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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1918.

*REX v. HARVEY AND TAYLOR.

Criminal Law—Conspiracy to Defraud—Evidence of Identity of one Prisoner—Trial by Judge without Jury—Sufficiency of Evidence to Sustain Conviction.

Case stated by WINCHESTER, Senior Judge of the County Court of the County of York.

The defendants were charged in the County Court Judge's Criminal Court for that they on the 27th September, 1917, in the county of York, did unlawfully conspire and agree together by deceit and falsehood or other fraudulent means to defraud John E. Thompson out of the sum of $2,170 in money, contrary to the Criminal Code; and further that the defendant Harvey at the time and place aforesaid fraudulently and knowingly by false pretences obtained from John E. Thompson $2,170 in money with intent to defraud, contrary to the Criminal Code.

The County Court Judge found both defendants guilty on the said charges; and, at the request of counsel for the defendants, reserved for the consideration of the Court the following questions:—

(1) Was there evidence admissible and sufficient against the accused on which they could properly be convicted on the said charges?

(2) Should I have admitted as evidence a certain book?

Evidence as to the identity of the defendant Harvey was given by the complainant at the trial before the County Court Judge. At the preliminary inquiry in the Police Court, the com-

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

plainant had sworn that he recognised the defendant Harvey as the man with whom he had dealings; but at the trial he said that he was not sure. "To the best of my knowledge, he was the man."

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

W. Horkins, for the defendants.

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

THE COURT were of opinion, for reasons stated at the conclusion of the hearing, that it could not be said that there was no evidence to support the conviction of Harvey; and, Harvey being convicted, there was ample evidence against Taylor.

MULOCK, C.J. Ex., said that, if the case had been tried before him with a jury, he should not have allowed the case against Harvey to go to the jury.

CLUTE and RIDDELL, JJ., thought the case could not have been withdrawn from a jury.

THE COURT answered the first question in the affirmative. The second question then became immaterial.

Conviction affirmed.

SECOND DIVISIONAL COURT. MARCH 1st, 1918.

*BARCHARD & CO. LIMITED v. NIPISSING COCA COLA BOTTLE WORKS LIMITED.

Chattel Mortgage—Action by Division Court Judgment Creditors of Mortgagor to Set aside—Mortgage Void under Bills of Sale and Chattel Mortgage Act—Failure to Issue Execution under Division Court Judgments—Neglect to Adopt Simple and Inexpensive Procedure—Amounts of Judgments Paid by Judgment Debtors after Commencement of Action to Set aside Chattel Mortgage—Costs of Action and Appeal.

An appeal by the defendants from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiffs in an action to set aside a chattel mortgage made by the defendant company to the defendant Taylor.

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

Gideon Grant, for the appellants.

W. S. Brewster, K.C. for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment, in which he said that the plaintiffs recovered two judgments, for $100 each, against the defendant company in a Division Court; but, instead of proceeding, in the ordinary manner, to enforce these judgments in that Court, and without as much as issuing execution there, they began this action, in the Supreme Court of Ontario, against their judgment debtors and the defendant Taylor, to set aside a chattel mortgage made by them to him—in order that the plaintiffs might make the amounts of their judgments out of the mortgaged goods of the defendant company.

The usual and the proper course in such a case is to seize the mortgaged goods under execution in the Division Court, and, in case of a claim to them being made by the mortgagee, to litigate that claim in the Division Court in interpleader proceedings.

The plaintiffs were perhaps within their strict rights in beginning another action for the purpose of determining whether the mortgage was invalid against creditors of the mortgagors under the Statute of Elizabeth or under the Bills of Sale and Chattel Mortgage Act; but, if successful in such an action, should have no more costs than would have been allowed to them if they had taken the simpler and cheaper course: Goldsmith v. Russell (1855), 5 DeG. M. & G. 547; Reese River Silver Mining Co. v. Atwell (1869), L.R. 7 Eq. 347, 350, 352.

Some time after this action was brought, the judgment debtors paid to the plaintiffs and the plaintiffs accepted payment of the amounts of both Division Court judgments; and steps were thereupon taken to have the question of the costs of this action disposed of at Chambers; but, as the parties were not able to agree upon the facts, the Master in Chambers referred the matter to the trial Judge; and the action was brought on for trial in the usual way.

The defendants' contention then, and throughout, was, that the chattel mortgage was valid, and therefore they should not pay any of the costs of this action. The plaintiffs' contention throughout was, that the mortgage was invalid against creditors, and therefore they should have all the costs of this action.

The trial Judge, finding the parties at issue on the question of costs and the means of recovering such costs only, thought there was no course open to him but to try the action, and the trial was

had accordingly. The Judge found that the chattel mortgage was void, under the provisions of the Bills of Sale and Chattel Mortgage Act, against creditors of the mortgagors, and awarded to the plaintiffs their costs of the action.

The evidence supports the finding of the trial Judge: the mortgagee took the wrong kind of a mortgage, and must now take the consequences which the Act attaches.

After this action was brought, the plaintiffs' claim was not for the amounts owed to him upon the Division Court judgments only—it was for the costs of this action also; and the payments which were made were but part payments of a greater claim. It was true that the costs did not become a debt until adjudged to the plaintiffs; but, when adjudged, why should an invalid mortgage stand in the way of enforcing payment of them? It could hardly be in the interests of any of the parties to go through the form of another trial to reach a conclusion already reached between the same parties. If the mortgage was invalid against creditors when the action was tried, it is still equally invalid, and should not be permitted to stand in the way of enforcement of the balance of the plaintiffs' claim in this action, now in the form of a judgment of this Court.

The appeal should be dismissed, but without costs—not because of any merits of the appellants, who had been unduly litigious, but because of the demerits of the respondents in taking unnecessary, unusual, and costly steps to enforce rights when they could have been better enforced in the usual speedy and inexpensive way.

RIDDELL, J., for reasons stated in writing, agreed that the appeal be dismissed without costs.

LENNOX and ROSE, JJ., agreed in the result.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. MARCH 1ST, 1917.

*REX v. BAINBRIDGE.

Criminal Law—Indictment for Seditious Libel—Single Count—Demurrer—Motion to Quash—Amendment—Jury—Verdict of "Guilty"—Effect of—Consent of Grand Jury to Amendment of Indictment—Necessity for—Trial upon Seven Libels—Conviction upon two—Only one Found by Grand Jury—Discharge of Prisoner.

On the 22nd November, 1917, the accused was tried before HODGINS, J.A., and a jury, and convicted, upon an indictment for a seditious libel.

Some questions as to the regularity of the indictment and other questions were raised at the trial by demurrer and motion to quash and were overruled by the Judge, who refused to state a case for the appellate Court: see ante 218.

The accused moved a Divisional Court of the Appellate Division for leave to appeal from the convictions. Leave was granted, and the trial Judge directed to state a case: ante 338.

The case stated by the trial Judge was heard by MACLAREN and MAGEE, JJ.A., CLUTE, J., FERGUSON, J.A., and ROSE, J.

R. T. Harding, for the accused.

Edward Bayly, K.C., for the Crown.

