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APPELLATE DIVISION.

Second Divisional Court. November 5th, 1918.

LEONARD v. WHARTON.

Libel—Writing Capable of being Libellous—Question for Jury—Innuendo—Rejection of Evidence at Trial—New Trial.

This was an action for libel, brought by George F. Leonard, George A. Parmiter, Leonard & Parmiter, and Leonard-Parmiter Limited, plaintiffs, against Reginald A. Wharton, the Canada Bonded Attorney and Legal Directory Limited, and Canada Trade List and Addressing Company, defendants.

The action was commenced in September, 1916; before it came down for trial, judgment had been given by the Appellate Division in Canada Bonded Attorney and Legal Directory Limited v. Leonard-Parmiter Limited and Canada Bonded Attorney and Legal Directory Limited v. G. F. Leonard (1918), 42 O.L.R. 141. Those actions were practically between the same parties as the libel action, and the matters in dispute in all the actions were intimately related to each other.

The first writing complained of as libellous was a circular letter dated the 15th September, 1916, addressed to business firms by the defendants or some of them, upon the letter-head of the defendent the Canada Bonded Attorney and Legal Directory Limited, as follows:—

"Certain circulars signed by G. F. Leonard and G. A. Parmiter, which are being sent to our subscribers, on a letter-head intituled 'Canadian Guide to Bonded Lawyers,' have come to our attention.

"As G. F. Leonard claims to have been in our employ up to June 30, 1916, and G. A. Parmiter resigned on July 7, 1916, the origin of their 'list' is obvious.

"A writ for $4,048.61 was issued against G. F. Leonard on July 27, $2,334.54 of which was money collected by him for this company and not remitted.

"As vice-president and secretary-treasurer, these gentlemen were possessed of one share each of C.B.A. & L.D. Limited, and were employed as traveller and bookkeeper respectively.

"We were informed this morning by the general manager of" a guarantee company "who bond our attorneys, that the attorneys who appear in the above named list are not bonded by his company, contrary to the statement made in their circular dated August 28, 1916."

The innuendo was to the effect that the plaintiffs were charged by the letter with having stolen the contents of a list of subscribers, had stolen money, and had made a false representation as to the bonding of attorneys.

The second writing alleged to be libellous was a similar circular letter, containing like charges; and the innuendo was to the like effect.

The trial of the action was begun before MEREDITH, C.J.C.P., and a jury, at a Toronto sittings, on the 5th June, 1918.

The Chief Justice withdrew the case from the jury, being of opinion that no one could reasonably find any libel in any of the words that were used by the defendants.

The action was dismissed without costs.

The plaintiffs appealed, and their appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and KELLY JJ.

J. P. MacGregor, for the appellants, contended that the writings were capable of being construed as libellous, and that the plaintiffs were entitled to shew by evidence the circumstances in and by which the language complained of was alleged to have the meaning set out in the innuendo. He referred to Australian Newspaper Co. v. Bennett, [1894] A.C. 284.

A. C. McMaster and E. H. Senior, for the defendants, respondents, contended that the language used could not, in view of the decision in the previous cases, 42 O.L.R. 141, be regarded as libellous.

At the conclusion of the argument the judgment of the Court was delivered by MULOCK, C.J.Ex., who said that all the members of the Court were of opinion that the circular letter sent by the defendant company to its subscribers was capable of being libellous, and the jury should have been so told, and it should have been left to them to say whether it was such in fact.

The trial Judge dismissed the action without permitting the plaintiffs to complete their case, and assumed apparently that

the defendant company would be able to establish its defence of justification.

On both grounds, the verdict should be set aside and a new trial had.

The costs of the former trial and of this appeal should be costs in the cause.

SECOND DIVISIONAL COURT. DECEMBER 9TH, 1918.

*SEAGRAM v. PNEUMA TUBES LIMITED.

Fines and Penalties—Action for Penalties against Company and Secretary—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 134—Default in Making out and Transmitting Summaries to Provincial Secretary—Secretary "Wilfully" Permitting Default—Finding of Fact of Trial Judge—Appeal—Remission of Full Penalties upon Payment of Substantial Sum.

Appeal by the defendant J. J. Gray from the judgment of LATCHFORD, J., ante 59.

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

The appellant in person.

George Bell, K.C., for the plaintiff, respondent.

THE COURT agreed with LATCHFORD, J., that the appellant was subject to the penalties imposed by the Ontario Companies Act; but, being of opinion that he was entitled to some relief, ordered that, upon payment by him to the plaintiff of $4,000 and interest, the plaintiff should discharge her judgment for $12,760. The Court dealt with the case on the assumption that leave to appeal from the order of MIDDLETON, J., 40 O.L.R. 301, had been granted, and that the appeal had been heard. The plaintiff's costs of the appeal are included in the $4,000.

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

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1918.

*HOEHN v. MARSHALL.

Mortgage—Sale under Power—Duty of Mortgagee to Mortgagor—Inadequacy of Price not Leading to Presumption of Fraud—Right of Assignee of Mortgage to Exercise Power of Sale—Rights of Mortgagee under Mortgage from Purchaser—Effect of Registration—Bona Fides—Charges of Fraud—Costs.

Appeals by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 14 O.W.N. 316.

The appeals were heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. M. McEvoy, for the appellants Rylands, Logie, and Alice Marshall.

The appellant Catharine Marshall was not represented.

P. H. Bartlett, for the plaintiff, respondent.

MULOCK, C.J. Ex., read a judgment in which he said that the action was brought by Marcel Hoehn, executor of James Marshall, deceased, to set aside as fraudulent and void a conveyance of land to the defendant Rylands, made by Catharine Marshall, in exercise of a power of sale contained in a mortgage made by James to one McMartin, and by McMartin assigned to Catharine, and also to set aside a mortgage made by Rylands to Elizabeth Logie.

The trial Judge declared the plaintiff entitled to redeem on payment of the moneys owing on the mortgage to Elizabeth Logie, and the defendants appealed from that judgment. The trial Judge did not find fraud; but, by decreeing redemption, in effect set aside the deed to Rylands, apparently upon the ground that the sale to him was at an undervalue.

The only possible ground for impeaching the sale is inadequacy of price, but inadequacy is a matter of degree. Mere inadequacy is not sufficient; it must be so gross as to lead to the presumption of fraud—to the conclusion that the mortgagee was negligent or unfaithful in the discharge of his duty, which is to bring the property to the hammer under every possible advantage to his cestui que trust: Downes v. Grazebrook (1817), 3 Mer. 200, 205; Chatfield v. Cunningham (1892), 23 O.R. 153, 166; Warner v. Jacobs (1882), 20 Ch. D. 220.

Latch v. Furlong (1866), 12 Gr. 303, distinguished.

