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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 12TH, 1920.

LEONARD v. WHARTON.

Pleading—Statement of Claim—Libel—Amendment—Substitution of New Statement of Claim after Order for New Trial—Effect of Order—Addition of Causes of Action—Embarrassment—Direction for Speedy Trial.

Appeal by the plaintiffs from the order of MIDDLETON, J., 17 O.W.N. 430.

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

J. P. MacGregor, for the appellants.

A. C. McMaster, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. APRIL 19TH, 1920.

CLARKSON v. DAVIES.

Practice—Consolidation of Actions—Indirect Substitution of New Plaintiff for one Disqualified—Appeal—Costs—Leave to Appeal.

Appeals by the defendants Dunn and Crawford and by the defendant Deacon from an order made by LENNOX, J., on the 19th March, 1920, consolidating two actions.

Leave to appeal from the order of LENNOX, J., was given by MIDDLETON, J., in Chambers, on the 20th March, 1920: see ante 62.

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

A. C. McMaster, for the appellants Dunn and Crawford.

J. M. Godfrey, for the appellant Deacon.

M. L. Gordon, for the plaintiffs, respondents.

J. J. Maclennan, for the Galbraith estate.

THE COURT allowed the appeal with costs, including the costs of obtaining leave to appeal, and set aside the order of LENNOX, J.

SECOND DIVISIONAL COURT. APRIL 19TH, 1920.

RE SOLICITOR.

Solicitor—Undertaking of Person (not Client) with Solicitor to Pay Costs in Connection with Certain Proceedings—Taxation of Solicitor's Bill—Scope of Undertaking—Appeal from Taxation.

Appeal by Edward Morgan from the order of MIDDLETON, J., 17 O.W.N. 452.

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

G. T. Walsh, for the appellant.

J. M. Ferguson, for the respondent.

THE COURT allowed the appeal with costs, holding that the appellant's undertaking did not extend to the part of the solicitor's bill in dispute.

SECOND DIVISIONAL COURT. APRIL 19TH, 1920.

YOLLES & ROTENBERG LIMITED v. H. H. ROBERTSON CO. LIMITED.

Mechanics' Liens—Action Brought to Vacate Registration of Liens—Order Made in Action Vacating Liens upon Payment of Money into Court—Jurisdiction—Mechanics and Wage-Earners Lien Act, secs. 27 (4), 33, 34—Amending Act, 6 Geo. V. ch. 30, secs. 1, 2—Money Paid into Court Transferred to Credit of Proceeding to Enforce Liens—Payment out of Portion Applicable to Discharged Lien—Appeal—Costs—Leave to Appeal.

Appeal by the defendants from an order of MIDDLETON, J., in Chambers, vacating, upon payment into Court of $3,787.36, two mechanics' liens registered by the defendants against interests in certain lands in Toronto.

Leave to appeal from the order of MIDDLETON, J., in Chambers, was granted by RIDDELL, J., in Chambers, on the 25th March, 1920: see ante 85.

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

L. A. Landriau, for the appellants.

Hamilton Cassels, K.C., for the plaintiffs, respondents.

THE COURT directed that the money paid into Court in this action be transferred to the credit of the proceeding commenced under the Mechanics and Wage-Earners Lien Act; one of the liens having been extinguished by payment, the portion of the money paid into Court applicable to that lien to be paid out to the plaintiffs; the appeal should be allowed; the plaintiffs should pay to the defendants the costs of obtaining leave to appeal and the costs of the appeal; the costs of the application to MIDDLETON, J., should be costs in the cause.

SECOND DIVISIONAL COURT. APRIL 20TH, 1920.

*RE SHIELDS, SHIELDS v. LONDON AND WESTERN TRUST CO.

Costs—Taxation—Defendants Severing—Rule 669—Practice—Parties Representing same Estate and Interest—Receiver of Share of Person Having Interest in Estate—Administration Proceeding.

Appeal by the plaintiff Andrew J. Shields from the order of MIDDLETON, J., 17 O.W.N. 490.

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

W. E. Fitzgerald, for the appellant.

J. C. Elliott, for the estate of W. B. Shields and the Molsons Bank.

W. Lawr, for Jessie, Anne, and John J. Shields.

W. J. Elliott, for the Union Trust Company, receiver of the share of John J. Shields.

THE COURT dismissed the appeal with costs.

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

SECOND DIVISIONAL COURT. APRIL 21ST, 1920.

FRIEDMAN v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Goods—Contract—Delivery without Payment or Indemnity—Recovery of Damages by Shipper against Carriers—Company to which Goods Delivered Made Liable over to Carriers—Third Party—Costs.

Appeals by the defendants, the third party, and the plaintiff from the judgment of LENNOX, J., 17 O.W.N. 381.

The appeals were heard by MULOCK, C.J. Ex., RIDDELL and SUTHERLAND, JJ., and FERGUSON, J.A.

W. L. Scott, for the defendants.

A. W. Langmuir, for the third party.

J. J. O'Meara, for the plaintiff.

THE COURT dismissed with costs the appeals of the defendants and the third party; and allowed the appeal of the plaintiff so far as to give him costs on the Supreme Court scale without any set-off.

SECOND DIVISIONAL COURT. APRIL 22ND, 1920.

TRICKEY v. ROSS.

Appeal—Report of Mining Commissioner pursuant to Reference in Action—Questions of Fact—Conflicting Evidence—Demeanour of Witnesses—Agreement—Refusal to Disturb Report—Partnership—Interests in Mining Property—Motion to Confirm Report—Further Appeal.

An appeal by the defendant from the order and judgment of ORDE, J., ante 27.

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

J. Cowan, for the appellant.

W. R. Smyth, K.C., for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LENNOX, J. APRIL 12TH, 1920.

FULLER v. CITY OF NIAGARA FALLS.

Highway—Nonrepair—Injury to Person Walking on Sidewalk—Defective Condition—Nonfeasance—Misfeasance—Municipal Act, sec. 460—Construction and Effect—Failure to Give Notice under sub-sec. 4—Absence of "Reasonable Excuse" under sub-sec. 5—Dismissal of Action.

Action by George Fuller and Mabel Fuller, husband and wife, to recover damages arising from injury sustained by Mabel Fuller by a fall upon a sidewalk in the city of Niagara Falls.

The action was tried without a jury at St. Catharines.
A. C. Kingstone and M. A. Seymour, for the plaintiff.
George Wilkie, for the defendants, the city corporation.

LENNOX, J., in a written judgment, said that the plaintiffs alleged that owing to the neglect of the defendants' council to keep the city highways in repair, as required by sec. 460 (1) of the Municipal Act, the plaintiff Mabel Fuller, while proceeding easterly upon a sidewalk on the north side of Morrison street, fell and was severely injured.

Failure to give the notice required by sub-sec. 4 of sec. 460 was pleaded; and the plaintiffs, in reply, invoked the saving provisions of sub-sec. 5.

The learned Judge heard all the evidence, and now stated his conclusions of fact, which were favourable to the plaintiffs, and assessed the plaintiffs' damages contingently at $2,000.

The action was, however, he considered, barred by the fatal want of notice under sec. 460 (4).

In O'Connor v. City of Hamilton (1904), 8 O.L.R. 391, Meredith, J., at p. 414, pointed out that, if the plaintiff had a right to recover on the ground of misfeasance, notice of the accident, under the statute then in force, the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 606, was not necessary. That could not be said as to notice under the present section. The learned Judge read sec. 460 (1) as covering the whole range of corporate duty *and liability* in the matter of damages. Sub-section 2 imposed a specific limitation of the time for bringing the action, "whether the want of repair was the result of nonfeasance or misfeasance." Sub-section 4 was not specifically said to apply to damages occasioned by misfeasance as well as nonfeasance, but it evidently

applied to both—to all damages occasioned by the condition of the highway and to every liability imposed by sec. 460 (1)—for "no action shall be brought for the recovery of the damages mentioned in sub-sec. 1 unless notice in writing," etc., is given. The time for serving notice expired on the 14th November, 1919; and nothing was done within the meaning of the statute until about the 6th December. Conditions had not changed in the meantime, and the defendants were not in fact prejudiced by the delay. But the "reasonable excuse" required by sub-sec. 5, in order that its saving provision may be applied, was wanting. The case was not in principle different from Wallace v. City of Windsor (1916), 36 O.L.R. 62. See the cases collected inthe Canadian Municipal Manual (1917), p. 641 et seq.

Action dismissed without costs.

MIDDLETON, J. APRIL 13TH, 1920.

JONES v. SPENCER.

Vendor and Purchaser—Agreement for Sale of Land—Action for Balance of Purchase-money—Defence—Limitation of Liability of Each of Several Purchasers to Share of Purchase-money Applicable to Share in Purchase—Construction of Agreement—Representation as to Effect—Evidence—Interest post Diem—Rate of Interest upon Interest—Judicature Act, sec. 35.

Action to recover a balance of purchase-money under an agreement, dated the 18th October, 1912, for the sale by the plaintiff and purchase by the defendants of certain lands.

The action was tried without a jury at Sault Ste. Marie.
J. E. Irving, for the plaintiff.
U. McFadden and W. G. Atkin, for certain defendants.
Pleadings noted closed against others.

MIDDLETON, J., in a written judgment, said that it was contended that, upon the true construction of the agreement, the purchasers did not each become liable for the whole purchase-price, but each became liable only for one-twelfth share, or, in the case of those who took more than one share, for two-twelfths, of the price; and, if that was not the true construction of the agreement, then it was said that the signature to the agreement was obtained upon the representation that that was its legal force and effect.