MAGEE, J.A., read a judgment in which, after referring to facts and citing authorities and provisions of the Criminal Code, he said that the questions asked in the stated case should be answered as follows:—

(1) Should the demurrer to the indictment have been allowed? A. Yes.

(2) Should the motion to quash the indictment have been allowed. A. Yes.

(3) If the two previous questions, or either of them, are answered in the affirmative, does the verdict make the indictment good? A. No.

(4) Could the amendment of the indictment which was made at the trial be rightly made without the privity of the grand jury? A. No.

(5) Should such amendment have been made in any case? A. Not without the privity and consent of the grand jury.

(6) Was there any impropriety or defect in the proceedings

at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury? A. Yes. The accused was tried upon seven libels, and was convicted upon two, when the grand jury had found a true bill upon one only, which was not known to be either of the two.

The prisoner should be discharged.

MACLAREN, J.A., and ROSE, J., agreed with MAGEE, J.A.

CLUTE, J., also read a judgment. For reasons stated at length, he reached practically the same conclusions as MAGEE, J.A., though his answers to questions 5 and 6 were in different words.

He added that the Crown should not be precluded, if so advised, from preferring a new indictment.

FERGUSON, J.A., agreed with CLUTE, J.

Prisoner discharged.

FIRST DIVISIONAL COURT. MARCH 1ST, 1918.

WHYTE v. HENDERSON.

Principal and Agent—Commission on Sale of Secret Process—Contract—Liability—Joint Obligation to two Agents—Release by one—Effect of—Judgment—Declarations—Payment of Moiety of Commission to one Agent—Recital in Judgment—Reference Unnecessary—Costs—Appeal.

Appeal by the defendant from the judgment of MASTEN, J., 12 O.W.N. 346.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., LATCHFORD, J., and FERGUSON, J.A.

E. D. Armour, K.C., for the defendant.

I. F. Hellmuth, K.C., and Neil Sinclair, for the plaintiff, respondent.

The judgment of the Court was read by HODGINS, J.A., who said that the trial Judge, after making certain declarations, referred it to the Master in Ordinary to inquire "and report what

was the share in the said commission to which the late Edward D. Whyte became and was entitled, and what part or portion thereof, if anything, is still due to the plaintiff herein from the defendants or either of them, having regard to the declarations aforesaid."

The declarations were: (1) that the agreement to pay commission was established, and that thereunder a commission of 10 per cent. became payable by the appellant to Edward D. Whyte and the defendant Gordon; (2) that the manner of payment was to be by money and shares as described; (3) that the beneficial interest in the commission to which Whyte became entitled did not, in consequence of his death, pass to the defendant Gordon, but that the appellant is liable to the plaintiff for Whyte's share.

When this case was before this Court previously, it was expressly decided that the contract sued on was a joint one, and that the respondent must add the co-contractee before judgment could be given. This had now been done. The judgment, consequently, must be for recovery by both parties, the respondent and the added defendant, against the appellant, as was done in Cullen v. Knowles, [1898] 2 Q.B. 380. This situation was correctly apprehended in the judgment now appealed from, and paras. (1) and (2) were correct in form and in law.

It appeared, however, from the evidence taken in this case on the former trial, and was not now disputed, though not formally proved at the new trial, that the appellant had settled with the defendant Gordon, paying him a moiety of the commission earned under the agreement sued on; and the defendant Gordon, as between himself and the respondent, admitted by his silence in face of para. 19 of the amended statement of claim, that the respondent was entitled to the other moiety.

In these circumstances, a reference was unnecessary, unless the appellant wished to prove formally therein, at his own expense, the fact of the settlement with the defendant Gordon. If not, judgment might properly be entered for the respondent for one half of the commission, payable as set out in para. 2 of the judgment in the Court below, the same being prefaced by a recital that the appellant had paid to the defendant Gordon his moiety of the commission, and that Gordon admitted, under the pleadings in this action, the right of the respondent to the other moiety; and there should also be included a declaration that, upon the appellant paying the respondent the remaining moiety, he should be entirely discharged from all further liability under the contract sued on. This would safeguard the appellant. If he desired it, he might reserve his right against Gordon to recover from him the

amount paid to the respondent under this judgment or any part of it.

The respondent should have the general costs of the action, but not such as were occasioned throughout by her omission to add Gordon as a party when the action was begun. The costs dealt with under the former order of this Court were not otherwise dealt with by the trial Judge, and could not now be interfered with. The appellant failed substantially in the appeal, and should pay the costs of it.

FIRST DIVISIONAL COURT. MARCH 1ST, 1918.

*REID v. MORWICK.

Husband and Wife—Business Carried on in Name of Husband—Claim by Wife to Assets of Business as against Execution Creditor of Husband—Business Begun on Moneys Supplied by Wife from Separate Estate—Joint Venture—Partnership between Husband and Wife—Married Women's Property Act, secs. 4 (2), 7 (1)—Husband's Share of Assets Liable to Satisfy Execution—Findings of Trial Judge—Credibility of Witnesses—Inferences from Facts—Appeal.

Appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action with costs.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., CLUTE, J., and FERGUSON, J.A.

Peter White, K.C., and W. H. Lockhart Gordon, for the appellant.

A. M. Lewis, for the defendants, respondents.

A judgment was read by FERGUSON, J.A., who said that the plaintiff was an execution creditor of the defendant William Morwick. The defendant May Ann Morwick was the wife of William. The issue tried was, whether or not the assets of a certain business carried on in the name of William Morwick were exigible under the plaintiff's executions, they being claimed by Mary Ann Morwick. The action was prosecuted on the basis that any claim of Mary Ann Morwick to the goods was dishonest. It was, however, clearly established that her money was used to purchase the plant with which the business was commenced; and in her testimony she stated that she neither gave nor lent

that money to her husband; also that it was well understood that everything was hers, and not her husband's. The learned trial Judge accepted this testimony as trustworthy. The understanding deposed to did not appear to be based on any agreement, but to be simply an inference, in which the learned trial Judge agreed. His mind apparently was not directed to the idea that the transaction between the husband and wife might have been in the nature of a joint venture.

In the view of FERGUSON, J.A., the result turned on the proper inferences to be drawn from the acts of the defendants, accepting the finding of the learned trial Judge that the evidence of the defendants as to what they severally said and did was trustworthy. In accepting that finding, but refusing to adopt as binding the understanding of either of the defendants as told in the witness-box, or the inference of the trial Judge, there was no intention to depart from the usual practice of the Court of accepting the findings of the trial Judge, as to the credibility of the witnesses.

After an exhaustive statement of the facts and review of the evidence, and reference to the Married Women's Property Act, R.S.O. 1914 ch. 149, secs. 4 (2), 7 (1); Cooney v. Sheppard (1896), 23 A.R. 4; Laporte v. Cosstick (1875), 23 W.R. 133; and other authorities; the learned Justice of Appeal said that the effect of the Act was to enable a married woman who has separate estate to enter into partnership with her husband.

The defendants entered into a joint venture, without an express agreement as to the wife's share, and she was entitled to share equally with her husband therein.

Reference to In re Simon, [1909] 1 K.B. 201.