The plaintiff's counsel also contended that the mortgagee only, and not Catharine Marshall, her assignee, was entitled to exercise the power of sale contained in the mortgage. This point

is concluded by Barry v. Anderson (1891), 18 A.R. 247, in which it was held that the assigns of the mortgagee could validly exercise the power of sale contained in the assigned mortgage.

Further, the prior registration of the deed to Rylands might protect Elizabeth Logie in respect of her subsequently registered mortgage. There was no evidence impeaching her bona fides in respect of her mortgage, and she was entitled to maintain it, and also to have maintained the foundation upon which it rested—the deed to Rylands, her mortgagor.

The appeal should be allowed with costs and the action be dismissed with costs. Inasmuch as the plaintiff had, in his statement of claim, made charges of fraud against the defendants, they were entitled to the costs of the action.

Clute, Riddell, and Sutherland, JJ., agreed with Mulock, C.J. Ex.

Kelly, J., agreed in the result, for reasons stated in writing.

Appeal allowed.

Second Divisional Court. December 10th, 1918.

*HICKMAN v. WARMAN.

Vendor and Purchaser—Agreement for Sale of Land (House and Lot by Street Number)—Conveyance of Lot according to Plan of Survey—Covenant for Title—Extended Meaning of, by Short Forms of Conveyances Act—House Encroaching on Next Lot—Removal of House—Cost of—Damages Recovered by Purchaser against Vendor—Equitable Right to Reformation of Deed of Conveyance.

Appeal by the plaintiff from the judgment of Denton, Jun. Co. C.J., dismissing an action brought in the County Court of the County of York to recover damages for a breach of a contract.

The appeal was heard by Mulock, C.J. Ex., Clute, Riddell, and Sutherland, JJ.

A. J. Russell Snow, K. C., for the appellant.

A. C. Heighington, for the defendant, respondent.

Clute, J., in a written judgment, said that on the 12th June, 1913, the plaintiff entered into an agreement with the defendant to purchase a "house and lot known as No. 144 north side of Glen-

wood avenue, city of Toronto. The defendant produced to the plaintiff, before the agreement was signed, a surveyor's plan of the land. Both parties believed—but were mistaken—that the survey was correct; and, relying upon the plan, the defendant conveyed to the plaintiff by deed, in June, 1913, the west half of lot 82 on the north side of Glenwood avenue, as shewn on the plan. By a subsequent survey it plainly appeared that house No. 144 was so built as to encroach 4 feet on the next lot to the west of 82. The owner of the next lot offered to sell the plaintiff 4 feet, but the plaintiff preferred to remove his house, and did so, at an expense of $125.

Upon the undisputed facts, the house and lot which the plaintiff bought was house and lot 144. Had the deed followed the agreement, the plaintiff would have been entitled to succeed in an action for reformation of the deed to make it comply with the agreement; but, as the transaction had been completed, the plaintiff was entitled to damages to compensate for the loss.

The deed was made in pursuance of the Short Forms of Conveyances Act, R.S.O. 1914 ch. 115, according to which the defendant covenanted that he had the right to convey the lands and premises thereby conveyed or intended so to be. The undisputed facts brought the case strictly within this covenant; and an action lay for breach of covenant for title.

The proper measure of damages was the difference between the value of the property as it purported to be conveyed and the value as the vendor had power to convey it: Turner v. Moon, [1901] 2 Ch. 825; Great Western R. W. Co. v. Fisher, [1905] 1 Ch. 316; Eastwood v. Ashton, [1915] A.C. 900.

The damages to which the plaintiff would be entitled under this rule would be much more than the cost of removing the house; but no evidence was given upon which the damages could be ascertained according to the rule; and the damages would be at least the cost of the removal.

The judgment below should be set aside, and judgment should be entered for the plaintiff for $125 with costs of the action and of the appeal.

Mulock, C.J. Ex., agreed with Clute, J.

Riddell, J., agreed in the result, for reasons stated in writing.

Sutherland, J., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1918.

*JARVIS v. CONNELL.

Brokers—Transactions between—"Borrowing Shares"—Payment Made by Borrower—"Making up" or "Closing out"—Contradictory Evidence—Appreciation of—Cross-examination—Suspicious Circumstances—Reversal by Appellate Court of Finding of Fact of Trial Judge.

Appeal by the plaintiff from the judgment of ROSE, J., at the trial, dismissing the action, which was brought for a return of money paid by the plaintiff to the defendants, who were stockbrokers, as security for a loan of 2,600 shares of Temiskaming Mining Company stock.

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

J. R. Roaf, for the appellant.

C. W. Livingstone, for the defendants, respondents.

RIDDELL, J., in a written judgment, said that the plaintiff on the 23rd February, 1916, borrowed from the defendants 2,600 shares. In such a transaction, the borrower pays to the lender as security the market price of the shares at the time; the lender can at any time call in the loan, and then the borrower must return the shares, receiving his; he has an option, however; and the more usual course is for the borrower to pay the lender an amount which will cover the rise in value of the shares (if any) and allow the loan to continue until a new demand by the lender. This is called "marking up." If the borrower fail to return the stock or to mark up, the lender may buy in to protect himself and charge the borrower with the difference in price.

The plaintiff paid $1,625 on the day of the loan, and on the 19th April marked up $300, placing on the face of the cheques "2,600 Temisk." and "margin" respectively. On the 29th April (Saturday) a new demand was made upon the plaintiff, that he should bring the stock in on Monday morning, the 1st May, or the account would be closed up. Early in the following week the plaintiff paid $400 by a cheque which had no memorandum on its face as to the object for which it was given. This was the sum which he should have paid to entitle him to retain the stock as his own and so close out the account—it was equally the sum which he should have paid to mark up, being the amount by which the stock had risen.

The plaintiff went overseas on the 16th May, 1916, and did

not return until the end of October, 1917. He then offered to return the stock and demanded his money. This being refused, he brought this action in November, 1917.

If the $400 paid on the 1st May, 1916, was in reality marking up, the plaintiff, it was admitted, must succeed; if it was a closing out of the account, admittedly he must fail.

The defendants asserted that they had on the Monday bought shares to replace the lent shares, at 80, and that they had sent the ordinary notice to the plaintiff—"We have this day bought for you 2,600 shares of Temiskaming at 80 cents"—but the plaintiff did not know of the purchase, if there was one, and he received no notice till long afterwards. The plaintiff went to the defendants' office intending to pay the $400 for marking up; he knew nothing of the closing out by the purchase of shares or otherwise; he swore that he paid it for marking up, and there was no contradiction. He was cross-examined, but the main object of the cross-examination seemed to be to shew that the money was not paid to the defendant Connell. The plaintiff swore that he gave the cheque to Connell, and Connell neither denied receiving the cheque nor that it was paid for marking up. The trial Judge said that the plaintiff seemed to be mistaken—he must have given the cheque to some clerk in the office. The learned Judge had misapprehended the effect of the evidence (Beal v. Michigan Central R. R. Co (1909), 19 O.L.R. 502). In the absence of contradiction by Connell, the Court should now find that the $400 was paid to him by the plaintiff and for marking up.