This latter contention absolutely failed upon the evidence. It was not shewn that the plaintiff himself made any representation, and Buchanan, who was put forward as the plaintiff's agent, was the agent of the purchasers themselves, and the plaintiff was in no way responsible for his acts. Nor did Buchanan, in any way, misrepresent the nature or effect of the agreement.

The agreement was capable of only one interpretation. The plaintiff agreed to sell the lands to the defendants, together named as the parties of the second part, at one price for the whole, payable in instalments, with interest. There was a clause in the agreement which gave rise to the defendants' contention: "It is understood and agreed that the amount contributed and the shares of each of the parties of the second part in and to the said moneys and lands agreed to be purchased are as follows:" then followed a list of the names of the parties of the second part, who take "an undivided two-twelfths share" or "an undivided one-twelfth share" as the case may be. This was intended only to indicate the rights of the purchasers as between themselves, for it was immediately followed by a covenant by the parties of the second part with the party of the first part that they will well and truly pay the whole purchase-price at the times and in the manner above stipulated. The language was too clear to admit of this being treated as a covenant on the part of each to pay one-twelfth or two-twelfths, and not a covenant to pay the whole.

Furthermore, although the defendants were quite honest in their belief that their liability was in respect of the number of shares taken, this never was thought to be any limitation on the right of the plaintiff to receive the whole price. He did not stipulate to sell so many undivided twelfths of his property, nor did the purchasers intend to buy so many undivided twelfths of the lands. The plaintiff was certainly not to convey until he received his whole price, and neither party contemplated his conveying an undivided fraction of his estate. The defence therefore failed.

There was no clause in the agreement entitling the purchaser to interest post diem at the contract-rate, 7 per cent.; and the interest must be computed at 5 per cent. only, after the due date of the respective instalments. Moneys paid must be applied first upon interest and then upon principal: McGregor v. Gaulin (1848), 4 U.C.R. 378; Bettes v. Farewell (1865), 15 U.C.C.P. 450. The interest payable under the contract was a sum of money "payable by virtue of a written instrument at a time certain," and therefore, under sec. 35 of the Judicature Act, interest upon it at 5 per cent. might be allowed from the time of its maturity. The account on this footing should be taken by the Registrar.

There should be judgment for the plaintiff accordingly, with costs throughout.

MIDDLETON, J. APRIL 14TH, 1920.

ROBINSON v. MORRISON.

Partnership—Action for Declaration of Dissolution—Settlement of Action—Dispute as to—Finding of Referee—Reversal on Appeal—Judgment for Sum Agreed upon in Settlement or for Percentage of Profits—Reference—Election—Costs—Appeal Entered in Wrong Forum.

Appeal by the plaintiff from the report of the Local Judge of Perth, acting as an Official Referee under sec. 65 of the Judicature Act.

The appeal was heard in the Weekly Court, Toronto.

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

J. H. Spence and C. H. McKimm, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff alleged a partnership between himself and the defendant, and sued for a declaration of dissolution. The plaintiff now said that, shortly after the commencement of the action, an arrangement was made between the solicitors for himself and the defendant by which the action was settled upon the basis that the defendant was to pay the plaintiff $750, or 40 per cent. of the profits of the business, whichever the defendant might, upon consideration of the accounts, deem most in his interest. The making of the settlement was denied. The Referee found that there was no settlement and no partnership, and reported that the action should be dismissed with costs.

The learned Judge had heard argument only upon the question of settlement or no settlement, and found himself quite unable to agree with the Referee's conclusion.

The appeal should be allowed, and judgment should be entered for the plaintiff for $750, unless the defendant should elect, before the issue of the order, to take a reference, in which case there should be a reference to the Local Master to ascertain the profits, with a declaration that the plaintiff was entitled to 40 per cent. thereof. The order should not issue for 10 days. The plaintiff should have the costs throughout, including the costs of this appeal, the latter costs to be taxed as if the appeal had been regularly made, instead of being made, as it was, to a Divisional Court of the Appellate Division, and then transferred to the High Court Division.

MIDDLETON, J., IN CHAMBERS. APRIL 15TH, 1920.

*HAMILTON v. HAMILTON.

Discovery—Examination of Plaintiff Residing Abroad—Place for Examination—Rule 328—"Just and Convenient"—Conflicting Decisions—Judicature Act, sec. 32.

Appeal by the defendant from an order of the Master in Chambers dismissing the defendant's application for an order for the examination of the plaintiff for discovery in Toronto.

G. R. Munnoch, for the defendant.
D. B. Sinclair, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the plaintiff was a resident of New York. The pleadings were filed in Toronto, and the solicitors for both parties practised in Toronto. Rule 328 provides that where a party to be examined is out of Ontario the Court may order the examination to be taken at such place as may seem just and convenient.

There being two reported decisions irreconcilable with each other, Lick v. Rivers (1901), 1 O.L.R. 57, and Duell v. Oxford Knitting Co. (1918), 42 O.L.R. 408, each entitled to equal weight, the learned Judge, as he understood sec. 32 of the Judicature Act, was not at liberty to depart from either, and consequently was at liberty to follow the one which commended itself to him. He had the less hesitation in following the earlier case, because it was regarded when decided as removing any doubt as to the practice, and had been uniformly followed until the decision of the Duell case, 17 years later.

The appeal should be allowed, and an order should be made directing that the examination of the plaintiff take place in Toronto.

The costs of the appeal should be costs in the cause to the plaintiff in any event, and the costs of the motion before the Master should be costs in the cause.

MIDDLETON, J., IN CHAMBERS. APRIL 15TH, 1920.

PORTER v. PORTER.

Judgment Debtor — Examination of — Unsatisfactory Answers — Motion to Commit—Rule 587—Unsatisfactory Disposition of Property—Notice of Motion—Refusal to Amend.

Motion by the plaintiff for an order to commit the defendant to the common gaol for his refusal to disclose his property or his transactions and for not making satisfactory answers respecting the same upon his examination as a judgment debtor.

J. Harley, K.C., for the plaintiff.
J. E. Jones, for the defendant.

MIDDLETON, J., in a written judgment, said that he had read, with care, all the questions in the examination referred to in the notice of motion, and was of opinion that the motion failed.

The Rule under which the motion was made, 587, covered three entirely distinct matters. A judgment debtor is liable to be committed:—

(1) If he does not attend, and does not allege a sufficient excuse for not attending, upon being served with the appointment for his examination.

(2) If he refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same.

(3) If it appears from the examination that he has concealed or made away with his property in order to defeat or defraud his creditors.

Here the notice of motion was expressly confined to the second of the possible grounds of attack.

Upon the argument, the real contention was, that the disposition made by the defendant of his property was not satisfactory. This does not constitute an "unsatisfactory answer" within the meaning of the Rule. This has been determined in many cases: e.g., Lemon v. Lemon (1874), 6 P.R. 184; Foster v. Van Wormer (1888), 12 P.R. 597; People's Loan and Deposit Co. v. Dale (1899), 18 P.R. 338.

Unsatisfactory as the conduct of the debtor may have been, particularly in the eyes of the plaintiff, this does not bring the case within the scope of that provision of the Rule invoked; and, as the motion is one of a high penal character, the case charged must be strictly made out before an order can go, and leave to amend the notice of motion ought not to be given.

The motion must be dismissed, but the dismissal should be without costs.

MIDDLETON, J. APRIL 16TH, 1920.

*REX v. KOZAK.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling-house—Accused Personally Carrying Liquor in Travelling Bags from Place outside of Ontario to his own Dwelling-house in Ontario—Sec. 43 of Act—Conviction Made on Ground that Accused "could not Act as his own Carrier"—Conviction Quashed.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Windsor, for that the defendant did, at the said City of Windsor, on the 15th February, 1920, unlawfully have in his possession liquor in a place other than his private dwelling-house, contrary to the provisions of the Ontario Temperance Act.

T. J. Agar, for the defendant.
T. P. Brennan, for the magistrate.

MIDDLETON, J., said that the defendant had been to Montreal, and was returning with intoxicating liquor in two "grips" to his residence in Windsor. At Windsor station he was arrested, and on trial convicted and fined $500. He sought to shew that this liquor was being taken by him to his private residence for his personal use and to argue that this was not an infraction of the law. The magistrate refused to allow this, stating that the possession of the liquor shewed an offence, and the accused could not act as his own carrier. This was shewn by affidavit of the counsel who defended Kozak. The magistrate made an affidavit in answer, but did not deny this; he (the magistrate) swore that the "evidence tended to raise against the defendant a very strong case of suspicion."

By sec. 43 of the Act, nothing in the statute "shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of Ontario to a place where the same may be lawfully received and lawfully kept in Ontario." It is not right to say that the accused was his own carrier: he was, upon the evidence, taking the liquor from a place out of Ontario to a place where the liquor lawfully might be within Ontario—his own residence—unless his intention was to keep for sale, which was not suggested in the evidence.

This case differs from others where there is no evidence as to the view entertained by the magistrate and where the conviction

has to be sustained upon the theory that the statutory presumption has not been rebutted. Here the conviction is bad because the magistrate thought that to be an offence which is not forbidden by the law.

The conviction whould be quashed; no costs; order for protection.

LOGIE, J. APRIL 16TH, 1920.

*ERNST BROS. CO. v. CANADA PERMANENT MORTGAGE CORPORATION.

Mortgage—Two Parcels of Land Mortgaged by one Instrument Executed by two Several Owners—Subsequent Conveyance by one Owner of his Parcel to the other, after Second Charge Made upon it in Favour of Creditor—Application of Doctrine of Marshalling in Favour of Creditor—Both Debts Payable by the same Person—Costs—Priorities.

Action for a declaration that certain securities held by the defendants the Canada Permanent Mortgage Corporation should be marshalled in favour of the plaintiffs as against the defendant Jeremiah McAsey.