The original investment of $500 by the wife was a capital contribution by her from her separate estate; and the profits and assets of the business over and above this original contribution are owned by the defendants equally.

The appeal should be allowed, and there should be a judgment for the plaintiff declaring that the defendants are equal partners in the business carried on in the name of William Morwick, and that his share in the partnership business and assets is liable to satisfy the plaintiff's execution.

MACLAREN and MAGEE, JJ.A., agreed in the conclusion of FERGUSON, J.A.

HODGINS, J.A., and CLUTE, J., dissented, reasons in writing being given by each of them.

Appeal allowed; HODGINS, J.A., *and* CLUTE, J., *dissenting.*

SECOND DIVISIONAL COURT. MARCH 1st, 1918.

CANADIAN BARTLETT AUTOMOBILE CO. LIMITED v. GRAND TRUNK R. W. CO.

Railway—Carriage of Goods—Contract—Bill of Lading—Conditions—Liability for Delivery to Unauthorised Person—Loss or Damage to Goods not Resulting—Real Loss—Deprivation of Control—Damages.

Appeal by the plaintiffs from the judgment of the County Court of the County of Perth in an action to recover $755, the amount of a draft, because, in breach of their agreement as carriers of an automobile, the defendants delivered it, without the order of the bank, the consignees, to some one who had retained possession of it. The County Court awarded the plaintiffs $25, and by the appeal they sought to increase the amount.

The appeal was heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

R. S. Robertson, for the appellants.

W. E. Foster, K.C., for the defendants, respondents.

H. S. White, for the third party, the Meaford Transportation Company, respondents.

The judgment of the Court was read by ROSE, J., who said that the plaintiffs, who carried on business at Stratford, sold a motor car to one Purvis, who lived at Gore Bay, Manitoulin Island. The car having been destroyed by fire, the plaintiffs, in the hope that Purvis would accept another, of a later model, shipped a car to Providence Bay, the landing place on Manitoulin Island, consigned to the order of a bank, and forwarded the bill of lading to the bank, with a draft upon Purvis for $755 attached, instructing the bank to deliver the bill of lading to Purvis only upon payment of the draft.

The agreement for the sale of the car that had been destroyed contained a warranty that the car would in certain particulars compare favourably with certain other well-known makes of cars; and there was a provision that the vendors' "demonstrator" would deliver the machine. To demonstrate the qualities of the second car, the plaintiffs sent their secretary, Steepe, to Manitoulin Island. They also notified their own sales-agent on the Island that, while they felt that they must have payment before delivery to Purvis, Steepe would "be right on the job to take the

matter up with" the agent; and they assured the agent that, if the car was found not to be as represented, they would immediately forward their cheque.

Before the car reached the Island, the bill of lading, with the draft attached, came to the hands of the bank; the draft was presented; payment was refused; and the bank returned the documents to the plaintiffs. When Steepe learned of this, he tried to induce the plaintiffs to consent to the delivery of the car without payment. This the plaintiffs would not do; but they authorised the railway company (defendants) to make delivery upon receipt of a cheque. Steepe had no knowledge that this authority had been given; but Purvis apparently said that he had made or could make arrangements with the bank. Accordingly, when the car had reached Providence Bay, Steepe and Purvis went there, and Steepe paid the freight charge to the wharfinger, in whose custody the car was, and induced him to let Steepe take it away. Purvis then returned to Gore Bay; and, after a day or two, Steepe followed in the car, and during the next few days drove the car with Purvis in it to various places to which Purvis wished to go. On the last of these days, a break-down occurred, and Purvis announced that he would not accept the car. Steepe then left the car in Purvis's barn, and returned to Stratford. Correspondence ensued; Purvis adhered to his refusal to accept the car; and finally took it to the wharf and put it in a shed, where it still was when the action was tried, in the same condition as when Steepe left it.

The plaintiffs' claim depended upon the contract between them and the defendants. The contract was in writing, in the form of a bill of lading, signed by both parties. By it, the defendants agreed to carry the car to Providence Bay "if on its road, otherwise to deliver to another carrier on the route to said destination;" and it was stipulated that the surrender of the original bill of lading, properly endorsed, should be required before the delivery of the car. Providence Bay is not on the defendants' road; and they performed this part of their contract when they handed the car over to the Meaford Transportation Company (third parties) for carriage to Providence Bay. However, endorsed upon the bill of lading was a condition making the defendants "liable for any loss, damage, or injury to" the car "caused by or resulting from the act, neglect, or default of" the third parties. The third parties have no wharf or warehouse of their own at Providence Bay; their ships dock at the Government wharf, and the goods arriving by these ships are delivered into the custody of a wharfinger appointed by the Government and paid by the

retention of part of the fees collected by him. He it was who allowed the car to be taken without the surrender of the bill of lading.

It was not necessary to pass upon the question of the third parties' responsibility for the wharfinger's act; for, even if the unauthorised delivery to Steepe (or to Purvis, if it could be said to have been to him) was an "act, neglect, or default of" the third parties, it did not cause or result in any "loss, damage, or injury to" the car; and so the condition endorsed upon the bill of lading did not make the defendants liable. The car was not lost; if it ever got into the possession of Purvis, he refused to keep it, and, if it is still on Manitoulin Island, it is there because first Steepe and then the plaintiffs refused to take it away.

Assuming that the defendants were responsible for the unauthorised delivery, and guilty of a conversion of the car, the damages recoverable were limited to the real loss caused to the plaintiffs by the deprivation of their control over the car, from the time of the wrongful delivery until the time when their control was re-established, if they chose to exercise it: Lemon v. Grand Trunk R. W. Co. (1914), 32 O.L.R. 37. If there was any such real loss, it was less than $25, the sum which was awarded to the plaintiffs by the County Court, and which the defendants did not object to pay. If the plaintiffs had a contract with Purvis by which he came under obligation to pay for the car, nothing that was done or omitted by the carriers or the wharfinger had relieved him of that obligation; if there was no such contract, the plaintiffs did not prove that they had sustained a real loss by saying that, perhaps, if the third parties had refused to part with the car until payment was made, Purvis might have paid the amount of the draft.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 1ST, 1918.

*DOMINION PAPER BOX CO. LIMITED v. CROWN TAILORING CO. LIMITED.

Sale of Goods—Unfitness for Purpose Intended—Return of Part of Goods only—Misrepresentation by Vendor's Agent—Right to Repudiate Whole Contract—Loss of Right by Retention of Part of Goods—Warranty or Condition of Fitness—Breach—Right to Reject Part—General Damages—Special Damage—Damages in Respect of Quality of Goods Used or Retained—Appeal—Cross-appeal—Costs.

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of the County Court of the County of York.

