The
Ontario Weekly Notes

VOL. XI. TORONTO, FEBRUARY 2, 1917. No. 21

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. JANUARY 22ND, 1917.

REX v. SCHOOLEY.

Ontario Temperance Act—Intoxicating Liquor Found on Hotel Premises—Magistrate's Conviction—Evidence Improperly Admitted—Effect on Mind of Magistrate—Order Quashing Conviction—Costs—Protection of Magistrate and Police Officer.

Motion to quash a magistrate's conviction of the defendant for having liquor in his hotel bar-room in violation of the provision of the Ontario Temperance Act, 1916.

W. M. German, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the objection to the admission in evidence of what purported to be an analysis of the liquor seized upon the defendant's premises was well taken, and the Crown did not rely upon the said analysis.

Such being the case, Rex v. Melvin (1916), 11 O.W.N. 215, was expressly in point and binding. A letter from a chemist which was before the magistrate may have had some effect on his mind, inasmuch as the only other evidence was that of the chief of police, who said that he "would not swear to whisky by the taste of it but could by the smell of it."

Order quashing the conviction without costs, and with protection to the magistrate and police officer, so far as there is power to protect them.

MIDDLETON, J. JANUARY 23RD, 1917.

*CROMARTY v. CROMARTY.

Husband and Wife—Alimony—Validity of Marriage—Validity of Previous Foreign Divorce of Wife—Jurisdiction of Foreign Court—Domicile of Parties at Time of Institution of Proceedings for Divorce—Change of Domicile—Animus Manendi—Fraud upon Foreign Court—Status of Husband to Attack Divorce—Collusion—Quantum of Alimony—Reference—Costs.

An action for alimony. The defendant admitted the plaintiff's right to alimony if there was a valid marriage.

The action was tried without a jury at Toronto.

J. W. Bain, K.C., P. White, K.C., and M. L. Gordon, for the plaintiff.

H. H. Dewart, K.C., and R. T. Harding, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff was first married to one Lampkin, from whom she obtained a divorce by the decree of the Superior Court of Cook County, Illinois, on the 2nd May, 1896. Five days later, she married the defendant.

The validity of the marriage depended on the validity of the Cook County divorce; and the validity of the divorce depended upon the domicile of the parties at the time of the institution of the proceedings in Illinois leading up to the divorce. "The Court of the bona fide existing domicile has jurisdiction over persons originally domiciled in another country to undo a marriage solemnised in that other country; and such a divorce will be recognised by the English Courts even if granted for a cause which would not have been sufficient to obtain a divorce in England:" Bates v. Bates, [1906] P. 209 (C.A.); Harvey v. Farnie (1882), 8 App. Cas. 43; Le Mesurier v. Le Mesurier, [1895] A.C. 517.

Lampkin and the plaintiff were both originally domiciled in Ontario, and were married in Ontario on the 5th July, 1886. They made their home in Ontario until September, 1892, when Lampkin went to Chicago, Cook County, Illinois; his wife followed him there in June, 1893. Divorce proceedings were instituted by her in Chicago in March, 1896, and the bill was

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

served on Lampkin in Chicago on the 17th March, 1896. No defence was entered, and the case was heard on oral evidence produced for the plaintiff on the 24th April, and the decree of divorce pronounced on the 2nd May, 1896.

When Lampkin went to Chicago in 1892, he went with the fixed intention of making it his permanent home; and there was nothing in the evidence inconsistent with a change of domicile in 1892: Seifert v. Seifert (1914), 32 O.L.R. 433.

In 1892, the married pair had acquired a domicile of choice in Chicago, and that domicile was not changed until after the decree had been pronounced.

The validity of the Chicago divorce was attacked upon the ground of fraud upon the Court of Illinois: but "a divorce granted by a foreign Court, being a judgment affecting the status of the parties, stands on the same footing as a judgment in rem, and therefore cannot be set aside in this country, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced:" Bates v. Bates, supra. It would be a monstrous thing to hold that the defendant's marriage to the plaintiff conferred upon him a status to attack the divorce and annul the marriage.

Apart from that, it was clear that no fraud was practised upon the Court.

When once it is made to appear that the foreign Court has a general jurisdiction over the subject with which it has dealt, and that the persons with whose rights and status it has dealt were so resident within its jurisdiction as to be properly subject to the authority of the foreign State, our Courts ought never to attempt to inquire whether the jurisdiction of the foreign Court has been properly exercised: Pemberton v. Hughes, [1899] 1 Ch. 781, 790.