The action was tried without a jury at a Toronto sittings.
H. J. Scott, K.C., for the plaintiffs.
Shirley Denison, K.C., for the defendant corporation.
H. H. Davis, for the defendant Jeremiah McAsey.

ORDE, J., in a written judgment, said that one Frank McAsey, desiring to purchase lot 13 in the 9th concession of Glenelg, applied to the defendant corporation for a loan. The corporation declined to advance the amount required upon the security of lot 13; and Frank procured his brother Jeremiah, a defendant, to agree to include the west half of lot 14 in the 8th concession, which Jeremiah owned, in the mortgage. Of the amount to be advanced, $200 was to go to Jeremiah. A mortgage, dated the 23rd May, 1912, was thereupon executed by Jeremiah and Frank in favour of the corporation, upon both lots, for $1,200, of which $1,000 was paid to Frank and $200 to Jeremiah. Both mortgagors acknowledged receipt of the whole $1,200, and covenanted for its repayment. The mortgage made no mention of the several ownership of the two parcels. It was duly registered, and constituted a first charge upon both parcels.

On the 2nd June, 1914, Frank, by a written agreement, which the plaintiffs registered, made a charge upon lot 13 in favour of the plaintiffs for $1,740.

On the 1st April, 1916, Frank executed a conveyance in fee of lot 13 (except 20 acres) in favour of Jeremiah, for an expressed consideration of $1,500. The conveyance was in the usual short form, with the usual short form covenants, and made no mention of the corporation's mortgage or of the plaintiffs' charge.

The plaintiffs sought a judgment marshalling the securities held by the corporation so as to entitle the plaintiffs to the benefit of the security of lot 14, subject to the priority of the corporation's mortgage for the balance still due thereon.

The plaintiffs' right to have the securities marshalled must depend, if it existed at all, upon their establishing that Jeremiah purchased lot 13 from Frank with the obligation to assume and pay off the corporation's mortgage and the plaintiffs' charge; and the question whether or not a direct personal liability of Jeremiah to the plaintiffs must also be established, was invloved.

The learned Judge finds that Jeremiah took the conveyance of the 1st April, 1916, as absolute purchaser from his brother; that he then assumed, as between himself and his brother, both the corporation's mortgage and the plaintiffs' charge; that he took possession and thereafter acted as the absolute owner, and negotiated a new loan and executed a new mortgage to the corporation as the absolute owner. The real agreement between the brothers was that Jeremiah was to take over lot 13 and pay off the two incumbrances.

Reference to Halsbury's Laws of England, vol. 13, paras. 164, 165, et seq.; Story's Equity, 13th ed., sec. 642; Fisher on Mortgages, 6th ed., p. 694 et seq.; Coote on Mortgages, 8th ed., p. 804 et seq.; White & Tudor L.C. in Eq., 7th ed., p. 56 et seq.

The fact that Jeremiah was not directly liable to the plaintiffs did not exclude the application of the doctrine of marshalling.

The real test is not whether or not the debts to the first and second mortgagees are owed to them by the same person, but whether or not, in working out the equities among the parties interested, the two debts ought to be paid by the same person.

If the Court were administering both parcels and were distributing the proceeds among the plaintiffs, the corporation, Jeremiah, and Frank, the securities would be marshalled in favour of the plaintiffs as against both Frank and Jeremiah; and the fact that Frank is not a party to this action, and the fact that the plaintiffs have not become subrogated to his right to a personal judgment against Jeremiah, should not affect the application of the doctrine.

The plaintiffs were entitled to a judgment declaring that, subject to the mortgage of the defendant corporation for the balance due to them for principal, interest, and costs, the plaintiffs had a charge upon the west half of lot 14 for the balance due them for principal and interest and their costs of this action.

The defendant Jeremiah McAsey should pay the costs both of the plaintiffs and the defendant corporation, such costs to be included in the amounts for which they held charges upon the lands, those of the corporation ranking ahead of the whole charge of the plaintiffs.

LATCHFORD, J. APRIL 16TH, 1920.

*KENDRICK v. DOMINION BANK AND BOWNAS.

Gift—Cheque on Bank Accompanied by Delivery of Pass-book—Cheque for Full Amount to Credit of Drawer—Presentation and Payment after Death of Drawer—Bank not Notified of Death—Bills of Exchange Act, secs. 165, 167—Evidence—Donatio Mortis Causa—Requisites of.

Action by Rosalie G. Kendrick, administratrix of the estate of Edward Charles Kendrick, deceased, against the Dominion Bank and Irene Bownas to recover $803.20, deposited by the intestate in the bank to his own credit, and withdrawn upon a cheque in favour of the defendant Bownas, signed by the intestate, but not presented or paid until after his death.

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

R. B. Henderson, for the plaintiff.

W. B. Milliken, for the defendants the Dominion Bank.

G. W. Holmes, for the defendant Bownas.

LATCHFORD, J., in a written judgment, said that, as the cheque was shewn to have been paid by the bank without notice or knowledge that the drawer was dead, the action, as against the bank, was dismissed at the close of the plaintiff's case during the trial.

The learned Judge was of opinion that the cheque was not the subject of a gift inter vivos, but only mortis causa—it was not intended to be absolute except in the event of the donor's death.

The signature to the cheque was undoubtedly the signature of Kendrick; he gave the defendant Bownas the cheque and the bank pass-book when fully competent to transact business and without being subject to any undue influence.

Reference to McLellan v. McLellan (1911), 23 O.L.R. 654; Clement v. Cheesman (1884), 27 Ch. D. 631.

The proposition that death is a revocation of the authority to pay is not quite accurate: it is not the death of the customer, but notice of his death, that operates as a revocation of the authority of the bank to pay: Bills of Exchange Act, R.S.C. 1906 ch. 119, secs. 165, 167.

Here the cheque was for the whole amount to the credit of the intestate in a savings bank account, and the handing over of the signed cheque was accompanied by the handing over of the pass-book.

Reference to Brown v. Toronto General Trusts Corporation (1900), 32 O.R. 319; In re Lee, Treasury Solicitor v. Parrott, [1918] 2 Ch. 320.

There was much in the present case to differentiate it from the McLellan case; and the learned Judge was of opinion that what was done constituted a good donatio mortis causa.

Action dismissed with costs.

MIDDLETON, J. APRIL 16TH, 1920.

*PARLOV v. LOZINA AND RAOLOVICH.

Negligence—Collision of Motor Vehicle with Street-car—Injury to Passenger in Motor Vehicle—Non-paying Guest of Driver and Co-owner of Car—Action against both Owners—Negligence of Driver—Cause of Collision—Liability of Owners—Motor Vehicles Act—Damages.

Action to recover damages for injuries sustained by the plaintiff while being driven by the defendant Lozina in a motor vehicle owned by the two defendants.

The action was tried without a jury at Sault Ste. Marie.

U. McFadden, for the plaintiff.

J. A. MacInnis, for the defendants.

MIDDLETON, J., in a written judgment, said that the defendants, at the time of the accident giving rise to the action, were the owners of a motor car. On the 5th May, 1917, while the car was being operated by Lozina, he received as passengers in the car the plaintiff and several of his companions. It was contended that they were carried for hire; but the learned Judge found against the plaintiff's contention on that point. They were guests of Lozina.

The car was driven by Lozina down East street and turned on to Queen street, where a line of street-railway is operated. Lozina, owing to inexperience and lack of skill, negligently drove his vehicle in front of an approaching street-car, without looking to see that his way was clear. In the collision which followed, one of the passengers was killed, and Parlov was seriously hurt.

Accepting the story as told by Lozina himself, the learned Judge had no hesitation in finding that Lozina's negligence was the proximate cause of the injury to the plaintiff.

The main contention on the part of the defendants was that the plaintiff could not maintain this action unless he was a passenger for hire and that he had no greater right than a mere licensee. This contention was disposed of adversely by two decisions of the Court of Appeal in England: Harris v. Perry & Co., [1903] 2 K.B. 219, and Karavias v. Callinicos, [1917] W.N. 323. See also Lygo v. Newbold (1854), 9 Ex. 302, 305: "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care."

Lozina did not, having regard to all the circumstances of the case, exercise due and reasonable care.

The injuries which the plaintiff suffered were severe. In all the circumstances, the damages should not be assessed at less than $1,500.

An action brought against the owner of an automobile who is entertaining his friends gratuitously does not commend itself to one, and bears rather hardly upon the co-owner of the car; but it was admitted that the provisions of the Motor Vehicles Act leave no way of escape for him, when once the other owner is liable.

Judgment for the plaintiff against the two defendants for $1,500 with costs.

ORDE, J. APRIL 17TH, 1920.

RE ABRAMOVITCH AND GULOFSKY.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Tenant in Possession—Monthly Tenant—Notice to Quit—Assertion of Lease for a Year—Refusal to Quit—Time Made of Essence of Agreement—Application under Vendors and Purchasers Act—Tenant Served with Notice under Rule 602—Disclaimer of Yearly Tenancy by Tenant upon Hearing of Motion—Order Declaring Objection to Title Invalid and Requiring Tenant to Give up Possession—Costs.

Application by a purchaser of land, under the Vendors and Purchasers Act, for an order declaring valid an objection made to the vendor's title.

The application was heard in the Weekly Court, Toronto.

A. Cohen, for the purchaser.

J. Singer, for the vendor.

J. W. Broudy, for a tenant of the land.

ORDE, J., in a written judgment, said that the contract of sale provided that the sale was to be completed on or before the 7th March, 1920, when possession was to be given to the purchaser, or he was to accept the present tenancies and be entitled to receipt of the rents and profits thereafter. After that clause, which was partly printed, came, in writing, the words, "tenant monthly—notice to vacate to be given to him immediately." The contract provided also that time should be in all respects strictly of the essence thereof.