The suspicious change in the books of the defendants, and the impossibility of reconciling the alleged buying in for the plaintiff on the 1st May with contemporaneous entries, would cause the Court to decline to accept the defendants' account. No rule forbade the Court from disagreeing with the trial Judge even on questions of fact: Dempster v. Lewis (1903), 33 S.C.R. 292; and this was one of the clear cases in which the Court should disagree with the trial Judge.

The appeal should be allowed, and judgment should be entered for the plaintiff (on his handing back the borrowed shares) for $1,975 and interest from the teste of the writ and costs here and below.

Mulock, C.J. Ex., and Clute and Sutherland, JJ., agreed with Riddell, J.

Kelly, J., read a dissenting judgment.

Appeal allowed (Kelly, J., *dissenting.*)

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1918.

*RE SOLICITORS.

Solicitors—Order for Taxation of Itemised Bill of Costs—Lump Sum Allowed by Taxing Officer—Reference back with Direction to Adjudicate upon each Item—Non-tariff Items—Evidence.

An appeal by the executors of William Robertson, deceased, from an order of ROSE, J., in the Weekly Court, dismissing an appeal by the executors from a certificate of the Senior Taxing Officer upon a reference for taxation of a bill of costs of the solicitors.

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

H. S. White, for the appellants.

R. McKay, K.C., for the solicitors, respondents.

MULOCK, C.J. Ex., read a judgment in which he said that William Robertson, since deceased, under a guaranty given by him and others to the Molsons Bank, became liable to pay certain solicitors' fees, charges, and expenses; and, after his death, an itemised bill thereof was rendered to his executors. Thereupon the latter applied for and obtained an order for the taxation of the bill, they submitting to pay what, if anything, should be found due to the solicitors upon such taxation.

The Taxing Officer, instead of taxing the various items, allowed the solicitors a bulk sum of $450, and from his certificate the applicants appealed to Rose, J., who dismissed the appeal, and this was an appeal by the executors from such decision.

The order having directed that the itemised bill be taxed, it became the duty of the Taxing Officer to adjudicate upon each item. This he had not done, but, instead, had allowed a bulk sum. That was not a taxation within the meaning of the order; and the certificate of the Taxing Officer should be set aside, with costs, and the matter be referred back to that officer to be dealt with as directed by the order.

During the argument, counsel for the appellants stated that the bill included some non-tariff charges. Should such be the case, the officer must determine the value of such services on evidence.

The appellants should have their costs throughout, which costs the solicitors might set off pro tanto against any amount to which they might be found entitled.

CLUTE, SUTHERLAND, and KELLY, JJ., agreed with MULOCK, C.J., Ex.

RIDDELL, J., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1918.

OWEN SOUND WIRE FENCE CO. v. UNITED STATES STEEL PRODUCTS CO.

Contract—Sale of Goods—Breach—Construction of Contract—"Specifications"—"Specify"—Dimensions of Wire—Evidence—Explanation of Technical Trade Terms.

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 13 O.W.N. 104.

The appeal and cross-appeal were heard by MULOCK, C.J.Ex., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

Wallace Nesbitt, K.C., and Britton Osler, for the defendants.

W. H. Wright, for the plaintiffs.

SUTHERLAND, J., read a judgment in which he said that the action arose out of a contract in writing, dated the 18th October, 1915, whereby the defendants agreed to sell and furnish to the plaintiffs 1,000 tons of "galvanised Bessemer wire No. 9 and coarser" at $2.25 per 100 llbs., f.o.b. mill, Pittsburg, and "extra for shipment from Cleveland 42 cents per 100 lbs."

The contract contained the following clause: "Specifications shall be furnished to the seller by the buyer in substantially equal monthly quantities, beginning on or before the first day of December, 1915, and ending on or before the last day of February, 1916. Buyer's failure to furnish specifications as aforesaid may, at seller's option, without notice to buyer, be treated and considered as a waiver on the part of the buyer of all right to demand any subsequent delivery of the unspecified portion of the goods."

To explain and make clear what the technical term "No. 9 and coarser" meant in the trade, evidence was properly admitted at the trial; it shewed that, while the exact gauge of No. 9 wire is .144 of an inch in diameter, any diameter varying within the limits between .140 and .148 was known in the trade to be covered

by the term "No. 9," and that "coarser" meant the grades of wire, such as 8 and 7, drawn coarser or thicker than 9.

It appeared from the evidence that it is difficult to manufacture wire with such nicety and exactness as to keep to the perfect standard under a particular number, and that slight variations are not easily avoided.

Upon the argument of the appeal, the Court was asked to construe the contract so as to determine one point, whether the plaintiffs could insist, as they did, that they could call for No. 9 within the limits between .140 and .144, or whether the defendants had the right, provided they kept within the limits between .140 and .148, to supply wire as No. 9, even if it ran between .144 and .148.

So long as the defendants supplied wire of a diameter between .140 and .148, the plaintiffs could not demand that what should be sent to them should be in effect what was known in the trade as "No. 9 scant," that is to say, between .140 and .144.

The appeal of the defendants should therefore be allowed upon the question of the proper construction to be placed on the word "specify."

The counterclaim should be dismissed; the cross-appeal should be dismissed; and the plaintiffs' judgment for the small claim of $162.52 should stand.

There should be no costs for or against either party of the action or appeal.

MULOCK, C.J. Ex., and KELLY, J., agreed with SUTHERLAND, J.,

RIDDELL, J., agreed in the result, for reasons stated in writing. He said that the real dispute was this: the plaintiffs took the position that they might select from what was recognised as gauge No. 9, wire exactly gauge No. 9 and finer, i.e., from .144 to .140 of an inch in diameter; while the defendants maintained that the plaintiffs could specify only the gauge—No. 9, No. 8, No. 7—but could not call upon the defendants to furnish only the finer grade of No. 9. The plaintiffs' claim was unfounded. If the exact words and their exact meaning were taken, the plaintiffs had no right to any wire under .144 at all—that being exact gauge No. 9. But, assuming that No. 9 meant from .140 to .148, their case was not advanced; they might specify No. 9 or any coarser gauge—such as No. 8—but there was no power to break up a gauge and call for wire of a particular diameter or diameters within the gauge, excluding all other diameters.

LATCHFORD, J., agreed with RIDDELL, J.

Judgment below varied.

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1918.

*FLEXLUME SIGN CO. LIMITED v. GLOBE SECURITIES CO.