The appeal and cross-appeal were heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

M. H. Ludwig, K.C., for the plaintiffs.

R. D. Moorhead, for the defendants.

ROSE, J., read a judgment in which he said that the defendants ordered from the plaintiffs 19,000 paper boxes; the plaintiffs made and delivered to the defendants 8,500 boxes. The defendants used some of these; but, finding that they were not strong enough, returned to the plaintiffs what remained on hand, except so many as the defendants thought they would need pending delivery to them of boxes ordered from another maker, at the same time sending to the plaintiffs a cheque for the price, as they computed it, of the boxes used or retained. The plaintiffs refused to accept the cheque or to acknowledge the defendants' right to reject the boxes, and sued in the County Court for the price of the boxes delivered and for damages for breach of contract. The defendants, besides denying that the boxes delivered were such as they were bound to accept, alleged that they had suffered loss by reason of the plaintiffs' breach of contract to deliver boxes fit for the purposes for which the boxes were intended; and, although they did not put upon the record a formal counterclaim for such damages, they gave evidence in support of their allegation, and at the trial asked leave to amend by adding a counterclaim. The leave was not expressly granted or refused, and the motion was renewed before this Court.

At the trial, judgment was given in favour of the plaintiffs for $105 and costs.

The plaintiffs appealed, contending that they had established their right to payment for all the boxes delivered and to damages for the defendants' refusal to accept the whole number ordered; and the defendants cross-appealed against the judgment for $105 and against the refusal of the trial Judge to give them damages upon their counterclaim.

The defendants asked the plaintiffs to quote prices for boxes such as the defendants required. The plaintiffs sent a salesman, Skinner, to see the defendants. The defendants described to Skinner the kind of boxes they required and told him of the purpose for which they were required, and he left specimen boxes with the defendants, assuring them that these boxes were suitable for the purposes specified. The defendants accepted Skinner's assurance, and, relying upon his judgment, gave him the order. As soon as the defendants began to use the boxes, it became apparent that they were not fit for the purpose for which they were required—that is, to contain parcels of clothing.

Skinner, in negotiating with the defendants, made a misrepresentation as to the use of the boxes by another dealer; it was not a fraudulent misrepresentation; but it was a material representation, inducing the contract, and Skinner was the man put forward by the plaintiffs to negotiate the contract; so that the defendants were entitled to repudiate upon learning the facts. The right to repudiate because of this misrepresentation was a right to repudiate the contract as a whole—the defendants could not affirm as to part, as they did by retaining some of the goods, and repudiate as to the remainder. Therefore, they could not rely upon the misrepresentation; and the inquiry was narrowed to the effect of the breach of an alleged warranty or condition.

Through Skinner the defendants made known to the manufacturers the purpose for which the boxes were to be used; and they relied upon the skill of the manufacturers to furnish boxes reasonably fit for that purpose; so that there was an implied condition that the goods should be fit for the purpose; and, that condition being broken, the defendants had the right to reject the goods. The case fell within the 4th rule in Jones v. Just (1868), L.R. 3 Q.B. 197, rather than within the 3rd rule: see Ontario Sewer Pipe Co. v. Macdonald (1910), 2 O.W.N. 483; Hopkins v. Jannison (1914), 30 O.L.R. 305.

The fact that specimen boxes were exhibited made no difference; the sale was not "by sample."

In the case of a sale of a number of articles each one of which must be of the kind and quality ordered, the purchaser is not bound to reject or retain all: Molling and Co. v. Dean & Son

Limited (1901), 18 Times L.R. 217. The defendants were entitled to accept some, as they did, and to reject the others. General damages are recoverable only where the property has passed: Frye v. Milligan (1885), 10 O.R. 509; and there was no evidence of special damage in respect of the boxes returned.

The only damages recoverable by the defendants were such as, treating the stipulation as to quality as a warranty, they could prove that they had sustained by the breach of that stipulation in respect of the boxes used or retained. The defendants should be allowed to amend their pleadings, and to have (at their own risk) such damages ascertained in the County Court and set off against the plaintiffs' claim.

The judgment in favour of the plaintiffs should be reduced to $99.87, the price of the boxes used or kept by the defendants, with costs in the County Court upon the appropriate scale; the plaintiffs to pay the costs of their appeal. No costs should be specially taxed in respect of the cross-appeal, which did not materially add to the expense in this Court; and the costs of the reference back, if the defendants elected to take one, should be in the discretion of the County Court Judge.

MACLAREN and FERGUSON, JJ.A., concurred.

LENNOX, J., dissented, for reasons briefly stated in writing.

Judgment below varied as stated by ROSE, J.

SECOND DIVISIONAL COURT. MARCH 1st, 1918.

*CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Company—Trustees and Directors—Breaches of Trust—Sums Paid to Directors out of Price Paid by Company for Land—Right of Shareholders to Compel Repayment to Company—Sum Paid by Officers of Company to Director as Commission upon Resale of Land—Right to Compel Repayment—Liability of Directors for Repayment—Certain Directors not Directly Concerned—Evidence.

Appeals by the defendants and cross-appeal by the plaintiff from the judgment of MASTEN, J., 11 O.W.N. 51, 37 O.L.R. 611.

The appeals and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

I. F. Hellmuth, K.C., for the appellant Fullerton.

W. N. Tilley, K.C., and D. Urquhart, for the appellants Murray, Gibson, and Bryan.

H. J. Macdonald, for the executors of the deceased defendant Doran, appellants.

J. E. Lawson, for the defendant company.

A. C. McMaster and J. H. Fraser, for the plaintiff, respondent and cross-appellant.

MEREDITH, C.J.C.P., read a judgment in which he said that at the trial of the action the plaintiff's claims were reduced to four items, involving three separate questions; at the hearing of the appeal, they were further reduced to three items, involving two separate questions—the plaintiff abandoning the fourth item and third question, upon which he had failed at the trial.

The items now in question were: $3,867.25 claimed from the defendant Fullerton; the like sum claimed from the estate of Doran, deceased; and a further sum of $8,121.22 claimed from the same estate. The one question covered the first two items; the third item involved another and altogether different question.

Question 1: whether the plaintiff can compel payment, to the defendant company, of the first two items, the amounts of which were received by the defendants Fullerton and Doran, respectively, out of the price paid by the company for the land in question.

Question 2: whether the plaintiff can compel repayment to the company of the amount of the third item, which was paid by the company, or its officers, to Doran, in his lifetime, as a commission upon a sale of the company's lands.

These questions, the learned Chief Justice holds, were rightly decided by Masten, J., in favour of the plaintiff.

The plaintiff had a right to enforce his interests in these matters in the name of the company, though all other shareholders should release theirs.

The learned Chief Justice was also of opinion that the evidence was sufficient to connect the defendants Gibson and Bryan with the improper payment to Doran of the $8,121.22.

The appeal should be dismissed; and the cross-appeal, having been abandoned, should also be dismissed.

LENNOX, J., agreed with the Chief Justice.

ROSE, J., read a judgment in which he said he agreed that the defendant Fullerton and the Doran estate, respectively, must

account for the payments made to Fullerton and Doran by Wallace out of the profit made by him upon his sale to the defendant Fullerton as trustee.

With regard to the item of $8,121.22, the learned Judge reached the conclusion that there was no authority for the payment; that the Doran estate was liable; that the defendants Fullerton and Murray, who signed the cheque, were also liable; but that the other directors, the defendants Gibson and Bryan, were not liable.

RIDDELL, J., agreed with ROSE, J.

Appeal dismissed; RIDDELL *and* ROSE, JJ., *dissenting on one point.*

SECOND DIVISIONAL COURT. MARCH 1ST, 1918.