When the contract was made, the vendor informed the purchaser that one Kaman was a monthly tenant; and the vendor, on the 5th February, 1920, gave Kaman notice to quit at the expiration of the next expiring month of his tenancy, which would be the 7th March, 1920. But Kaman's solicitor wrote that Kaman had "a verbal lease" for a year, which would not expire for 11 months, and that he would not move out.

The objection to the title was on account of this tenancy. It was made on the 24th February; and this motion was launched on the 11th March, 1920.

Notice was given to Laman, under Rule 602, and upon the motion coming on for hearing counsel appeared for Kaman and stated that his claim to a year's lease could not be sustained.

The learned Judge said that, the tenancy being a monthly one, all that the contract required of the vendor was to give immediate notice to quit, which was done. But the purchaser said that it was not sufficient that his objection should be satisfied at this late stage—he was entitled to satisfactory evidence, other than the mere statement of the vendor, that the tenancy was in fact a monthly one. Time was of the essence of the contract, and the purchaser stood on what he said was his strict right, viz., to withdraw from the transaction if the title was not cleared on the 7th March, 1920.

The learned Judge was of opinion that, in all the circumstances, the purchaser ought not to be allowed to withdraw. He based his claim to do so upon the narrow ground that the tenant's position was subjecting him (the purchaser) to a law-suit. But proceedings to oust an overholding tenant might have become

necessary even if the vendor had proved conclusively that the tenancy was monthly. The risk of an overholding tenant is a necessary incident of every lease.

The purchaser, to some extent, waived the condition as to time by offering to wait until the vendor took proceedings to oust the tenant. When the matter came before the Court, the alleged objection was removed.

Rule 602 gives the Court power to make an order binding on the tenant. In view of his admission that he was only a monthly tenant, the notice to quit on the 7th March was effective. The order made upon this application should contain a declaration that Kaman wrongfully holds the land as against the landlord, and an order that he shall immediately give up possession.

The application of the purchaser should be dismissed, and the purchaser should pay the vendor's costs; but, as the tenant's wrongful assertion of a yearly tenancy was the cause of the application, the tenant should pay all the costs, that is, the purchaser's own costs and the costs which the purchaser shall pay the vendor.

LATCHFORD, J. APRIL 17TH, 1920.

NAZZARENO v. ALGOMA EASTERN R.W. CO.

Railway—Carriage of Goods—Destruction by Fire of Goods at Station of Destination—Liability of Railway Company—Conditions of Bill of Lading—Notice of Arrival of Goods—Time for Taking Delivery—Absence of Negligence—Carriers—Warehousemen.

Action for the value of a car-load of goods shipped by the plaintiff's agent in Montreal to the plaintiff at Copper Cliff, and destroyed by fire at the defendants' station at Copper Cliff.

The action was tried without a jury at Sudbury.

T. M. Mulligan, for the plaintiff.

C. McCrea, for the defendants.

LATCHFORD, J., in a written judgment, said, after stating the facts, that he was unable to find that the value of the goods at the place of shipment was less than $6,500. The liability (if any) of the defendants, under the conditions of the bill of lading, was limited to the actual value at the time and place of shipment, plus the freight paid, $230.30.

The conditions endorsed on and forming part of the bill of lading provided that the liability of the carriers should be that of warehousemen only, where the loss was caused by fire occurring after 48 hours from the time when written notice was given of the arrival of the goods at their destination. As the loss occurred less than 48 hours after the car arrived at the defendants' station and notice had been given, it was urged that liability attached to them, not as warehousemen, but as carriers.

The plaintiff had, on the 11th November, notice amply sufficient to have enabled him to pay the freight and have the car delivered to him on that day or on the 12th. Reasonable notice was all that the defendants were required to give; and the notice which they gave was, in the learned Judge's opinion, reasonable. Apart from the contract, the time which ought to be allowed a consignee to take delivery must depend upon the varying circumstances of each particular case. It "begins from notice or knowledge:" per Rose, J., in Richardson v. Canadian Pacific R.W. Co. (1890), 19 O.R. 369, 374.

All that the plaintiff had to do after being notified by the defendants of the arrival of the car at their station was to send over a cheque for the amount of the freight. This he could easily have done on the afternoon of the 11th. Even then the car was in the actual physical possession of the transfer company to which, as his agents, the plaintiff, when he directed the shipment to be made to the defendants' Copper Cliff station, intended that it should be delivered.

The action could not succeed, whether the defendants were regarded as carriers or warehousemen. As the latter, no negligence had been proved against them. As the former, they discharged all their obligations when they delivered the car at its destination.

Action dismissed with costs.

KELLY, J. APRIL 17TH, 1920.

ROBERTSON v. CANADIAN FERTILIZER CO.

Sale of Goods—Contract—Time for Delivery—Failure of Vendor to Deliver—Excuse—"Usual Contingency Clause"—Shortage of Cars—Inability to Obtain Raw Material—Duty of Vendor—Disregard of other Contracts—Counterclaim—Costs.

The plaintiffs, who carried on business in Norfolk, Virginia, claimed damages from the defendants, who carried on business in

Chatham, Ontario, for non-delivery of 157½ tons of fertilizer, under a contract of the 9th September, 1916. Counterclaim by the defendants for the value of the portion of the goods actually delivered.

The action and counterclaim were tried without a jury at Chatham.

J. M. Pike, K.C., and J. C. Stewart, for the plaintiffs.

J. G. Kerr and J. A. McNevin, for the defendants.

KELLY, J., in a written judgment, after setting out the facts, said that the chief ground of defence was inability to make deliveries, due to conditions which, the defendants contended, came within the meaning and purport of the contingency clause of the contract. The shipment was to be "in bulk car-loads as ready, say equal monthly quantities from date to January 30th, 1917"—"usual contingency clause to apply." This was explained in the evidence as meaning a clause which would protect both parties against contingencies which might arise on account of fire, strikes, war, breakdown of machinery, and contingencies beyond their control, but not an increase in the market-value of the commodity agreed to be sold.

The evidence was, in the opinion of the learned Judge, conclusive that the defendants' failure to deliver was due to the shortage of cars in which to make shipments, their inability to obtain the raw material for which they had contracted—a supply not being procurable elsewhere—and the refusal of some of the railway companies to permit their cars to cross the boundary-line, not to speak of the acute labour situation which, in the early days of delay, retarded the defendants' business.

Had the defendants disregarded their other contracts, they could have made complete delivery to the plaintiffs within the time specified in the contract. In the circumstances which arose, they were not called upon to adopt that plan. They had no reasonable ground for believing at the time of the contract that they would be confronted by uncontrollable conditions which developed several weeks later.

Reference to Tennants (Lancashire) Limited v. C. S. Wilson and Co. Limited, [1917] A.C. 495; Peter Dixon and Sons Limited v. Henderson Craig & Co. Limited, [1919] 2 K.B. 778.

The learned Judge said that he could come to no other conclusion than that the circumstances were such as to invoke the contingency clause of the contract, and thus relieve the defendants from further performance down to the time when the plaintiffs, by their positive refusal to accept, put an end to further deliveries.

It was unnecessary to discuss the further defences set up.

It was admitted that there was due to the defendants, on deliveries actually made, $506.10. The defendants counterclaimed for a much greater sum, alleging that the plaintiffs' weights at Norfolk, credited to the defendants, were short and not properly made; and also that the analysis there was to their disadvantage. The contract, however, provided for weighing and sampling at Norfolk, and named the persons to make the analysis; these persons actually made it. The learned Judge said that he could not, on the evidence, find that the plaintiffs were not correct in these respects. Some at least of the alleged shortage of weight was accounted for by leakage in transit from Chatham to Norfolk.

The action should be dismissed with costs, including, pursuant to the order of the Appellate Division of the 28th April, 1919, the costs of the former trial and of the appeal from the judgment pronounced thereat. The defendants should have judgment on their counterclaim for $506.10, with interest from the 19th March, 1917, and with costs of the counterclaim.

ORDE, J., IN CHAMBERS. APRIL 19TH, 1920.

*REX v. HAGEN.

Ontario Temperance Act—Magistrate's Conviction for Offences against secs. 40 and 41—No Evidence to Sustain Conviction under sec. 41—Presence of Intoxicating Liquor in Dwelling-house—Prima Facie Evidence of Guilt—Sec. 88—Finding of Magistrate—Sale or Exposure for Sale—Seizure of Liquor in Transit—Sec. 70—Conviction of Another in Respect of same Liquor—Effect of—Sec. 84 (Amended by 7 Geo. V. ch. 50, sec. 30).

Motion to quash a conviction of the defendant by the Police Magistrate for the Town of Welland for offences against the provisions of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50.

L. B. Spencer, for the defendant.
T. P. Brennan, for the magistrate.

ORDE, J., in a written judgment, said that on the night of the 20th February, 1920, at Welland, one Whalley, in company with one Urquhart and one or two other men, called with a sleigh, of which Urquhart was the driver, at the private dwelling-houses of

John Toyne, Harvey Dawdy, and Charles R. Hagen, the defendant, and removed from each certain quantities of intoxicating liquor, placed them on the sleigh, and drove away with them. Shortly afterwards the liquor was seized by the License Inspector, and the seizure was followed by a search of the houses from which the seized liquor had been taken. A quantity of liquor was found in Hagen's house.

Hagen was charged in general terms with having unlawfully violated secs. 40 and 41 of the Ontario Temperance Act.