Costs—Counsel Fees—Taxation between Party and Party of Defendants' Costs of Several Actions Stayed to Abide the Result of another Action—Right of Defendants to Give Notices and Set Actions down for Trial—Counsel Fee Allowed in each Action—Quantum—Interference with Discretion of Taxing Officer—Special Circumstances—Appeal to Divisional Court from Order of Judge in Chambers on Appeal from Taxation—Right to Appeal without Leave—Rule 507 (2).

An appeal by the defendants from an order of MEREDITH, C.J.C.P., in Chambers, on appeal from the taxation of the defendants' costs of the above and eight other actions, brought by the same plaintiffs against nine different defendants, reducing the amounts of counsel fees allowed to the defendants by the Taxing Officer.

The actions were for infringement of a patent for an invention.

An action was brought by the plaintiffs—not one of the nine actions—against the Macey Sign Company Limited; it was tried by SUTHERLAND, J., who, on the 29th May, 1916, dismissed it: Flexlume Sign Co. Limited v. Macey Sign Co. Limited (1916), 10 O.W.N. 305.

The nine actions had been commenced before judgment was given in the Macey action. On the 1st June, 1916, the defendants in the nine actions gave notices of trial and entered the actions for trial. On the 7th June, the plaintiffs moved before the Master in Chambers to stay the trial of the nine actions. The motion was refused. The plaintiffs appealed, and upon the appeal BOYD, C., on the 21st June, 1916, stayed the proceedings in the nine actions until the result of an appeal in the Macey case should be known, on the plaintiffs undertaking that they would allow judgment to be entered for the defendants with costs if the appeal in the Macey case should be determined against the plaintiffs: Flexlume Sign Co. v. Globe Securities Co. (1916), 10 O.W.N. 380.

The appeal in the Macey case failed: Flexlume Sign Co. Limited v. Macey Sign Co. Limited (1917), 12 O.W.N. 89.

The nine actions were accordingly dismissed with costs to the defendants; and on the taxation of these costs the Taxing Officer allowed a counsel fee of $100 in each action. On appeal MEREDITH, C.J.C.P., reduced the amount to $100 as counsel fee for and in all the nine actions.

The appeal from the decision of MEREDITH, C.J.C.P., was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

R. McKay, K.C., for the appellants.

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

THE COURT held:—

(1) That the appeal lay without leave under Rule 507 (2), for the order appealed against finally disposed of the right of each defendant to receive certain money by way of costs.

Talbot v. Poole (1893), 15 P.R. 274, approved and followed notwithstanding the change in the law.

(2) That the defendants were justified in setting down their cases for trial and giving notices of trial.

(3) That thereupon the defendants' solicitor became entitled to deliver briefs to counsel, and, if intending to take his own brief as a barrister, was entitled to a counsel fee at trial.

(4) That, while the general rule is that the discretion of the Taxing Officer as to quantum cannot be interfered with, the Court is not precluded from doing so under very special circumstances; and there were such circumstances in this case.

(5) That, as the costs between party and party are the costs of the litigant, each bill of costs was a separate matter; and, each being taxed by itself, a counsel fee should be taxed in each.

(6) That in each case a counsel fee of $50 should be allowed as "counsel fee at trial."

The order below was varied accordingly; the costs of the appeal, fixed at $75, to cover all costs of appeal, to be paid by the plaintiffs; no costs of the appeal to the Chief Justice in Chambers.

SECOND DIVISIONAL COURT. DECEMBER 11TH, 1918.

McCARTNEY v. McCARTNEY.

Pleading—Deed Attacked on the Ground of Fraud—Fraud not Found at Trial—Deed Set aside for Improvidence—Amendment not Asked for or Made at Trial—Amendment Made by Appellate Court nunc pro tunc—Rules 183, 186—Costs.

An action to set aside a conveyance by the plaintiff to his son, the defendant, on the ground of fraud. An order was made directing that the plaintiff set out in full the charges of fraud; and in the amended statement of claim several claims of fraud were set out.

At the trial before MEREDITH, C.J.C.P., fraud was not found, but the deed was set aside on the ground of improvidence only, no amendment being made or asked for in the pleading: no costs were given because of the unfounded charges of fraud.

The defendant appealed.

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

Strachan Johnston, K.C., for the appellant.

L. W. Goetz, for the plaintiff, respondent.

THE COURT held that, while the pleading should have been amended at the trial—Rule 186; Hyams v. Stuart King, [1908] 2 K.B. 696—the Court might, and under the circumstances should, make the proper amendment *nunc pro tunc*. The difference between Rule 183 and the English Rule 1037 (O. 70, r. 1) was pointed out.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 12TH, 1918.

RE MAILLOUX.

ST. LOUIS v. MAILLOUX.

Will—Construction—Specific Devises of Different Portions of one Farm—Descriptions in Will—Evidence—Conflicting Constructions.

An appeal by Eugene Mailloux from the judgment of LENNOX, J., 14 O.W.N. 85, upon certain questions directed by an order of MIDDLETON, J., 11 O.W.N. 355, to be tried; and an appeal by Rose St. Louis from the judgment of CLUTE, J., of the 3rd December, 1910, in an action in which like questions were raised between other parties.

The appeals were heard by MULOCK, C.J.Ex., LATCHFORD, SUTHERLAND, KELLY, and MASTEN, JJ.

D. L. McCarthy, K.C., and J. D. Le Grandpré, for the appellant Eugene Mailloux and his children and for the executors of Hypolite P. Mailloux, whose will was in question.

T. Mercer Morton, for Rose St. Louis and her children.

E. C. Cattanach, for the Official Guardian, representing the infant Patrick (Teddy) Mailloux.

THE COURT allowed the appeal from the judgment of LENNOX, J., and dismissed the appeal from the judgment of CLUTE, J.; costs of all parties out of the estate.

SECOND DIVISIONAL COURT. DECEMBER 13TH, 1918.

*TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORPORATION OF OTTAWA.

Cemetery—Agreement under Seal between Owner and Municipal Corporation—Covenant by Owner to Pay Annual Sum to Corporation—Consideration—Covenant by Corporation not to Prevent or Prohibit Use of Cemetery for Interment of Dead in all Time to Come—Cemetery Act, sec. 37—Unlawful Covenant—Failure of Consideration—Owner not Bound by its Covenant.

An appeal by the defendant corporation from the judgment of the Senior Judge of the County Court of the County of Carleton, in favour of the plaintiff, the Municipal Corporation of the Town of Eastview, in an action for the recovery of $200 in the circumstances set out below.