*COOK v. HINDS.

Company—Directors—Remuneration for Services as Managers—By-law—Necessity for Approval by Shareholders—Duties of Directors as Servants or Agents of Company—Application of Law of Principal and Agent—Breach of Duties—Destruction of Future Prospects of Company—Construction Company—Obligations to Carry out Contracts and Attract Further Business—Inseparable Duties.

Appeal by the plaintiff from the judgment of MASTEN, J., 12 O.W.N. 404.

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

Wallace Nesbitt, K.C., and A. M. Stewart, for the appellant.

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

RIDDELL, J., in a written judgment, said that, in all matters of consequence in this appeal, he accepted the findings of fact of the trial Judge and based thereon the findings about to be made.

The defendants, directors of a construction company, and acting as servants or employees of the company, made up their minds as early as July or August, 1911, that, while they would faithfully act as servants of the company in completing contracts

already entered into, they would not endeavour to obtain any further contracts for the company. In July or August, 1911, G. S. Deeks spoke to the Canadian Pacific Railway officials and told them that any future contracts would not be taken for the company but for himself and his confrère. This continued to be the fixed purpose and intention of the defendants. They carried on the affairs of the construction company in an eminently satisfactory manner so far as the construction contracts were concerned, i.e., so far as the carrying out of contracts already entered into was affected; but they did so in such a way as to destroy the business of the company and prevent its success in procuring further business to do.

"Where the transactions between a principal and his agent are severable, and in some of them the agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the cases in which he has been honest, but is not entitled to it in the instances in which he has been dishonest:" head-note in Nitedals Taendstikfabrik v. Bruster, [1906] 2 Ch. 671. And it is equally clear that where the agent is to be paid for several inseparable duties, unfaithfulness—even without fraud—in the performance of any one of those duties will disentitle him to all remuneration: cf. what is said by Kennedy, J., in Hippisley v. Knee Brothers, [1905] 1 K.B. 1, at p. 9.

Remembering that it was the duty of faithful servants, agents, employees—whatever name may be thought proper—so to carry on the business of the company as to attract further business and not to put the company out of business, the learned Judge could not think that the defendants were faithful to the company at all—the duties were not severable, but inseparable.

Reference to Palmer v. Goodwin (1862), 13 Ir. Ch. R. 171, 172.

The defendants might very steadily and very faithfully complete the contracts already had, and yet very steadily and very completely destroy the company's business prospects—they had the general management of the company's business, not simply the supervision of work in the field. They failed in their duty at least as early as August, 1911, and thence continuously till the close of the company's business.

The learned Judge said that he was not applying any supposed rule of trusteeship on the part of directors, but the ordinary rules governing principal and agent; and, upon the application of these rules, the defendants were not entitled to any remuneration from the company whose whole future they were ruining, even had it previously been understood that they should be paid.

Not being entitled to remuneration after August, 1911, they could not receive from the company any remuneration for that time without the unanimous consent of the shareholders.

The by-law provided for remuneration from the 1st May, 1909, to the 23rd February, 1912. This must be set aside on this record. There is no need of expressing any opinion as to whether, had the by-law limited remuneration to August, 1911, as the latest date, it would be valid.

Nor did the learned Judge consider the argument that the by-law was not bona fide.

The appeal should be allowed with costs here and below.

LENNOX and ROSE, JJ., for reasons stated by each of them in writing, agreed that the appeal should be allowed.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 25th, 1918.

*RE SHEPARD AND ROSEVEAR AND MOYES CHEMICAL CO. LIMITED.

*RE MOYES CHEMICAL CO. LIMITED AND HALSTED.

Mortgage—Mortagors and Purchasers Relief Act, 1915—Application of, to Derivative Mortgage—Stay of Proceedings upon Mortgage—Motion by Mortgagee, Maker of Derivative Mortgage—Motion for Leave to Commence Proceedings against Original Mortgagors—Agreement to Pay Higher Rate of Interest—Costs.

Motion by the Moyes Chemical Company Limited for an order for leave to commence proceedings against George Shepard and Charles L. Rosevear, the makers of a mortgage to the applicants and the owners of the mortgaged land, if the Court should be of opinion that such proceedings should be allowed; and for an order staying the proceedings instituted by the executors of James Addison Halsted, deceased, under the Winding-up

Act, against the applicants, and restraining the executors from commencing an action or other proceedings against the applicants upon their covenant to pay to the deceased Halsted the sum of $4,000 secured by an assignment of the Shepard and Rosevear mortgage by the applicants to him.

The motion was made under sec. 2 of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22.

H. J. Martin, for the applicants.
H. A. Newman, for Shepard and Rosevear.
F. J. Hughes, for the executors of Halsted.

MIDDLETON, J., in a written judgment, said that the land was worth $34,000; there was a first mortgage upon it for $15,000; the applicants' mortgage was a second mortgage for $4,900; and the derivative mortgage to Halsted was for $4,000.

As between the mortgagors (Shepard and Rosevear) and the applicants, it had been arranged that the mortgage should stand at 7 per cent. interest. The mortgagors could not pay by reason of war conditions; and there seemed to be such a margin in the property that the delay could not prejudice the applicants.

The interest upon the derivative mortgage to Halsted was at 10½ per cent. The executors contended that a derivative mortgage is a mortgage of personal property, and not within the Mortgagors and Purchasers Relief Act, 1915.

What must be ascertained is the intention of the statute. It relates to "the recovery of money secured by mortgage" (sec. 2 (1) (*a*)), and prohibits action, in certain circumstances, to recover money "secured by any mortgage of land or any interest therein" (ib.) A mortgagee has an "interest in land" and the loan upon the derivative mortgage is money secured by a mortgage of this interest, and so the statute prevents action to recover it, not only as against the land, but by any collateral remedy.

On the merits, the application should be granted and proceedings stayed.

The applicants should have their costs, $20 against the mortgagors and $20 against the executors of Halsted, to be paid in 10 days.

ROSE, J., IN CHAMBERS. FEBRUARY 25th, 1918.

RE HUTSON AND DAVIDSON.

Mortgage—Application for Leave to Enforce by Foreclosure or Sale—Mortgagors and Purchasers Relief Act, 1915, sec. 2—Application Granted unless Mortgagors Agree to Terms—Increase in Rate of Interest.

Motion by mortgagees, under sec. 2 of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, for leave to take proceedings for foreclosure or sale.

E. G. Long, for the applicants.
A. T. Hunter, for the mortgagors.

ROSE, J., in a written judgment, said that he thought this a case for an arrangement something like that made in Re Thomas and Morris (1915), 8 O.W.N. 403. He would grant leave to commence proceedings unless the mortgagors would increase the rate of interest to 6½ per cent. and pay over to the mortgagees the net revenue derived from the mortgaged premises. Provision ought to be made: (a) for the furnishing of periodical statements of income and disbursements; (b) that the annual payments of $1,000 on account of the principal of the first mortgage and all the interest upon that mortgage should be taken into account in arriving at the net revenue; (c) that the mortgagees might apply if any statement was not furnished or was unsatisfactory, or if any payment was not made. The parties would probably be able to agree upon the details of the arrangement; but, if there should be difficulty, they might speak to the learned Judge.