At the hearing before the Police Magistrate, after evidence of the seizure of the liquor upon the sleigh and of the finding of liquor in Hagen's house had been given, Hagen swore that he was absent from his house on the evening of the 20th February, and that Whalley had not taken the liquor from his (Hagen's) house with his consent. He said he was not a partner of Whalley, and had nothing to do with him. Hagen admitted having got 25 cases of liquor on the 3rd February, 1920, and that there were still 7 cases in his cellar.

Hagen was convicted "for that he . . . on the 20th day of February, A.D. 1920 . . . in his premises unlawfully did, in contravention of the Ontario Temperance Act, section 40, expose or indirectly barter or sell liquor, section 41, in that he did have by one William Urquhart, his clerk, servant or agent, liquor in other than his private dwelling, in which he resides, namely, in a sleigh on the public highway."

The conviction covered at least two separate offences, or classes of offences, repectively defined by secs. 40 and 41; but that was permissible under sec. 98.

It was contended that there was no evidence to support the conviction, and Rex v. McKay (1919), 46 O.L.R. 125, was relied on.

If the conviction had been confined to the offence of having liquor in a place other than a private dwelling, under sec. 41, it might reasonably be held that there was no evidence upon which to convict. There was no evidence that Urquhart was Hagen's clerk, servant or agent, or that Whalley had any authority to employ Urquhart. There was abundant evidence to establish that some of the liquor upon the sleigh was Hagen's, but there was no evidence that he was in any way responsible for its presence there.

But Hagen was also convicted of an offence against sec. 40. The presence of liquor in his dwelling-house was prima facie evidence of guilt under sec. 88. There was, therefore, evidence upon which the magistrate could convict, and it was not open to the Judge to review the magistrate's decision: Rex v. Le Clair (1917), 39 O.L.R. 436.

There is nothing in sec. 70 of the Act to prevent the simultaneous seizure of liquor in transit and the prosecution of the offender under sec. 41.

It was objected that Whalley had been convicted of the same offences, and that under sec. 84, as amended by 7 Geo. V. ch. 50, sec. 30, the conviction of one of them was a bar to the conviction of the other. Whalley was convicted under both sections, 40 and 41; there was nothing in the conviction to shew that Whalley's offence had any connection with Hagen whatever. Confining Hagen's conviction to an offence under sec. 40, there was ample evidence that Whalley was guilty of an offence under sec. 41.

Motion dismissed with costs.

LOGIE, J. APRIL 20TH, 1920.

*HART v. TORONTO GENERAL TRUSTS CORPORATION.

Trusts and Trustees—Lands of Married Woman Conveyed by her and her Husband to Purchaser—Mortgage for Part of Purchase-money Taken in Name of Husband—Subsequent Release of Equity of Redemption to Husband on Payment by him of Trifling Sums—Death of Husband and Subsequent Death of Wife—Claim of Devisee of Wife to Lands—Evidence—Declaration of Wife when Applying for Probate of Husband's Will—Self-serving Statement—Inadmissibility—Resulting Trust—Repayment to Estate of Husband of Sums Paid by him—Declaration in Favour of Devisee.

Action by John S. Hart against the Toronto General Trusts Corporation, executors of the will of Samuel Softley, deceased, and against R. B. Beaumont, an executor of the will of Julia Hart, deceased, and against the Methodist Church, for a declaration that the plaintiff is entitled, as devisee of Julia Hart, formerly Julia Softley, to certain lands in the township of Toronto.

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

R. McKay, K.C., and G. W. Adams, for the plaintiff.

Casey Wood, for the defendants the Toronto General Trusts Corporation.

R. B. Beaumont, in person.

E. W. Wright, for the Methodist Church.

LOGIE, J., in a written judgment, said that Julia Softley,

afterwards Julia Hart, being entitled in fee simple to the lands in question as her separate estate, on the 1st April, 1888, conveyed them to one Palmer, Samuel Softley (her husband) joining in the deed as a grantor, for the consideration of $5,000—"$1,000 in cash and a mortgage for $4,000 for the balance." The mortgage for $4,000 was taken in the name of Samuel Softley, instead of Julia Softley. The evidence did not shew the reason for this, but did shew that Samuel was accustomed to do his wife's business in his own name. This mortgage had never been discharged. Palmer conveyed the lands to one Hagar, who gave a second mortgage thereon to one Henderson; and, on the 30th November, 1891, Hagar, reciting his inability to pay the $4,000 mortgage, conveyed the lands to Samuel Softley, in consideration of $50 and a release of all claims and demands in respect of the $4,000 mortgage. Softley then paid Henderson $50 and received a discharge of his second mortgage.

Samuel died in February, 1899, and Julia in January, 1917.

Julia specifically devised the lands in question to the plaintiff.

The defendants the Methodist Church were the residuary devisees and legatees under the will of Samuel.

Julia was sole executrix of the will of Samuel. When she died the Toronto General Trusts Corporation were appointed in her stead.

The inventories and valuations sworn to by Julia in her application for letters probate of Samuel's will contained the words, "Farm 45 acres, Township of Toronto" (the lands in question), "held in trust for Mrs. Softley, $5,000." It was contended for the plaintiff that these words were admissible in evidence in this action as a declaration by Julia in the course of duty as executrix.

Reference to The Henry Coxon (1878), 3 P.D. 156, 158, as shewing that entries in a document made by a deceased person can be admitted as evidence only when the entries relate to an act or acts done by a deceased person and not by third parties.

The inventories etc. did not comply with these tests and were not admissible; nor were they admissible as declarations against interest—they were in fact self-serving declarations.

There was nothing in the evidence to bring the case within Clergue v. Plummer (1916), 37 O.L.R. 432, 38 O.L.R. 54.

There was, however, a presumptive or resulting trust in favour of Julia, in the circumstances. No evidence was adduced that any consideration passed from Samuel to Julia which would justify the mortgage being taken in the name of Samuel; no evidence to rebut the presumption of a resulting trust, and no evidence of a gift. The onus of proving such a gift was upon those claiming under Samuel: In re Flamank, Wood v. Cock (1889), 40 Ch. D. 461.

That onus had not been discharged.

The mortgage for $4,000 was the property of Julia; and Samuel was in no stronger position by reason of his obtaining a release of the equity.

The plaintiff must do equity by paying to the estate of Samuel Softley $100 with interest thereon from the dates upon which he paid the two sums of $50.

There should be judgment declaring that Julia Softley or Hart was the owner of the lands at the time of her death, and that the plaintiff as her devisee is entitled to the same, subject to a charge of $100 and interest in favour of the estate of Samuel Softley.

Costs of all parties (those of the executors of Samuel Softley as between solicitor and client) to be paid out of the property in question.

KELLY, J. APRIL 21ST, 1920.

SAMUELS v. BLACK LAKE ASBESTOS AND CHROME CO. LIMITED.

Contract—Delivery of Ore—Breach—Refusal to Complete Delivery—Excuses for Non-delivery—"Pinching out" of Ore—Failure to Prove—Contingencies—Increased Cost of Production—Impossibility of Performance—Extension of Time for Making Deliveries—Assessment of Damages at Date of Refusal to Make Further Deliveries—Measure of Damages—Contract-price—Market-price at Extended Date Greater than at Date of Original Breach.

Action for damages for breaches of two contracts by the defendants to deliver to the plaintiffs a large quantity of Canadian lump chrome ore.

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

A. W. Anglin, K.C., and R. C. H. Cassels, for the plaintiffs.

Hamilton Cassels, K.C., and R. S. Cassels, K.C., for the defendants.

KELLY, J., in a written judgment, after setting out the facts, said that at the trial stress was laid upon evidence intended to shew that the reason for the defendants' failure to live up to the contracts was the "pinching out" of the ore in their mines. This the learned Judge finds not to have been the fact. Ample for these contracts would have been produced if the defendants had made reasonable efforts to that end. To obtain the required

quantity would have entailed greater expense than they contemplated when they contracted with the plaintiffs; that and the higher price obtainable from other purchasers went a long way to account for the defendants' refusal to complete these contracts.

The alleged unsatisfactory sampling and analysing of certain car-loads of the ore was not a sufficient reason for refusal to deliver.

There was nothing in the contract or in the evidence to support the contention that there was any agreement by the plaintiffs that the defendants should have the right to sell a quantity of chrome ore to other customers.

The defendants' failure of performance was not due to any of the contingencies provided against in the contracts themselves; nor could it be said that any event happened interfering with that performance which could not reasonably have been anticipated by the contracting parties when the contracts were entered into.

Increased cost of production, unless specially provided against, is not a ground for refusal to perform. Mere economic unprofitableness is not to be regarded as equivalent to impossibility of performance: Tennants (Lancashire) Limited v. C. S. Wilson and Co. Limited, [1917] A.C. 495, 516, 522, 526.

The mode of dealing between these contracting parties, involving delay in deliveries for the convenience of or to suit the purposes of the defendants, and the acquiescence and forbearance of the plaintiffs, were sufficient to support the implication of an arrangement for postponement from time to time of the deliveries. There was also express evidence that the time was extended down to the defendants' repudiation on the 21st June, 1918. No new contract was then substituted for the original written contracts, and the Statute of Frauds did not apply: Ogle v. Earl Vane (1868), L.R. 3 Q.B. 272.

When the time for performing a contract for sale has been postponed, at the request of either vendor or purchaser, and the contract is ultimately broken, this has the effect of defining the period at which the breach takes place. The damages for non-delivery will be calculated at the market-price of such goods on the last day to which the time was extended, if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable time after the last grant of an indulgence: Mayne on Damages, 8th ed., p. 214; Hickman v. Haynes (1875), L.R. 10 C.P. 598; Ralli v. Rockmore (1901), 111 Fed. Repr. 874.