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

W. Nesbitt, K.C., and H. St. Jacques, for the appellant corporation.

W. A. Armstrong, for the plaintiff corporation, respondent.

MULOCK, C.J.Ex., read a judgment in which he said that the defendant corporation owned the Notre Dame Cemetery, which adjoined the municipality of the plaintiff corporation, and also a number of lots intersected by streets within the limits of the town, and desired to enlarge the cemetery by the addition thereto of the lots and the streets just mentioned. To that end it entered into negotiations with the plaintiff corporation, and it was arranged between the two that the plaintiff corporation should consent to the closing of the streets and the enlargement of the cemetery by the addition of the lots and the streets, when closed, and should, through the Local Board of Health of Renfrew, petition the Provincial Board of Health to approve of the enlargement of the cemetery, in consideration of which the defendant corporation, upon the enlargement being made, was to pay to the plaintiff corporation the annual sum of $200 in lieu of the general taxes and war tax levy which the defendant corporation had theretofore paid in respect of the lots.

An order closing the streets and an order approving of the enlargement of the cemetery were obtained, pursuant to the arrangement. Thereupon, the lots in Eastview having become cemetery lots and ceased to be liable to assessment and taxation, a formal agreement under seal was made between the two corporations, dated the 25th November, 1916, whereby the defendant corporation covenanted to pay $200 annually to the plaintiff corporation, to compensate it for the loss of revenue; and the plaintiff corporation covenanted to approve and allow forever the use for cemetery purposes of the lots mentioned and never to attempt to prevent or prohibit interment of the dead therein.

The defendant corporation refused to make the first annual payment of $200, and this action was brought to recover it.

By sec. 37 of the Cemetery Act, R.S.O. 1914 ch. 261, the Legislature conferred upon the council of every urban municipality the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality; and, therefore, the plaintiff corporation was unable by any contract to divest itself of such powers or to abridge them. They were entrusted to the corporation for the public good, and the corporation must always be in a position to exercise them when the public interest so required. The plaintiff corporation could not contract itself out of such powers, unless authorised by the Legislature to do so.

The covenant of the plaintiff corporation was, therefore, illegal and void: Ayr Harbour Trustees v. Oswald (1883), 8 App. Cas. 623; Montreal Park and Island R.W. Co. v. Chateauguay and Northern R.W. Co. (1904), 35 Can. S.C.R. 48, 58.

The agreement being under seal, no consideration was necessary; but, where in fact a consideration in named, it must be a lawful one. The agreement shewed that the sole consideration for the defendant corporation's covenant was the unlawful one of the plaintiff corporation. Transgression of the law cannot give the transgressor a cause of action. No action would lie against the plaintiff corporation because of its breach of its unlawful covenant; neither could it maintain an action against the defendant corporation on a covenant wholly induced by unlawful consideration.

The appeal should be allowed and the action dismissed, but without costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.Ex.

RIDDELL, J., agreed in the result, for reasons stated in writing.

Appeal allowed.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. DECEMBER 9TH, 1918.

*RE ONTARIO TEMPERANCE ACT—RENAUD'S APPLICATION.

Ontario Temperance Act—Seizure of Intoxicating Liquor Found in Railway Car—Shipment under False Names from Quebec to Manitoba—Seizure at Town in Ontario en Route—Jurisdiction of Magistrate for Town to Order Confiscation—Sec. 70 of Act—Application to Quash Order—Status of Applicant—"Owner"—Intention to Violate Act—Onus.

Motion by Louis Renaud for an order quashing an order made by the Police Magistrate for the Town of North Bay directing the confiscation of a quantity of intoxicating liquor found in a railway car in the town.

James Haverson, K.C., for the applicant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, set out the facts. At North Bay, an accident happened to a railway car said to contain "mixed pickles," and it was revealed that under this name and brand were concealed in 133 barrels, containing 13 tons, a large quantity of bottled liquor (intoxicating), supposed to be worth $10,000.

Section 70 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, provides that "where an inspector . . . finds liquor in transit . . . upon the premises of any railway company . . . and believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same . . ." The section then provides for the condemnation of the liquor by summary proceedings before a Justice; and sub-sec. 6 provides that at the hearing "any person who claims that the liquor is his property and that the same is not intended to be sold or kept for sale in violation of this Act may appear and give evidence . . . ," which the magistrate may hear and deal with as upon the trial of a complaint under the Act. By sub-sec. 7, if no person claims to be the owner or "if the Justice disallows such claim" and finds that the liquor was intended to be kept or sold in violation of the Act, he may declare it forfeited to His Majesty. By sub-sec. 8, if the Justice finds that the "claim of any person to be the owner of the liquor is established," and "it does not appear that it was intended to sell or keep the liquor in contravention of this Act," the liquor may be "restored to the owner."

By sub-sec. 9, if it appears that the liquor was consigned to some person in a fictitious name, or was shipped as other goods, or was covered or concealed in such a way as to make discovery of its true nature difficult, it shall be prima facie evidence that the liquor was intended to be sold or kept for sale in violation of the Act.

The attention of the Inspector having been called to the bottles, he applied to the Police Magistrate for condemnation, and the case was heard.

The case for the Crown was complete as soon as it was shewn that the liquor was in the possession of the railway company, at North Bay, disguised as mixed pickles.

Counsel "for the person who is claiming the liquor" appeared before the magistrate, but this person was not named, nor was there any evidence as to ownership.

On this motion the applicant was said to be Louis Renaud, but there was no affidavit by him, nor any indication that he had any title to the liquor, nor that any such person existed.

At the hearing a way-bill of the railway company was produced shewing the Canada Vinegar Works of Montreal as the consignors and W. J. McKenzie & Co. Limited, of Winnipeg, as

consignees. The bill of lading was not produced. The consignees, by counsel, disclaimed before the magistrate any knowledge of the transaction.

Counsel for the applicant admitted that the names of the consignors and the consignees were used without their knowledge to lend colour to the shipment of so large a quantity of pickles.

It was argued that, "as the liquor was shipped in Quebec for Manitoba, the moment this appeared the magistrate's jurisdiction was gone."

But there was no evidence to shew that it was not intended to keep and sell the liquor in Ontario. The way-bill, false in all else, could not be regarded as conclusive in respect to the place of shipment and destination.

The application failed, for two reasons:—

(1) The applicant was not shewn to be the owner, and so had no locus standi.

(2) The facts shewn, quite apart from the provisions of sub-sec. 9, were enough to indicate an intention to violate the Act.

Section 70 was applicable, for the liquor was found in Ontario, and the magistrate had jurisdiction to enter into the inquiry under the Act; and all its provisions applied until it was proved that the transaction was one to which the Act did not apply.

Motion dismissed with costs.

FALCONBRIDGE, C.J.K.B. DECEMBER 10TH, 1918.

POHLMAN v. TIMES PRINTING CO.

Libel—Newspaper—Notice before Action Addressed to Company, Publisher of Newspaper, by Incorrect Name—Effect of Misnomer—Amendment—Verdict—Costs.

The above and two other actions were brought by the same plaintiff against the respective publishers of three newspapers for libels published therein.

The actions were tried together by FALCONBRIDGE, C.J.K.B., and a jury, at Hamilton.