The mortgagees ought to have the costs of this motion.

FALCONBRIDGE, C.J.K.B. FEBRUARY 26TH, 1918.

TEESON v. GRAND TRUNK R.W. CO. AND TORONTO R.W. CO.

Negligence—Street Railway Crossing Tracks of Grand Trunk Railway—Street-car Stopping on Crossing—Danger from Engine—Panic among Passengers on Street-car—Injury to Passenger—Negligence of both Companies—Defective Condition of Appliances—Failure to Operate Gates—Absence of Contributory Negligence.

Action for damages for injuries sustained by the plaintiff by reason of the negligence of the defendants.

The action was tried without a jury at Toronto.

T. N. Phelan, for the plaintiff.

D. L. McCarthy, K.C., for the defendants the Grand Trunk Railway Company.

Peter White, K.C., for the defendants the Toronto Railway Company.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that on the 5th April, 1917, the plaintiff, a widow, was a passenger on an east-bound car of the Toronto Railway Company—a car carrying from 30 to 35 passengers. This car proceeded to cross the tracks of the Grand Trunk Railway Company at De Grassi street. While the car was in the act of crossing the Grand Trunk tracks, it was brought to a stop on the tracks, and at that moment the headlight of a Grand Trunk train was seen to the north—whether actually approaching or not was not quite clear, but at any rate a lady cried out, "Oh, the engine is on top of us!" and a panic ensued among the passengers; a rush was made for the door, and the plaintiff was jostled or carried out of the car, and sustained personal injuries. She alleged negligence on the part of both defendants.

The learned Chief Justice finds that there was negligence on the part of the Toronto Railway Company in that the motorman proceeded to cross the Grand Trunk tracks without first looking for trains, and stopped his car on the tracks of the Grand Trunk.

There are three measures of precaution which are or ought to be adopted in order to prevent what happened here:—

(*a*) The furnishing and placing in position and maintanance of the derail. This is the duty of the Toronto Railway Company.

(*b*) Gates to prevent street-cars from going on the tracks when a train is expected.

(*c*) Semaphores.

The cost of the erecting of the semaphores, gates, and derails, and their attachments, is borne and paid by the Grand Trunk Railway Company.

The learned Chief Justice finds that the Toronto Railway Company was also guilty of negligence in respect of the plant operating the derail switch; that the set-screw was in a defective condition, and had been, from its appearance, in that condition for so long a time that a reasonable inspection would have revealed its condition.

He also finds that the Grand Trunk Railway Company was guilty of negligence in failing to operate the gates until it was too late. When any defect existed in the operation of the gates, the Grand Trunk Railway Company should have placed a watchman with a flag or lantern to supply the place of the gates.

The plaintiff should have leave to make any amendments that may be necessary in view of the above findings.

There was no contributory negligence on the part of the plaintiff. She was placed in a position of danger, and followed the natural instinct of self-preservation, if indeed she got off the car of her own volition. Probably she was thrown or hustled off by the other passengers.

The actual damages proved were $163; to this should be added $500 for the injury to her nervous system; and there should be judgment for the plaintiff against both defendants for $663, with costs on the Supreme Court scale.

As between the defendants there was no third party notice or claim for indemnity.

The finding being that both defendants were negligent, the cases cited by counsel for the Grand Trunk Railway Company do not apply so as to exonorate that company.

MIDDLETON, J. FEBRUARY 27TH, 1918.

*RE ASPEL.

Will—Construction—Charitable Gifts—Inaccurate Description of Objects of—Ascertainment by Evidence—Undisposed of Residue—Claim to, by Executors for themselves Beneficially—Trustee Act, sec. 58—Indication to the Contrary in Will—Provision for Remuneration of Executors—Claim of Charities to Residue—General Gift for Charitable Purposes—Testator without Living Relations—Executors Holding in Trust for Crown—Inquiry for Claimants.

Motion by the executors of the will of William Aspel for an order determining questions arising as to the meaning and construction of the will.

The motion was heard in the Weekly Court, Toronto.

W. T. Evans, for the executors.

G. H. Sedgewick, for the Corporation of the City of Hamilton.

E. F. Lazier, for the Hamilton Health Association.

W. S. MacBrayne, for the Synod of the Diocese of Niagara.

S. H. Slater, by appointment, for the unknown heirs or next of kin of the testator.

A. H. Gibson, for the Aged Women's Home and Hamilton Veteran Association.

J. M. Godfrey, for the Muskoka Sanatorium.

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

MIDDLETON, J., in a written judgment, said that the testator (who resided in Hamilton and died in July, 1917) gave seven pecuniary legacies, amounting in all to $9,300, and his estate amounted to almost $12,000.

"To the Old Man's Home, John Street North" the testator gave $1,000; and to "The Old Woman's Home, John Street North" $1,000. Upon the evidence, these two legacies were intended for a municipal institution—the House of Refuge—in the city of Hamilton, commonly called "The Old Men's Home" and the "Old Women's Home," the front of which is upon Burlington street, but the main street leading to it being John street.

The next bequest was $1,000 to "the Sanatorium." This was, no doubt, intended for the "Sanatorium" on the Hamilton "mountain," maintained by the Hamilton Health Association.

Next, there was a gift of "$1,000 to the Salvation Army of

this city." The Salvation Army, having branches in Hamilton, will take this legacy for use in connection with its work carried on in Hamilton.

Next, $5,000 "to the Niagara Diocese of the Church of England." This meant the Synod of the Diocese of Niagara.

The $100 given "to the 13th Regiment Veteran Society Fenian Raid 1866" goes to "the Hamilton Veteran Association of 1866."

The testator appointed executors to act "for the consideration of 8 per cent. of the whole estate as set forth in this my will." This gave the executors 8 per cent. of the whole estate as remuneration for their care, pains, and trouble.

As to the residue, the testator was unmarried, and, so far as known, had no relations.

The Crown claimed an escheat; the executors contended that they took beneficially; counsel for the Synod contended that the residue should be divided among the named charities pro rata, or that a scheme should be devised for distribution among charities; and counsel appointed to represent the heirs or next of kin asked that a reference to inquire for claimants and report should be directed.

As to the executors' contention, the position is defined by sec. 58 of the Trustee Act, R.S.O. 1914 ch. 121. If in the will the Court can find any indication of a contrary intention, the executors cannot hold beneficially, and, in the absence of next of kin, will hold for the Crown. The indication of a contrary intention is found in the provision made for them of a percentage for their services.

Reference to Middleton v. Spicer (1783), 1 Bro. C.C. 201, 205.

As to the claims of the charities, there was no gift of anything more than the named amount to any. The fact that in the event of a deficiency the legacies must abate, because there is not enough to answer the testator's bounty, does not augment the gift if there is a surplus, for there is no gift of it. For the same reason, the contention that there is a general gift for charitable purposes fails.

Reference to Attorney-General v. Mayor of Bristol (1820), 2 J. & W. 307.