The indulgence of extension to the defendants ended by their own act when they refused on the 21st June, 1918, to make further deliveries. For the purpose of estimating the damages, that must be taken as the date of the breach. The measure is the difference between the contract-price and the market-price at that later

date, although the latter was greater than at the date originally fixed for delivery: Halsbury's Laws of England, vol. 10, p. 334, para. 611.

For the lowest grade of ore covered by these contracts, ore analysing 32 per cent. chromic oxide, the contract-price was $23.50 per gross ton of 2,240 lbs. On the 21st June, 1918, the market-value of ore of a similar grade deliverable at the place and on the terms provided for in the contracts, was $53.76 per similar ton—or a difference of $30.26 per ton. The plaintiffs were content that the calculation should be based on this lower grade throughout.

Under the contracts they were entitled to delivery of an additional 2,660 tons. There should be judgment for the plaintiffs for $80,491.60 and costs.

MIDDLETON, J. APRIL 22ND, 1920.

MARTIN v. EVANS.

Mortgage—Foreclosure of Rights of Principal Debtor—Effect as to Property of Surety—Foreclosure Set aside as Nullity—Effect of Judgment—Admissions and Consent of Counsel—Interest pendente Lite—Application of sec. 18 of Limitations Act—Rate of Interest post Diem—Construction of Provisions of Mortgage-deed—Computation of Interest—Compound Interest.

An appeal by the defendants from a certificate of a Local Master upon the reference directed by the judgment of the Supreme Court of Canada, upon appeal from a judgment of a Divisional Court of the Appellate Division, Martin v. Evans (1917), 39 O.L.R. 479.

The appeal was heard in the Weekly Court, Toronto.

W. S. MacBrayne, for the defendants.

H. E. B. Coyne, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that the first question was whether it was open to the defendants to contend that, by reason of the dealings with the plaintiffs and with the property of William Evans the younger, the plaintiffs had discharged Williams Evans the elder and his property from all obligations with respect to the amount claimed.

It may be argued with much plausbility and force that, upon foreclosure of the property of the principal debtor, the property of the surety is entirely exonerated. But, if the foreclosure was a nullity, as apparently it was in the view taken by the Divisional

Court and the Supreme Court of Canada, it would seem to follow that it was a nullity for all purposes.

This question, however, was not now open for discussion, for two reasons: first, if this issue was one which it was intended to raise, it ought to have been raised in the action, and the judgment which had been entered was conclusive, for it left merely matters of account to be dealt with by the Master; second, in view of what took place in the Supreme Court of Canada, the judgment of that Court proceeded upon certain admissions by and consent of counsel for the present appellants, and it was not open to them to depart from the admissions and consent thus given, and what was now set up was in effect a receding from the position taken before that Court.

The second question arose upon the contention of the appellants that the plaintiffs were entitled to interest only for the 6 years prior to the taking of the accounts. This contention was based upon sec. 18 of the Limitations Act, R.S.O. 1914 ch. 75, which provides that "no arrears of . . . interest in respect of any sum of money charged upon or payable out of any land . . . shall be recovered by any . . . action but within 6 years next after the same respectively has become due . . . ."

The learned Judge did not agree with this contention. Recovery of arrears of interest by an action refers to interest which is in arrear at the time of the bringing of the action, and does not refer to the recovery of interest after the action has been brought. Interest pending the action has in practice always been allowed.

The third question is as to the rate at which interest should be paid. The Master has allowed interest post diem at the mortgage rate. The mortgage provides for repayment of the principal money with interest at 7 per cent., during the term and after default so long as the same shall remain in default, and this security shall continue until the same shall be fully paid and satisfied, etc.

Reference to Falconbridge on Mortgages, para. 318.

Here the intention requisite was abundantly and plainly expressed, and the parties clearly stipulated for the payment of interest post diem at the stipulated rate.

During the course of the argument it was said that the mode of computation adopted was the compounding of interest. That was not so. In the column headed "Compound Interest," interest so designated had been allowed upon the gales of interest falling due by virtue of the security, but the interest so allowed had not been compounded, for it had not been added to the interest-bearing fund. Had this been done, the amount claimed would have been increased by several hundred dollars. The mode of computation was in accordance with the authorities and accurate.

Appeal dismissed with costs.

LOGIE, J., IN CHAMBERS. APRIL 23RD, 1920.

VAN PATTER v. VAN PATTER.

Trial—Place of—Motion by Plaintiff to Change—Action for Alimony—Preponderance of Convenience—Speedy Trial.

An appeal by the plaintiff from an order of the Master in Chambers refusing the plaintiff's application to change the place of trial of an action for alimony from Barrie to Toronto.

W. R. Smyth, K.C., for the plaintiff.
W. Lawr, for the defendant.

LOGIE, J., in a written judgment, said that the material before him consisted of a copy of the pleadings and an affidavit of the plaintiff's solicitor to this effect: that the defendant had left Barrie and it was not shewn where he was; that it was the intention of the plaintiff, on her return from New York, to reside in Toronto; that the next sittings at Barrie for the trial of actions would be on the 19th April (now past); that a trial might be had in Toronto as cheaply as at Barrie; and that, if the venue was not changed, there was no possibility of a trial before the autumn.

From a perusal of the pleadings it was evident that, if the plaintiff proposed to establish at the trial the charges made against the defendant, some witnesses must be called who apparently resided in Barrie.

As the defendant in an action for alimony must pay the disbursements in any event, the difference in expense is of some importance: Fogg v Fogg (1887), 12 P.R. 249.

Preponderance of convenience is the usual ground upon which a defendant moves, but it may also be a cogent reason for a motion upon the plaintiff's part if he or she has manifestly chosen an improper place of trial; no case had, however, on the above material been made out by the plaintiff for a change of venue on that ground.

The plaintiff is dominus litis, no doubt; but a plaintiff's rights have been limited by many decisions, one of which is that the Court will not change the venue on the plaintiff's application merely to speed the trial unless it is shewn that the plaintiff is in danger of losing the debt: James v. James (1870), 3 Ch. Chrs. 58; and that was not shewn here.

Appeal dismissed with costs.

LOGIE, J. APRIL 23RD, 1920.

RE McDONAGH.

Will—Devise of Land to Widow for Life—Devise of Remainder to such "Person or Persons" as Wife should Appoint—Appointment by Will of Incorporated Synod of Church for Use and Occupation of Rector for Time being of Parish—"Person" Including Corporation—Interpretation Act, sec. 29 (x)—Religious and Charitable Gift not Affected by Rule against Perpetuities—Devise for Advancement of Religion—Mortmain and Charitable Uses Act, sec. 10—Power of Synod to Hold Lands—Devise to Individual—Vested Interest—Lapse—Absolute Gift—Attempted Forfeiture—Ineffectiveness—Remuneration of Executrix Provided for by Will—Renunciation of Co-executors—Increased Allowance—Death of Beneficiaries with Vested Estates in Remainder—Rights of Representatives.

Motion by the executors of the will of Mary Ann McDonagh, deceased, for an order determining certain questions as to the construction of her will and of the will of her deceased husband, John McDonagh.

The motion was heard in the Weekly Court, Toronto.

J. G. Schiller, for the Toronto General Trusts Corporation, the applicants.

A. C. Kingstone, for the Synod of the Diocese of Niagara.

J. J. Maclennan, for the residuary legatees and others in the same interest.

F. W. Harcourt, K. C., for two infants.

LOGIE, J., in a written judgment, said that John McDonagh predeceased his wife, and by his will devised to her for the term of her natural life the dwelling-house in which he resided at the time of his death, and from and after her death he devised the same to "such person or persons and for such estates or interests therein" as his said wife should "by deed or will appoint," and, in default of appointment, over.

Mary Ann's will contained this clause: "I give and bequeath my residence and grounds now occupied by me . . . to the Synod of the Diocese of Niagara for the sole and only use of and occupation by the Rector for the time being of St. John's Church, Thorold."

This "residence" was the "dwelling-house" of John, and by this clause in her will Mary Ann purported to exercise the power of appointment given her by her husband's will.

It was objected on behalf of the residuary legatees that, because the power of appointment, by the terms of John's will, was to be exercised in favour of a person or persons, and had been exercised in favor of a corporation, it was ineffective.

But the Synod is a "person:" Willmott v. London Road Car Co., [1910] 2 Ch. 525; In re Jeffcock Trusts (1887), 51 L.J. Ch. 507; Interpretation Act, R.S.O. 1914 ch. 1, sec. 29 (*x*). This objection failed.

It was urged, in the next place, that the gift was not a charitable one: that it was only a gift to the individual who should be Rector at the death of the testatrix and therefore void, and that if any other meaning was to be attached to the words "Rector for the time being," the gift would offend against the rule as to perpetuities.

It was conceded that a gift for religious purposes is prima facie a gift for charitable purposes, and that a good charitable gift is not subject to the rule against perpetuities.

Re McCauley (1897), 28 O.R. 610, referred to and distinguished.

The plain intention of Mary Ann McDonagh was, not to confine the devise to the person who at the time of her death happened to be Rector, but to extend it, upon his death or removal, to the person who should be his successor from time to time.

Reference to In re Daniels (1918), 87 L.J. Ch. 661.

The words used by the testatrix indicated what was in effect an increase of the Rector's stipend by the provision of a rectory-house for him, which was a good "religious purpose" and a good charitable devise for "the advancement of religion," within the Mortmain and Charitable Uses Act, and not a restriction or limitation of the devise to any particular Rector.

Reference to Attorney-General v. Cock (1751), 2 Ves. Sr. 273; Attorney-General v. Sparks (1753), Ambl. 201.

By 39 Vict. ch. 107, 54 Vict. ch. 100, 55 Vict. ch. 106, and 61 Vict. ch. 72, the Synod of the Diocese of Niagara is created a corporation; and, subject to the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, may hold and sell land devised to it by will for any charitable uses.