T. N. Phelan, for the plaintiff.

D. L. McCarthy, K.C., and J. A. Soule, for the defendants the Herald Printing Company.

D. L. McCarthy, K.C., and C.W.Bell, for the defendants the Spectator Printing Company.

S. F. Washington, K.C., for the defendants the Times Printing Company.

Falconbridge, C.J.K.B., in a written judgment, said that the only point not covered or cured by the verdict of the jury was the question of notice given by the plaintiff to one of the defendants.

That notice was given to The Herald Publishing Company," whereas the corporate name was "The Herald Printing Company."

This was mere misnomer, which could not mislead, and not a notice given to the wrong person as in Dingle v. World Newspaper Co. (1918), 14 O.W.N. 200, 43 O.L.R. 218, and Redmond v. Stacey (1918), 14 O.W.N. 73.

But the plaintiff should not have leave to amend.

All the defendants should have leave to amend in terms of the notice of motion annexed to the record in the case against the Herald Printing Company.

Judgment for the plaintiff in each case for $100 and costs on the Supreme Court scale.

Middleton, J. December 10th, 1918.

BOWLES v. CITY OF TORONTO.

Highway—Nonrepair—Death of Person Walking on Highway—Dangerous Condition Continued for Long Period—Negligence—Cause of Death—Inference from Facts Found by Trial Judge.

Action by the administrator of the estate of Edward Mills, deceased, to recover damages for his death, alleged to have been caused by the negligence or default of the defendants in respect of the condition of a highway.

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

T. N. Phelan, for the plaintiff.

Irving S. Fairty, for the defendants.

Middleton, J., in a written judgment, said that the defendants, in 1912, placed on Weston road a bank of earth, several hundred feet long and about 7 feet high. This bank extended over almost half the street, and was so placed in contemplation of a change of grade. Along the top of the bank, cinders were placed so as to form a walk about 6 feet wide, connecting at either end of the embankment with the sidewalk. A car-track ran

along the centre of the road, and, to avoid covering this with earth, the foot of the embankment was protected with a perpendicular board wall, 2 feet high, about 2 feet from the track.

From the top of this boarding to the cinder-walk was a slope of loose and rather soft earth, having a grade of about 1 foot in 2.

The deceased, a man of 50, left a companion, with whom he had been spending the evening, shortly before midnight, for the purpose of going home. His way lay along the street, and he would be on this embankment about 11.55. At this hour a car passed south along the railway, and nothing had then happened.

At 12.20 the next car passed, going south also; and, as the car rounded a curve, the body of the deceased was seen upon the track, where he apparently had fallen. The pilot of the car passed over him, and when he was removed from under the car he was found to be dead. Where he had been lying there was a pool of blood, but it was not possible to ascertain if he was dead or unconscious only when he was struck by the car. He then received such injuries that death was inevitable and must have been instantaneous.

After the body had been found, footsteps were noticed in the soft earth of the bank leading to the place where the deceased was first seen by the motorman and where the blood was on the ground.

Two questions must be resolved in favour of the plaintiff before there could be a recovery. There must be negligence on the part of the defendants, and this negligence must be found to have caused the death.

The condition of the bank, without adequate or any protection, condemned the highway; and that this condition was permitted to exist for 5 years was unpardonable.

As there was no eye-witness, the connection between the negligence and the death could be only a matter of inference. The learned Judge drew the inference that the deceased attempted to cross the road or stumbled upon the walk and fell from the bank the 2 feet on to the track, and that he was either killed by his fall or rendered unconscious and then killed by the car.

The marks on the bank and the blood on the ground pointed to this as the proper conclusion.

On a misty night, with lights that obscured the real situation, an accident such as this was just what might be expected.

Reference to McKeand v. Canadian Pacific R. W. Co. (1910-11), 1 O. W. N. 1059, 2 O.W.N. 812, and in the Supreme Court of Canada (not reported); Grand Trunk R.W. Co. v. Griffith (1911), 45 Can. S.C.R. 380.

To avoid confusion, the learned Judge added that he did not think the footprints mentioned by the defendants' witnesses were

made by the deceased; he accepted the evidence of the plaintiff's witnesses as to the footprints seen by them.

Judgment for the plaintiff; damages to be assessed at a non-jury sittings.

MIDDLETON, J. DECEMBER 11TH, 1918.

ELLIOTT v. ELLIOTT.

Husband and Wife—Gift by Husband to Wife during Coverture—Ante-nuptial Gift—Evidence—Intention—Words of Gift—Actual Delivery—Married Women's Property Act.

An issue directed by an order of a Local Judge to be tried in order to determine whether the plaintiff was entitled to certain rings as against her husband, the defendant.

The issue was tried without a jury at Sandwich.
F. W. Wilson, for the plaintiff.
J. H. Rodd, for the defendant.

MIDDLETON, J., in a written judgment, said that the question really was, whether the rings were given by the husband to his wife or were lent to her or entrusted to her in such a way that they still remained the husband's property. There was conflict between the husband and wife as to the facts; but, on the whole, the learned Judge preferred the wife's evidence.

The cases since the Married Women's Property Act establish that there may be a gift from a husband to his wife. In each case it is a question of fact, and care must always be exercised to see that there is an actual intention to give and words that import a real gift, and that the real transaction is not one in which the intention is that the property shall remain in the husband while the wife shall have the right to use articles for her adornment.

In this case, there was an intention to give, and words of gift, accompanied by actual delivery. The gift was complete. The husband trusted the wife at the time; and, if he is now disappointed, this does not enable him to revoke the gift once made.

The emancipation of the married woman, by which the common law unity and its injustice became a thing of the past, is complete; and this is one of its consequences, unforeseen perhaps, but inevitable in the absence of any statutory provision.

The subject is discussed in Kingsmill v. Kingsmill (1865), 41 O.L.R. 238. To the cases there cited a reference to Grant

v. Grant (1865), 34 L.J. Ch. 641, which shewed how clear the evidence of an intention to give must be in cases such as this, should be added.

Entertaining this view as to the gifts during coverture, the case as to the gift of the ring before marriage was simple.

The finding on the issue should therefore be for the wife.

MIDDLETON, J. DECEMBER 11TH, 1918.

SAMUELS v. DOMINION BANK.

Pledge—Action by Pawnbroker to Recover Value of Article Pledged to him and Taken by Police—Article in Custodia Legis—Unnecessary Action—Costs.

Action by a pawnbroker to recover from the defendants a ring pledged to the plaintiff, or to recover the value of the ring.

The action was tried without a jury at Sandwich.

A. B. Drake, for the plaintiff.

E. A. Clearly, for the defendants.

MIDDLETON, J., in a written judgment, said that this action was heard at the same time as Elllott v. Elliott, supra, and concercerned one of the rings found to belong to his wife.