An inquiry for claimants should not be directed. The residuary estate must bear the costs of administration and of this motion, and the executors' percentage. If the costs of an inquiry were added, the estate would be depleted to the vanishing point. The Crown would readily deal with any meritorious claim.

Costs of all parties out of the estate.

SUTHERLAND, J. FEBRUARY 28TH, 1918.

WESTCOTT v. CITY OF WOODSTOCK.

Highway—Nonrepair—Opening in Roadway—Absence of Guard—Injury to Bicyclist—Defective Eyesight—Negligence—Absence of Contributory Negligence—Damages.

Action for damages for injuries sustained by the plaintiff by reason of nonrepair of a highway in the city of Woodstock.

The action was tried without a jury at Woodstock.

W. T. McMullen, for the plaintiff.

Frank Arnoldi, K.C., and P. McDonald, for the defendants.

SUTHERLAND, J., in a written judgment, said that the defendants, the Corporation of the City of Woodstock, through their Board of Water Commissioners, made excavations in the roadway in Dundas street for the purpose of laying a water-main. The earth was piled up on the margins of the excavations or trenches, and formed a bank or mound, which was plainly visible and indicated excavations; but no watchman was employed and no guard put up across the open ends of the trenches. The plaintiff, a man of 74 years, suffering from failing eyesight, on the 25th April, 1917, shortly before noon, was riding along Dundas street, upon a bicycle; he fell or rode into the end of one of the trenches, and was injured.

The learned Judge said that, while the plaintiff, on account of his defective eyesight, might not have seen the mound as soon as an ordinary person would, and this might have caused him to make a sharper turn into the vacant space in the street, thereby causing him to go a little into the end of the bank, no accident would have occurred had the end of the trench been guarded, as it should have been, having regard to its depth and proximity to the space along which the plaintiff was obliged to travel.

Reference to Homewood v. City of Hamilton (1901), 1 O.L.R. 266.

The defendants were negligent in leaving the end of the trench without any adequate guard; and contributory negligence could not be imputed to the plaintiff.

Damages assessed at $800. Judgment for the plaintiff for that sum, with costs.

MASTEN, J., IN CHAMBERS. MARCH 1st, 1918.

*INGERSOLL PACKING CO LIMITED v. NEW YORK CENTRAL AND HUDSON RIVER R.R. CO. AND CUNARD STEAMSHIP CO. LIMITED.

Writ of Summons—Service on Foreign Corporation-defendant by Serving Agent in Ontario—Question of Fact whether Agent Proper Person to Serve—Limited Powers of Agent—Rule 23.

Appeal by the defendant the Cunard Steamship Company Limited from an order of the Master in Chambers dismissing the appellant company's application to set aside the service of the writ of summons upon one E. T. Boland, for the appellant company, a foreign corporation.

J. H. Moss, K.C., for the appellant company.
H. S. White, for the plaintiff company.

MASTEN, J., in a written judgment, said that Boland was an employee in Toronto of the Robert Reford Company Limited, a company incorporated under the laws of Canada, having its head office in Montreal, and having power to carry on business connected with lines of steamships. Boland was the agent and representative in Toronto of the Reford company, and, as an employee of that company, acted as agent in Toronto for the appellant company.

The action was for breach of duty in respect of the carriage of bacon.

The appellant company had no place of business of its own in Ontario; and, so far as it acted in Ontario, it acted through the Reford company, with which it had had relations for many years.

The appellant company contended that neither Boland nor the Reford company represented the appellant company in Ontario in such a manner as to permit service of the writ upon it by serving Boland in Ontario.

The Reford company's office in Toronto was maintained exclusively by itself, and not by the appellant company. The services rendered to the appellant company by Boland were paid for by a commission on the business done and by an annual payment of $2,000 by the appellant company to the Reford company for services throughout Canada.

Boland's powers in regard to the passenger and goods-carrying business of the appellant company were limited. If an applica-

tion was made to him for a passage or a freight contract, he had to communicate with the appellant company's office in New York, or with the head office of the Reford company in Montreal; he had no power to allot space or fix a rate, nor to modify or vary rates.

The cases Okura & Co. Limited v. Forsbacka Jernverks Aktiebolag, [1914] 1 K.B. 715, and Thames and Mersey Marine Insurance Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco (1914), 30 Times L.R. 475, were relied upon by the appellant company.

After quoting some of the opinions in the first mentioned case, the learned Judge said that the English principle was that the foreign corporation must be "here," and that it could only be "here" if it had a branch or representative "here" who could do things—not a mere conduit-pipe to receive proposals and report answers.

But the Ontario Rule 23 is much wider than the English Order IX., Rule 8.

Reference to Wagner v. Erie R.R. Co. (1914), 6 O.W.N. 386.

Rule 23, after providing that "a writ of summons . . . may be served on a corporation by service on . . . the clerk or agent of such corporation or of any agency thereof in Ontario," proceeds: "Any person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof."

The Reford company was such a person and was to be deemed the agent of the appellant company, and the service upon Boland for the appellant company was effective.

Appeal dismissed with costs to the plaintiff company upon final taxation in any event of the action.

RE LINCOLN AND ST. LOUIS—LENNOX, J.—MARCH 1.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Exercise of Power of Sale in Mortgage—Notice—Service—Validity—Notice Left in House of Mortgagor, but not Handed to her—Application under Vendors and Purchasers Act—Costs.]—Motion by John H. Lincoln, the vendor of land, under the Vendors and Purchasers Act, for an order declaring that the applicant had made out a good and marketable title to the land which he had agreed to sell to William A. St. Louis, and that the objection made

by St. Louis to the title, viz., that notice of exercising the power of sale contained in a mortgage from Lena Muchler to George H. Black was not properly served upon Lena Muchler, was invalid. The motion was heard in the Weekly Court, London. LENNOX J., in a written judgment, said that the affidavits and papers filed shewed that Lena Muchler and her husband did all they could to prevent service of the notice upon her, and succeeded in preventing the officer from actually delivering the notice into her hands; but she was fully and definitely informed by the officer of the nature, object, and contents of the notice, and it was left in the house for her, and was then and thereafter under her control. No doubt she read it; but, whether she did or not, it was a valid and effective service. Order made as asked by the vendor, with costs to the purchaser against the vendor, as the objection was reasonable; no other costs. J. A. McNevin, for the vendor. A. B. Drake, for the purchaser. J. M. McEvoy, for Lena Muchler.

QUINN v. THOMPSON—LENNOX, J.—MARCH 1.