The power of appointment had, therefore, been validly and effectively exercised in favour of the Synod, and the Synod took the land in fee simple, subject only to sec. 10 of the Mortmain and Charitable Uses Act.

Sophia Bell took a vested interest in the lands directed to be conveyed to her, and the devise to her did not lapse.

It was conceded and should be declared that the testator (John) could not, as he attempted to do, attach a forfeiture to an absolute gift, and that the consent of the residuary legatees

to a conveyance by William Henry McDonagh was not necessary, and that, upon the sale by him of lands devised to him, they did not, by virtue of the forfeiture clause, become revested in the trustees under the will of John.

The executrix of John's will accepted probate with knowledge that her co-executors were renouncing. She could get an increased remuneration only by application before accepting probate or by bargaining with the beneficiaries: Williams v. Roy (1885), 9 O.R. 534.

In regard to the clause in John's will directing the disposition of the residue among certain nieces of his wife and nephews and nieces of his own, it should be declared that the gifts vested in the beneficiaries on the death of John, and if any of them had died in the lifetime of Mary Ann their personal representatives took on her death.

Costs of all parties out of the estate.

ORDE, J. APRIL 23RD, 1920.

*COMMERCIAL FINANCE CORPORATION LIMITED v. STRATFORD.

Bailment—Sale of Motor-car—Conditional Sale—Agreement Filed pursuant to Conditional Sales Act—Property Remaining in Vendors until Full Payment—Possession and User by Purchaser—Agreement of Purchaser to Make Repairs and Keep Car Free from Lien—Right of Vendors to Repossession upon Default—Injury to Car—Liability of Purchaser for Necessary Repairs—Lien of Repairer—Default in Payment of Instalments of Purchase-price—Right of Repairer to Maintain Lien as against Vendors—Implied Authority of Bailee to Subject Vehicle to Lien, notwithstanding Express Agreement to Keep Free.

Action to recover possession of a motor-car, the property of the plaintiffs, upon which the defendant claimed a lien for repairs. The defendant counterclaimed for a declaration of his right to the lien.

The action and counterclaim were tried without a jury at a Toronto sittings.

F. J. Hughes, for the plaintiffs.

H. C. Moore, for the defendant.

ORDE, J., in a written judgment, said that on the 10th October, 1919, the plaintiffs the Premier Motor Sales Limited entered into

an agreement with Frances Darling for the sale to her of the car in question for $2,390.30, of which $800 was paid in cash, and the balance was to be paid in 10 monthly instalments of $159 each. The contract was embodied in a conditional sale agreement, duly filed in accordance with the Conditional Sales Act, R.S.O. 1914 ch. 136. The property in the car and its equipment, together with all additions or substitutions of parts, accessories, tires, etc., was to remain in the vendors until payment in full. The purchaser expressly agreed to make all necessary repairs and to keep the vehicle and its equipment free and clear of all liens and incumbrances. There were provisions entitling the vendors to repossession in the event of the purchaser's failure to observe any of the stipulations and agreements contained in the contract.

The contract was assigned to the plaintiffs the Commercial Finance Corporation Limited, but was afterwards re-assigned to the plaintiffs the Premier Motor Sales Limited.

The car was taken by Frances Darling, and on the 18th October, 1919, while in charge of McK., a friend of Frances D., was badly injured in a collision with a street-car. At McK.'s request, the car was taken to the defendant's garage for repair, and McK. gave the defendant instructions to repair it.

There was a great deal of evidence as to whether or not Frances D. had ratified McK.'s instructions to the defendant. She repudiated all liability for the repairs, but admitted giving instructions to the defendant not to allow McK. to take the car even if he paid for the repairs.

Upon contradictory evidence, the learned Judge finds that Frances D. did in fact make herself responsible for the repairs; that to all intents and purposes McK. was acting as her agent in ordering the repairs; and that any orders given by him for which he had not at the time express authority were afterwards ratified by her. The fact that the defendant opened the account in his books against McK. and subsequently billed McK. for the repairs did not amount to an election to look to McK. alone for payment nor release Frances D. from liability.

The repairs were completed on the 11th November, 1919, and the defendant's account for material and labour amounted to $564.47. This amount not having been paid to him, he claimed to be entitled to a lien upon the car therefor.

Frances D. failed to pay any of the instalments payable under the conditional sale agreement, the first of which fell due on the 13th November, 1919; and the plaintiffs now sought the recovery of the car, but declined to pay for the repairs.

The contract between the vendors and Frances D. being evidenced by writing signed by her and duly filed as required by the Conditional Sales Act, the provision that the ownership of

the car should remain in the vendors was valid as against any subsequent purchaser or mortgagee claiming from or under her. Unless there was some provision in the contract which either expressly or impliedly entitled the purchaser to create some lien or incumbrance upon the car, or the nature of the intended possession and use by her was such as to confer some such right, she had no power to sell the car or incumber it in any way.

It was contended for the defendant that the obligation cast upon Frances D. to keep the car in repair gave her the necessary authority to have the repairs made, and that the plaintiffs were bound by any lien which might arise as a result.

Reference to Green v. All Motors Limited, [1917] 1 K.B. 625.

The defendant was entitled to assert his lien on either of the grounds upon which the decision in that case was based; an implied authority is given by the owner to the bailee to have the subject of the bailment repaired and in so doing to subject it to the ordinary repairer's lien; and the stipulation in the agreement in this case that the purchaser "will keep the said motor vehicle and all its equipment free and clear of and from any and all liens and incumbrances" did not cut down or limit that authority.

The plaintiffs' claim for possession was, therefore, subject to the defendant's lien. The result as between the plaintiffs and defendant was not an injustice. The plaintiffs had their remedy against their purchaser, Frances D. So far as the plaintiffs were concerned, damage to the car was a necessary risk. There was no reason for shifting the loss to the pocket of the repairer.

Reference to Canadian Gas Power and Launches Limited v. Schofield (1910), 15 O.W.R. 847, a decision of Denton, Jun. Co. C.J. of York.

The filing of the contract pursuant to the Conditional Sales Act did not protect the plaintiffs against the application of the principles applied in these cases.

The action should be dismissed with costs, and the defendant should have judgment upon his counterclaim declaring him entitled as against the plaintiffs to a lien upon the car for $564.47, with costs.

LENNOX, J. APRIL 24TH, 1920.

McCOWAN v. JERMYN.

Fraudulent Conveyance—Transfer of Land by Husband to Wife—Husband Engaged in Hazardous Business—Conveyance Voluntary on its Face—Evidence—Failure to Shew Valuable Consideration—Indebtedness of Husband—Conveyance Declared Void against Creditors.

Action by McCowan, on behalf of himself and all other creditors of James Jermyn, deceased, against the widow of James Jermyn, to set aside a conveyance of land made to her by her husband in June, 1916, about 14 months before his death.

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

T. Herbert Lennox, K.C., and R. Lieberman, for the plaintiff.

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

LENNOX, J., in a written judgment, said that the principal creditors of the deceased were the plaintiff, Laura Jermyn (sister-in-law of the deceased), and the Imperial Bank of Canada. The indebtedness of the deceased to these creditors existed at the date of the conveyance; he had been, was then, and proposed to continue to be, engaged in the admittedly hazardous business of a dealer in speculative stocks; that was his only occupation; he had already sustained serious losses—so serious and repeated as to cause anxiety to himself and the defendant; the debts referred to were of long standing and overdue; his operations were being, and had been, to the knowledge of his wife, carried on upon borrowed money; and, upon the undisputed evidence, the avowed object and common purpose of both the grantor and grantee was to secure the property conveyed for the defendant and put it beyond the reach of creditors.

There was a previous conveyance from the husband to the wife of a life-interest in the same property, dated and registered on the 1st February, 1907. That conveyance was not attacked in this action.

The learned Judge was of opinion that the conveyance of a life-estate was all that was arranged for or contemplated by the husband and wife in the first place, and that the ultimate conveyance of the fee was a distinct arrangement, born of subsequent misfortunes, tentatively entered into about the 27th June, 1916, and not definitely determined upon or consummated until, to the knowledge of both parties, the position of the husband had become financially hopeless, to wit, on or about the 22nd December, 1916, when the attacked conveyance was registered. The defendant had, when the first conveyance was made, and thereafter until the husband's death, a fair knowledge and understanding of his transactions and financial position, and a thorough comprehension of the hazards of the speculative business he was engaged in. As to imputed knowledge in such cases, see Thompson v. Gore (1886), 12 O.R. 651.

The learned judge cited and quoted from the reports of many decided cases, and referred specially to Ferguson v. Kenny (1889), 16 A.R. 276, 291, 292.

The conveyance was, upon its face, a voluntary one. An attempt was made at the trial to shew that it was founded upon a bargain, or that it was in consideration of the payment of $1,165 by the wife to the husband; but that attempt failed, upon the evidence.

There should be judgment declaring that the conveyance of the 27th June, 1916, was fraudulent and void as against the creditors of James Jermyn, deceased, and that the moneys in Court stand in the place of the land. The plaintiff should have his costs against the defendant, and an order for payment thereof out of her share of the moneys in Court.

F. E. SMITH LIMITED v. CANADIAN WESTERN STEEL CORPORATION LIMITED—LOGIE, J.—APRIL 21.

Contract—Breach—Ear-marked Goods—Waiver — Injunction — Interim Order.]—Motion by the plaintiffs to continue an interim injunction granted by KELLY, J., on the 10th April, 1920, restraining the defendants from selling or dealing with certain goods, the subject of a contract between the parties, otherwise than in accordance with the contract. The motion was heard in the Weekly Court, Toronto. LOGIE, J., in a written judgment, said that the injunction should be continued until the trial. Fothergill v. Rowland (1873), L.R. 17 Eq. 132, cited for the defendants, was not in point. Here the goods were ear-marked, there they were not. Questions such as whether the plaintiffs had waived the right now claimed to the goods oversize could not be determined on this application—they were for the trial Judge. The trial should be speeded by all parties; costs in the cause. T. N. Phelan, for the plaintiffs. R. S. Robertson, for the defendants.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.—MIDDLETON, J.—APRIL 21.