The husband wrongfully took possession of the wife's rings and put them in the safety deposit vaults of the bank (defendants).

The wife wrongfully possessed herself of her husband's keys, and, presenting herself at the bank, was improperly permitted access to her husband's safety-box and given the rings.

The husband then prosecuted his wife for larceny in the Police Court, and failed.

In the meantime the wife had pawned a ring with the plaintiff, a licensed pawnbroker, and the police had obtained from him the ring to use in the Police Court.

The husband sued the bank for its wrongdoing, and in that action an interpleader order was made, and the rings were directed to be held by the Court pending the trial of an issue (Elliott v. Elliott, supra).

Samuels sued the bank and the Chief of Police for the value of the ring. The Chief of Police was blameless, as he gave no personal undertaking, and the ring was in custodia legis. The bank were not in possession of the ring, and, while not blameless, were not answerable to Samuels.

Samuels ought to have been made a party to the interpleader proceedings, but was not. His claim was really for the amount advanced, and his suit was the result of over-anxiety, as the wife recognised his right and was doing all she could to protect his property, and he could have no greater right than she could give him.

In this action there seemed to have been nothing but confusion of ideas and misappehrension as to facts, accompanied by considerable expense.

As near an approach to doing justice as is likely to be attained will be reached by dismissing the action without costs. The wife, who had succeeded in the issue, had undertaken to repay Samuels' advance to her, and the order for delivery of the ring to her in the other case is subject to her arranging with Samuels. If no arrangement is made, he may apply in that suit, as the ring is to remain in the custody of the Court in the meantime.

Action dismissed without costs.

MIDDLETON, J. DECEMBER 12TH, 1918

RE FULTON.

Will—Construction—Distribution of Residue among Members of Class of Legatees—''Legatees'' Confined to Persons Given Direct Pecuniary Legacies—Application for Determination of Question of Construction—Costs—Executors—Beneficiaries.

Application by the executors of Hugh Fulton, deceased, for an order determining a question as to the proper disposition of a fund in their hands so as to carry out the provisions of the will the deceased.

The motion was heard in the Weekly Court, London.

W. K. Cameron, for the executors as such.

J. M. McEvoy, for the executors, who were nephews of the testator, as individual beneficiaries under the will.

J. B. Davidson, for other nephews and nieces of the testator.

MIDDLETON, J., in a written judgment, said that the testator died on the 25th September, 1884, having on the 18th September, 1884, made a will which was admitted to probate on the 24th October, 1884.

The testator made provision for many gifts, devises, and legacies to nephews and nieces and others, and then provided that "if there still be a balance in the hands of my executors" upon the death of his niece Eliza, for whose maintenance he had provided, his executors should distribute this "amongst those of the said legatees who are my nephews or nieces who may survive my niece Eliza in proportion to the legacies hereinbefore bequeathed said nephews and nieces."

The question now arose as to how a residuary fund, which had accumulated for a third of a century, and now amounted to $4,400, was to be dealt with. Most of the nephews and nieces were still living, and there was no trouble in ascertaining the class; the difficulty lay in ascertaining which of the nephews and nieces were "legatees," and what were the "legacies" which were to determine the distribution.

By the will, the executors were "to pay the following legacies." Then followed a list of pecuniary legacies, "the said legacies to be paid after the expiration of one year from my decease." "All the above legacies I bequeath upon the condition that the said legatees make no claim upon my executors."

After all this, the testator "Willed and bequeathed" to his executors, his nephews Hugh Fulton and Henry Fulton, his live stock and farming implements, &c., share and share alike, for their absolute use, and "willed and devised" to them as tenants in common his farm said to be worth about $9,000. These two nephews received no pecuniary legacies.

In the scheme of distribution propounded by these executors, they included themselves as legatees, each at $4,500, on the theory that the farm was a "legacy" within the meaning of the will.

From the material and from the will itself there was no doubt that these nephews were intended to be preferred above the other nephews and nieces; but it was not to be inferred from this that the testator intended what he had not said, that land devised should be regarded as a legacy.

The will was prepared by a professional man, and in it from beginning to end there was no confusion in the terms used—all were used appropriately.

The intention was to give the farm and farm implements and live stock to these nephews, who had become to him almost sons, and to distribute the general estate among those whom he rightly called legatees; and, after some provision for abatement and priority among these legatees, there was the provision for the distribution of any surplus among them pro rata.

This clearly excluded the idea of the devisees being included in the distribution.

A second question arose as to the chattel property given,

which was a legacy in the strict sense of the term, but not a "legacy" within the meaning of the will. The will constituted its own dictionary; "legacy" meant "pecuniary legacy" and did not mean or include the "value of any specific legacy."

The testator contemplated a simple thing, "a distribution in proportion to the legacies," and not a valuation or inquiry as to the value of benefits conferred.

This answered a third contention, that the value of a claim or debt forgiven or reduced must be regarded as a legacy. In strict use of language, perhaps so, but not in the sense used by this testator. See for example the provision for James Fulton: "In addition to the payment to the said D. of his said legacy of one thousand dollars," the executors are "not to collect from him any sum he may now owe me on any account whatsoever, and to deliver up to him all promissory notes," &c.

So, where the executors are directed to pay the mortgage they owe, "I hereby releasing them from payment of any other sum or claim which I may now have against them in any way whatsoever secured," it is not possible that he meant an inquiry to be made as to the amount of any possible claim that might in that way be forgiven, for the purpose of distributing the possible balance that might remain.

The order should, therefore, direct distribution pro rata among the pecuniary legatees who are nephews or nieces and survived the niece Eliza, pro rata in proportion to the pecuniary legacies.

The costs should be paid out of the fund, but there was no reason why the executors should have two solicitors and two counsel, one representing them as executors and the other as individuals. They should be allowed only one bill, but the fee should cover the presentation of the case from the standpoint of the belligerent and not of the neutral.

MIDDLETON, J. DECEMBER 12TH, 1918.

RE SCATCHERD.

Distribution of Estates—Insolvent Estate of Intestate—Creditors' Claims—Payment Pari Passu whether Creditors Domestic or Foreign.

Motion by the domestic administrator of the estate of one Scatcherd, deceased, for an order determining a question arising on the administration of the assets of the estate.

The motion was heard in the Weekly Court, London.

F. P. Betts, K.C., for the domestic administrator.

T. Coleridge, for the foreign administrator (appointed by a Court of the domicile).

W. R. Meredith, for the infant beneficiaries.

MIDDLETON, J., in a written judgment, said that the estate was insolvent. The Ontario assets were enough to pay Ontario creditors in full, but the assets abroad were not enough to meet the claims of the foreign creditors, and the question submitted was, whether the Ontario creditors must be paid in full and the balance then be remitted for distribution in the Court of the domicile, among the creditors there.

