1915, ordered that the amount required for redemption should be paid into the head office of the Canadian Bank of Commerce on the 15th October, 1915. That order was forthwith binding on the defendant, and default was made in payment. Steps were not taken to procure a certificate of that judgment for the purpose of its enforcement in this Court till the 26th October, and that certificate was duly entered in the judgment-book of this Court on the 29th October, and thereupon it became enforceable: Rule 524.

This motion to foreclose was prematurely made and leave was given by the Court to enter the judgment. On the application now made, the cause had been restored to this Court, and the certificate of the bank shewed default. The affidavits filed before the entry of the Supreme Court judgment were irregular and could not be read, but they were not required, as the defendants appeared, and the default was manifest.

The order to foreclose should be made without costs, and its issue suspended for 10 days to allow the defendants to apply, if so advised, under the Mortgagors and Purchasers Relief Act, or otherwise.

BOYD, C., IN CHAMBERS. NOVEMBER 6TH, 1915.

CANADA GLASS MANTELS AND TILES LIMITED v. SHEPARD.

Summary Judgment — Rule 57 — Action on Promissory Note — Defence—Authority of Agent of Maker—Power of Attorney —Scope of—Conditional Leave to Defend.

Appeal by the defendants from an order of the Master in Chambers for summary judgment under Rule 57 in an action, begun by a specially endorsed writ of summons, to recover the amount of a promissory note made by the defendant Shepard, by her attorney, one Gordon, and endorsed by the defendant Cane.

J. R. Roaf for the defendants.
R. G. Hunter, for the plaintiffs.

THE CHANCELLOR said that Esdaile v. Le Nauze (1835), 1 Y. & C. Ex. 394, relied on by the defendants, did not really apply to the present power of attorney. In that case, the purpose for which the instrument was given was set forth in it, and controlled the scope of more general words thereafter used. On the face of the power of attorney to Gordon in this case, no limitation was expressed, and it was expressly stated that the attorney had power to make and endorse negotiable securities.

The defendants should not be allowed to defend unconditionally; but only upon payment into Court of $500 or giving security for the whole sum claimed within a week. In default of compliance with the condition, appeal dismissed with costs.

BOYD, C., IN CHAMBERS. NOVEMBER 6TH, 1915.

*RE HOGAN v. TOWNSHIP OF TUDOR.

Municipal Corporation—Claim against for Loss of Sheep—Dog Tax and Sheep Protection Act, R.S.O. 1914 *ch.* 246, *sec.* 18 *—Application to Council—Refusal—Enforcement by Action—Division Court—Prohibition.*

Motion by the Corporation of the Township of Tudor, defendant in an action in the Sixth Division Court in the County of Hastings, for an order prohibiting the enforcement of a judgment in that Court against the defendant for the value of certain sheep belonging to the plaintiff, alleged to have been killed by dogs of unknown owners.

F. Denton, K.C., for the defendant corporation.
M. H. Ludwig, K.C., for the plaintiff.

THE CHANCELLOR said that application for damages was made, under the Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, sec. 18, to the municipal council, who refused to entertain the claim or give relief. The grounds on which the council acted did not appear; but that made no difference in the result of this motion. A statutory right of relief was given to sheep-owners on an application satisfactory to the council. But nothing in the Act or elsewhere made the corporation liable in a Court of law for the amount of such damage. The special relief vouchsafed by the Legislature could not be transformed or enlarged into a legal right of action against this public body.

The further prosecution of the action should be inhibited.

RE RICHARDSON—LENNOX, J., IN CHAMBERS—NOV. 4.

Infant—Custody—Application of Father—Facts not Sufficiently Shewn—Leave to Renew upon Further Material.]—Application by the father of Frederick Richardson, an infant, for an order awarding him the custody of the child. The Protestant Orphans' Home was made respondent. The learned Judge said that the Orphans' Home placed this boy in the custody of some one, under articles of apprenticeship, but this person was not made a party to the proceedings. Nothing was shewn as to the

conditions under which the boy was living, or whether it would be for his advantage to have him removed to his father's home or not. It did not appear that sufficient was shewn to justify an order; but there might be facts which, if set out and verified, would shew that it would be for the benefit of the infant that the order should be made. In these circumstances, the motion should stand over, with leave to the applicant to renew it upon the material filed, and such other material as he might be advised to use, within six months, upon service of proper notice; and, in default of this being done, the motion should be dismissed with costs, without further order. F. Regan, for the applicant. A. C. Heighington, for the Protestant Orphans' Home.

RE SCARTH—LENNOX, J., IN CHAMBERS—NOV. 4.

Infant—Custody—Separation of Parents—Right of Father to Custody of Girl of Ten—Welfare of Infant—Costs.]—Application by James Frederick Scarth for an order giving him the custody of his daughter, Mary Howitt Scarth, a girl of about 10 years of age, living with her mother, the wife of the applicant, and the mother's parents, in the city of Toronto. The applicant is manager of a bank at Port Arthur. Differences having arisen between the husband and wife, they have separated, and the father demands the custody of the only child of the marriage. The learned Judge read a judgment in which he examined the facts with great care, and stated his conclusion that the interests of the infant would be best served by committing her to the custody of her father, with a provision for access by the mother at times to be stated. The learned Judge further says that, in view of the fact that there is in reality no excuse for the wife separating from her husband, in view of his attitude, and in the hope that the calamity of final separation may even now be averted, he will be prepared to consider an application for suspension of the order for a reasonable time if the application is made before the order is taken out. Order for delivery of the child to the applicant, who, notwithstanding the result, is to pay his wife's costs. R. C. H. Cassels, for the applicant. Henry Howitt, for the respondent.

RE HAMILTON—LENNOX, J.—NOV. 4.

Will — Construction — Share of Beneficiary—Settlement—Trustee—Advice—Income and Corpus.]—Motion by the Royal Trust Company, trustee under a settlement of the share and interest of Annie Seaborn Hill, daughter of the late Robert Hamilton, in his estate, under his will, for an order, under Rule 600, giving directions as to the carrying out of the terms of the trust. The motion was heard by LENNOX, J., in the Weekly Court. The learned Judge referred to the judgment of the Chancellor in Re Hamilton (1912), 4 O.W.N. 441, and to the case of Loch v. Bagley (1867), L.R. 4 Eq. 122, which gave the form of the settlement-deed; and said that what the will gave and withheld was the determining factor; and that had already been defined by the Court. There was nothing in the judgment of the Chancellor differentiating between corpus and income. No order as to costs. B. D. Hall, for the trustee. J. A. Worrell, K.C., for Annie Seaborn Hill. R. R. Hall, for others interested.