Pleading—Statement of Defence—Motion to Strike out Paragraphs Raising Issues Tried in Previous Action—Right to Attack Pleading of Defendant on this Ground—Matter to be Determined at Trial.]—Motion by the plaintiffs for an order striking out certain paragraphs of the defence, in which it was alleged that the defendants sought to have retried certain issues which, it was said, were already dealt with finally and conclusively in the former action between the same parties: see Ross v. Scottish Union and National Insur-

ance Co. (1917-18), 41 O.L.R. 108, 58 Can. S.C.R. 169; and see also Ross v. Scottish Union and National Insurance Co. (1919-20), 17 O. W. N. 166, 46 O.L.R. 291, ante 77. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that he had grave doubt as to the possibility of a motion such as this being successfully made. It had been held that an action may be stayed as vexatious and as an abuse of the process of the Court where a plaintiff seeks to litigate matters already adjudicated upon adversely to him. No case was cited and none could be found going to shew that a plaintiff has the right to attack a pleading of the defendant in the same way. It appeared that the most he could do was to plead the formal judgment and rely upon it at the hearing. But in this action there was much difficulty in determining whether the former adjudication prevented the defendants from now setting up the matters relied upon; and it would be highly inexpedient to attempt to discuss or determine the problems thus presented. The matter must be left to be dealt with at the trial, when the issues actually to be tried become more distinctly formulated, and the evidence relied upon is presented. The motion failed and should be dismissed with costs, to be paid by the plaintiffs to the defendants in any event. H. J. Macdonald, for the plaintiffs. W. J. Beaton, for the defendants.

ROWE v. HAMILTON—MIDDLETON, J.—APRIL 21.

Contract—Sawing Logs—Action for Price—Inferiority of Lumber Delivered—Counterclaim—Damages—Costs.]—Action to recover the price of sawing logs for the defendant and for certain minor items. In the defence and counterclaim the allegation was made that the lumber was not cut from the logs in accordance with the terms of the contract, and that in the result the defendant had received so much inferior lumber that the loss so occasioned had resulted in damages to an amount exceeding the amount due to the plaintiff. The action and counterclaim were tried without a jury at Owen Sound. MIDDLETON, J., in a written judgment, said that the evidence was far from satisfactory, as details were almost entirely lacking; but he was satisfied that the lumber was not cut in accordance with the contract, and that the defendant had sustained substantial damage by reason of the breach of contract. The claim made by the defendant was, however, too large. The temptation was always present to the plaintiff to cut the lumber in such a way as to give the greatest possible quantity of feet (board measure) with the least possible

labour. He was to be paid as much for the sawing out of the box-hearts as for the cutting of quarter-cut maple or white maple; and there was in truth a considerable wastage of the higher grades. The plaintiff was entitled to recover for the sawing of 199,000 feet at $7.50 per M., $1,492.50; for the three admitted items, $90; for ground rent, $90: in all $1,672.50: less $500 paid; leaving a balance of $1,172.50; and there should be deducted from this $500 damages for improper sawing, leaving a net balance of $672.50, upon which interest should be allowed from the date of the writ. As there had been a partial success, there should be no costs. That was better than to attempt to apportion the costs as between claim and counterclaim. The whole cost of the litigation had been substantially occasioned by the counterclaim, so that of this award the plaintiff at least could not complain. W. D. Henry, for the plaintiff. W. H. Wright, for the defendant.

RE GREAT WAR VETERANS ASSOCIATION OF THOROLD AND SYNOD OF THE DIOCESE OF NIAGARA—LOGIE, J.—APRIL 23.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Land Vested in Synod of Church—Power of Synod to Convey—Devisee under Will—Validity of Exercise of Power of Appointment—Application under Vendors and Purchasers Act.]—An application by the association, purchasers of land in the town of Thorold, for an order determining the validity or invalidity of an objection to the title. The land was the subject of the devise to the widow of John McDonagh with power of appointment as set out in Re McDonagh, supra. The application was heard in the Weekly Court, Toronto. LOGIE, J., in a written judgment, said that the decision in Re McDonagh disposed of this motion. The land was vested in the Synod of the Diocese of Niagara in fee simple, and the Synod alone, subject to its statutes and by-laws, could convey the same to the purchasers. G. H. Pettit, for the purchasers. A. C. Kingstone, for the vendors.

CATTANACH AND DAVIS v. ELGIE—KELLY, J.—APRIL 14.

Fraud and Misrepresentation—Sale of Land and Chattels—Acceptance of Threshing Outfit as Part of Consideration—Misrepresentations as to Condition of Outfit—Reliance on—Inducement for Making Contract—Claim by Subvendee of Outfit against Original Owner—Evidence—Reliance on Representations—Costs.]—Action to

recover damages for false and fraudulent representations made by the defendant in respect of a threshing outfit delivered by him to the plaintiff Cattanach as part of the consideration for land and chattels purchased by the defendant from Cattanach. The plaintiff Davis bought the outfit from Cattanach, and joined in the action, alleging some participation on the part of the defendant in the sale to him (Davis), and seeking in conjunction with Cattanach to hold the defendant liable for the loss sustained as a result of the purchase. The action was tried without a jury at St. Thomas. KELLY, J., in a written judgment, after stating the facts, found that the condition of the threshing outfit, particularly the engine, was not as represented by the defendant, who, knowing its true condition and its defects, concealed what he should have communicated to Cattanach, who relied upon and was induced by these representations to enter into the contract. The plaintiff Davis was not entitled to succeed. At the time of the resale to Davis, the defendant had parted with the outfit; his sale to Cattanach had been completed several days before, and he was in no way concerned in the outfit itself or in Cattanach's efforts to sell or the result of a resale. Davis swore that he relied upon what the defendant said about the outfit; but that evidence could not be accepted. There should be judgment for the plaintiff Cattanach against the defendant for $800 and two-thirds of the plaintiffs' costs of the action, and judgment for the defendant dismissing Davis's claim without costs. W. H. Barnum, for the plaintiffs. R. G. Fisher, for the defendant.

RE SOLICITORS—LOGIE, J.—APRIL 15.

Solicitors—Bill of Costs—Retainer—Findings of Taxing Officer—Evidence—Taxation—Appeal—Costs.]—An appeal by the solicitors from the report or certificate of the Taxing Officer at Toronto upon a reference for the taxation of a bill of costs rendered by the solicitors to Peter McDonald and others, as clients. The appeal was heard in the Weekly Court, Toronto. The questions raised were as to the retainer of the solicitors. The learned Judge disagreed with the findings of the Taxing Officer numbered 2 and 3 in his certificate, and was of opinion that the solicitors had established their retainer in respect of proceedings upon a certain reference and a certain appeal, and that the respondents called the "guarantors" were liable in respect of the items in the bill applicable to these proceedings and properly taxable. In regard to items in respect of services subsequent to the dismissal of the appeal, which related exclusively to a further appeal discussed but never taken, the learned Judge agreed with the Taxing Officer

that there was no retainer, and that these items were not properly chargeable against the guarantors. Success being divided, there should be no costs. Grayson Smith, for the solicitors. H. S. White, for Peter McDonald. T. J. Agar, for the other respondents.

RAEFF v. DIMITROFF—KELLY, J.—APRIL 19.

Principal and Agent—Contract—Remittance of Money to Foreign Country—Disobedience by Agent of Instructions of Principal—Profit Made by Agent—Currency—Exchange—Accounting—Costs.]—Action to recover $1,358.50 which the plaintiff entrusted to the defendant with instructions to remit $1,300 or its equivalent in United States currency to Bulgaria. The action was tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, said that he had to determine what was really the contract between the parties. The defendant received $1,358.50 from the plaintiff. The $58.50 was for exchange. What he actually did was to exchange that sum into Greek currency (drachmas) payable at Salonica and send the amount in that currency to his own correspondent, who sent 2,000 levs to the plaintiff's father in Bulgaria, and deposited 30,500 levs to the plaintiff's credit in a bank. This was contrary to the plaintiff's instructions and to the defendant's own receipt, in which it was stated that the amount was to be forwarded to La Banque Nationale, Bulgaria, City of Trozan, the money to be placed to his own account, the bank-book to be forwarded to Toronto. In more ways than one the plaintiff failed to carry out the plaintiff's instructions; he did not even remit the money in the currency (United States currency) which he said the plaintiff directed; and, instead of remitting it direct to the bank, he disregarded the instructions and remitted it through his own agent in Salonica. This course enabled him to make a profit out of the transaction, of which the plaintiff had no knowledge, and to which the defendant, being the plaintiff's agent, was not entitled. The 32,500 levs which went to the plaintiff's credit in Bulgaria were purchasable there with $970.15 in United States currency, at a rate of exchange agreed upon by counsel. The difference between $1,300 and $970.15—viz., $329.85—should be accounted for by the defendant; and the plaintiff was entitled also to a return of the exchange on this $329.85 at the rate (4½ per cent.) paid on the 1st October, 1919, in the purchase of the $1,300 in United States currency—$14.84. There should be judgment for the plaintiff for these two sums, totalling $344.69, and interest from the 1st October, 1919, with costs on the lower scale without set-off. W. A. Henderson, for the plaintiff. R. R. Waddell, for the defendant.