Since In re Klœbe (1884), 28 Ch. D. 175, the right of all creditors, whether domestic or foreign, to be paid *pari passu,* had never been disputed.

The learned Judge's own decision in Re Donnelly (1911), 2 O.W.N. 1388, was cited as being opposed to this. The note of the decision was misleading, as the facts were not stated. There was no suggestion of insolvency. The deceased had a summer residence in Ontario. The foreign administrator and the beneficiaries asked approval of a scheme by which the Ontario administrator should convey this property to the heirs, in consideration of certain lands in Pittsburg, owned by the heirs, being conveyed to the foreign administrator. The Ontario creditors, save a small number, had been paid in full, and the foreign administrator proposed to place with the Ontario administrator enough money to pay the balance remaining due. In that case the learned Judge refused to assume any responsibility for the scheme proposed, and directed the Ontario (ancillary) administrator to yield the assets to the administrator of the domicile as soon as the Ontario creditors were paid and its own charges and advances were repaid. This had nothing to do with the question now raised.

Order declaring that all the creditors should be paid pari passu; costs out of the estste.

LATCHFORD, J. DECEMBER 13TH, 1918.

HATTON v. COUNTY OF PETERBOROUGH.

Municipal Corporations—Duty of County Corporation to Provide Offices and Furniture and Supplies for County Crown Attorney and Clerk of Peace—Municipal Act, R.S.O. 1914 ch. 192, sec. 377—Reimbursement of Moneys Expended—Mandamus to Corporation to Provide Offices—Remedy as to Furniture and Supplies.

Action by the County Crown Attorney and Clerk of the Peace for the County of Peterborough to recover $1,200 for office accommodation and other necessary things which he provided at his own expense and for a mandamus to the defendant county corporation to provide the same for him in the future.

The action was tried without a jury at Peterborough.
Daniel O'Connell, for the plaintiff.
E. D. Armour, K.C., and F. D. Kerr, for the defendants.

LATCHFORD, J., in a written judgment, said that the plaintiff had held the offices of County Crown Attorney and Clerk of the Peace for the County of Peterborough since October, 1914, and was an officer connected with the Provincial Courts of Justice within the meaning of sec. 377 of the Municipal Act, which imperatively casts upon the defendants the obligation of providing such an officer with "proper accommodation, fuel, light, stationery, and furniture."

The plaintiff alleged that the defendants had failed in the performance of their statutory duty towards him, and that he had in consequence been put to expense, for which he claimed to be reimbursed. He also asked for a mandatory order directing the defendants to provide him with proper offices, fuel, light, stationery, and furniture.

The defendants said that they had fulfilled their statutory obligations, and that, if there was any failure on their part to provide the proper offices etc., the plaintiff made use of such accommodation as the defendants provided and accepted the same as suitable and sufficient, and by his acquiescence was estopped from maintaining this action.

The learned Judge found that the defendants had not at any time provided the plaintiff, as an officer connected with the Provincial Courts of Justice, with proper offices.

The plaintiff was entitled to be reimbursed for the expenses he

has been put to owing to the remissness of the defendants: Lees v. County of Carleton (1873), 33 U.C.R. 409.

It was impossible to ascertain, upon the evidence given at the trial, the precise amount for which the defendants were liable.

Prior to the 10th March, 1916, the defendants had no proper notice that the plaintiff was not satisfied, as his predecessor had been, to use in connection with his official position his chambers in the central section of the city, and the room and vault, or vault alone, provided in the court-house. Even after that date, the defendants could not be held liable for more than a part of the plaintiff's office expenses. That part the learned Judge—sitting as a jury—estimated at $200 a year, which for the period from the 10th March, 1916, to the date of issue of the writ, the 12th July, 1918, amounted to $466.66. The plaintiff was entitled to be paid, in addition, $64 expended by him for furniture which it was the duty of the defendants to supply; or, in all, the sum of $530.66.

As the typewriting machine was not certified by the Attorney-General to be necessary (sec. 337 (1)), the defendants were not liable for its cost.

As to the application for a mandamus, there had been a demand by the plaintiff for the performance by the defendants of their duty to provide him with proper offices etc., and a neglect and refusal to comply with that demand.

The right to compel by mandamus the performance of a public duty in which the plaintiff is personally interested is not open to question: Toronto Public Library Board v. City of Toronto (1900), 19 P.R. 329.

The plaintiff was entitled, in addition to the damages stated, to a mandatory order requiring the defendants to provide him with proper offices.

No such order could properly be made as to fuel, light, stationery, and furniture. If they should not be provided, the plaintiff would have an appropriate remedy in an action for damages.

Judgment accordingly, with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 14TH, 1918.

RE MACSWINEY.

RE ROCHE.

Military Law—Disobedience of Lawful Military Commands—Refusal to Don Uniform—Sentence of Court Martial—Imprisonment with Hard Labour—Application for Habeas Corpus——Order in Council Suspending Habeas Corpus Act in Respect of Persons in Military Custody—Validity—Penalty for Disobedience—Canadian Militia Act, R.S.C. 1906 ch. 41, sec. 122.

Motion for a habeas corpus to bring up the bodies of two men now suffering imprisonment under the sentence of a court martial for disobedience of lawful military orders.

These men refused to obey the requirements of the Military Service Act and to don His Majesty's uniform, were sentenced to two years' imprisonment with hard labour, and were confined at Kingston.

Gordon Waldron, for the applicants.
W. N. Tilley, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that by order in council of the 30th April, 1918, all persons who in fact were or might thereafter be in or taken into military custody should be held and remain in custody without bail or inquiry until released by direction of the Minister of Militia or delivered by his order to the civil authorities, notwithstanding anything contained in the Habeas Corpus Act or any other law.

In the opinion of the Supreme Court of Canada, this order in council was valid law, and that prevented the granting of any writ.

But for this order in council, the learned Judge said, he would have granted the writ to permit the argument of the questions suggested and the taking of any appeal open in due course of law; but the questions discussed did not appear to him to be capable of solution in favour of the prisoners. Under the British Army Act the punishments awarded were warranted. What was contended was that a provision (sec. 122) of the Canadian Militia Act, R.S.C. 1906 ch. 41, imposing a fine of $10 for disobedience of any lawful command, gave the only penalty which could be imposed. The learned Judge could find no inconsistency between the provisions of the Canadian Act and the very drastic provisions of the British Act, which were essential to enforce obedience on

active service. It would require something very clear to convince him that our Parliament meant to pass so impotent a law as that suggested by counsel for the applicants, by which a man might avoid conscription on payment of $10, or by which his only punishment for any kind of disobedience to orders or insubordination on active service was limited to this nominal fine.

CORRECTION.

In MASON & RISCH LIMITED v. CHRISTNER, ante 186, at p. 187, the counsel for the plaintiff company were J. G. Kerr and J. A. McNevin.