Mortgage—Moneys Advanced upon Security of Mortgage Paid to one of the Mortgagors—Conversion of Share of the other Mortgagor—Authority for Payment to one only—Absence of Written Authority—Evidence—Lien or Charge on Land of Mortgagor Converting Share of Co-mortgagor—Declaration of Rights—Costs.]—Action for a declaration that a certain mortgage formed no charge upon the lands of the plaintiffs and for an injunction and other relief. The action was tried without a jury at Owen Sound. LENNOX, J., in a written judgment, said that the question at the trial was, whether the mortgagee, the defendant Emily M. Thompson, had properly accounted for and paid the $2,500 for which the mortgage in her favour was executed by the plaintiffs and the defendant James Quinn. The evidence shewed that she had. The cheque for the money advanced was made payable to the defendant James Quinn; prima facie, it should have been payable to the plaintiff Walter T. Quinn and the defendant James Quinn jointly; but, although there was no written authority from Walter T. Quinn, it appeared that he had instructed the mortgagee's solicitor to make the cheque payable to James Quinn. The plaintiffs were entitled to relief against the lands of James Quinn, with full taxable costs of the action, for the defendant James Quinn, by conversion of the money, occasioned the litigation. There was no ground for saying that more than $800, or one half of the mortgage money after payment of the prior mortgage,

should have come to the hands of Walter T. Quinn. The defendant Thompson should have a declaration of her rights. Judgment declaring that the mortgage is a good, valid, and subsisting security, against the parties who executed it, upon the lands described in the instrument, in so far as the parties executing it had title, for the amount purported to be secured thereby; that, without prejudice to the rights of the defendant Thompson under her mortgage, the plaintiffs are entitled to a lien and charge upon the lands of the defendant James Quinn or his interest therein, and to priority and exoneration etc. No order as to costs between the plaintiffs and the defendant Thompson. The minutes of the judgment to be submitted to the learned Judge. W. H. Wright, for the plaintiffs. W. S. Middlebro, K.C., for the defendants.

DRURY v. BEECROFT—LENNOX, J.—MARCH 1.

Account—Action for—Surplus after Satisfaction of Mortgage-claim—Prima Facie Case of Existence of Surplus not Shewn—Dismissal of Action.]—Action by Richard Drury and wife for an account and payment of surplus moneys in the hands of the defendant after a sale of property which the plaintiffs mortgaged to him and the equity of redemption in which they afterwards released to him. The defendant executed a declaration of trust in favour of the plaintiffs. The action was tried without a jury at Barrie. LENNOX, J., in a written judgment, discussed the facts and the position of the parties at some length and interpreted the declaration of trust. He was of opinion that the plaintiffs must at the very least make a prima facie case by shewing that the defendant's claim was overpaid, and that there was something, more or less, coming to them. The right of the defendant to retain what would satisfy his mortgage-claim, according to its terms, had not been questioned upon the pleadings nor at the trial. Courts do not sit for the purpose of trying hypothetical cases or determining remote possibilities. There was no merit nor substance in the action. An account should not be directed for experimental purposes. Judgment dismissing the action—without costs if the plaintiffs do not appeal. J. G. Guise-Bagley, for the plaintiffs. W. A. Boys, K.C., for the defendant.

HONSBERGER v. HOSHEL—SUTHERLAND, J.—MARCH 1.

Master and Servant—Injury to Servant—Infant Working in Factory—Dangerous Machine—Want of Guard — Factory Shop and Office Building Act, R.S.O. 1914 ch. 229—Disobedience of Instructions—Servant Author of own Injury.]—The plaintiff, a boy of 15 years, sued by his next friend, his father, for damages on account of injuries sustained while operating a honey-extracting machine in the defendant's factory. The allegation was, that the machine was dangerous, and was not, at the time of the accident to the plaintiff, properly or safely guarded, as required by the provisions of the Factory Shop and Office Building Act, R.S.O. 1914 ch. 229. The action was tried without a jury at St. Catharines. SUTHERLAND, J., in a written judgment, after describing the machine and stating the effect of the evidence, said that he had come to the conclusion that the accident occurred through the disobedience of the plaintiff of the definite instructions given to him by the defendant not to reach over the machine; and that, being aware of the risk and danger incidental to so doing, he was the author of his own injury. Action dismissed with costs, if asked. H. H. Collier, K.C., and C. J. Bowman, for the plaintiff. A. C. Kingstone, for the defendant.

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3 Edw. VII. ch. 19, sec. 576 (O.) (Municipal Act)—See MUNICIPAL CORPORATIONS, 6.

4 Edw. VII. ch. 23, secs. 2 (8), 3, 5 (14) (O.) (Assessment Act)—See ASSESSMENT AND TAXES, 5.

4 Edw. VII. ch. 23, sec. 112 (O.) —See ASSESSMENT AND TAXES, 4.

R.S.C. 1906 ch. 37, secs. 46, 56 (9) (Railway Act)—See EXECUTION.

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STATUTES—(*Continued*).

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STATUTES—(*Continued*).

R.S.O. 1914 ch. 175, sec. 4 (Money-Lenders Act)—See INTEREST, 2.

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5 Geo. V. ch. 36, sec. 1 (O.)—See ASSESSMENT AND TAXES, 3.

5 Geo. V. ch. 45 (O.) (Ottawa Separate Schools)—See CONSTITUTIONAL LAW, 1, 2.

5 Geo. V. ch. 76, sec. 1 (O.) (City of Toronto)—See MUNICIPAL CORPORATIONS, 6.

6 Geo. V. ch. 27, sec. 1 (O.) (Amending Mortgagors and Purchasers Relief Act)—See MORTGAGE, 3.

6 Geo. V. ch. 35, sec. 6 (O.) (Amending Companies Act)—See COMPANY, 5.

6. Geo. 5 ch. 50, secs. 2 (*f*), 40, 88, 125 (O.) (Ontario Temperance Act)—See ONTARIO TEMPERANCE ACT, 3.

6 Geo. V. ch. 50, sec. 2 (*i*), cl. (i.) (O.)—See ONTARIO TEMPERANCE ACT, 9, 13.

6 Geo. V. ch. 50, sec. 40 (O.)—See ONTARIO TEMPERANCE ACT, 4.

6 Geo. V. ch. 50, secs. 40, 85, 88, 92 (2), 124, 125, 129, 131 (O.)—See ONTARIO TEMPERANCE ACT.

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6 Geo. V. ch. 50, sec. 49 (O.)—See ONTARIO TEMPERANCE ACT, 15.

6 Geo. V. ch. 50, secs. 74 (2), 96 (O.)—See ONTARIO TEMPERANCE ACT, 10.

6 Geo. V. ch. 50, sec. 88 (O.)—See ONTARIO TEMPERANCE ACT, 12.

6 Geo. V. ch. 50, sec. 95 (O.)—See ONTARIO TEMPERANCE ACT, 6.

6 Geo. V. ch. 96, sec. 2 (O.) (City of Toronto)—See MUNICIPAL CORPORATIONS, 6.

6 & 7 Geo. V. ch. 19, sec. 4 D. (D.) (Amending Act in Aid of Provincial Prohibitory Legislation)—See ONTARIO TEMPERANCE ACT, 1, 3.

7 Geo. V. ch. 45, secs. 9, 11 (O.) (Amending Assessment Act)—See ASSESSMENT AND TAXES, 2.

7 Geo. V. ch. 59 (O.) (Ottawa Separate Schools)—See CONSTITUTIONAL LAW, 1.

7 Geo. V. ch. 60 (O.) (Ottawa Separate Schools)—See CONSTITUTIONAL LAW, 2.

7 & 8 Geo. V. ch. 30, sec. 2 (D.) (Aid of Provincial Prohibitory Legislation)—See ONTARIO TEMPERANCE ACT, 1, 3.

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