There was no evidence to justify the contention that the suit in Illinois was collusive.

Judgment for the plaintiff for alimony, with a reference to the Master to fix the amount, unless the parties agree.

The plaintiff's costs as between solicitor and client to be paid by the defendant; in this respect the plaintiff is to have as near an approach to indemnity as the Court has power to afford.

MIDDLETON, J. JANUARY 23RD, 1917.

RE THOMPSON AND ROBBINS.

Will—Construction — Devise — Life Estate—Gift over to "Children" —Estate Tail—Rule in Shelley's Case—Vendor and Purchaser—Title to Land—Notice to third Person—Rule 602.

Motion by the vendor of land, upon an agreement for the sale and purchase thereof, for an order under the Vendors and Purchasers Act declaring invalid an objection raised by the purchaser to the title, and declaring that the vendor can make a good title.

The motion was heard in the Weekly Court at Toronto.

J. H. Fraser, for the vendor.

W. Lawr, for the purchaser.

MIDDLETON, J., in a written judgment, said that the question raised was as to the effect of a devise to the vendor of the lands in question. He claimed an estate tail, and, if he was right, he could make a good title. The devise was contained in the will of the vendor's father, and was to him "for and during the term of his natural life and thereafter if my said son leaves children of his body or their issue him surviving then to said children in equal shares absolutely the child or children of any deceased child of my said son to stand in the place of his her or their parent and to take his her or their parent's share but no more but if my said son leaves no child or children or their issue him surviving"—then over.

It was contended that the rule in Shelley's case applied. This could only be so if the word "children" could be regarded as meaning "heirs of his body."

Prima facie the rule has no application when, after a life estate, there is a gift to children, but it may be found that the testator has used the word "children" as equivalent to the word "heirs" or "heirs of his body." Here it was clear from the will that the testator had carefully chosen the words used, and that they must have their natural signification.

So clear is the distinction between a gift for life and after the death of the life-tenant to the children, and a gift for life and after the death of the life-tenant to his heirs or the heirs of his body, that when some other word such as "issue" is used, which is regarded as ambiguous, the discussion is whether the ambiguous

word should be read as "children," in which case the rule in question can have no application—see, e.g., King v. Evans (1895), 24 S.C.R. 356.

The case in hand is governed by Chandler v. Gibson (1901), 2 O.L.R. 442, which has the approval of the Supreme Court of Canada in Grant v. Fuller (1902), 33 S.C.R. 34.

A note upon Bowen v. Lewis (1884), 9 App. Cas. 890, in Challis on Real Property, 3rd ed., p. 164, aids in the understanding of that case. The words of Lord Cairns at p. 905 satisfactorily dispose of this case: "I take it to be clear upon the authorities that if you have a gift to children with words of inheritance, the children would take as purchasers."

The vendor had not shewn a good title, and the motion failed.

Had this matter not been regarded as free from doubt, notice to the Official Guardian, before dealing with it, would have been required. See Rule 602.

FALCONBRIDGE, C.J.K.B. JANUARY 24TH, 1917.

RE GINSBERG.

Evidence—Assignments and Preferences—Assignment for Benefit of Creditors—Examination of Assignor—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 38—Refusal to be Examined—Fear of Giving Incriminating Answers—Criminal Prosecutions Pending.

Motion by the assignee to commit an insolvent, who had made an assignment for the benefit of creditors, for refusal to answer questions upon an examination under the Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 38.

The motion was heard in the Weekly Court at London.

P. H. Bartlett, for the applicant.

W. G. R. Bartram, for the insolvent.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the solicitor for the insolvent swore that, in his opinion, it was impossible that the insolvent should be examined in this matter without informing the private prosecutors of evidence which would expose him to a criminal prosecution, and would amount to giving evidence wherewith to convict himself. Two of the

creditors had launched criminal prosecutions against Ginsberg, on the ground that he procured credit on false representations as to his financial standing and as to the amount of his assets and liabilities.

The protection extended in such cases by both Dominion and Provincial legislation, that his answers shall not be used or receivable in evidence against him, does not afford sufficient immunity in a case like this. The prosecutors might well get information from him which would enable them to get convicting evidence aliunde without using his own evidence against him at all. In fact the proceedings would take the form of an examination for discovery in a criminal case, which cannot be.

The rule laid down by the Lord Chancellor (Eldon), in 1812, has always been closely followed: "The strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, *but that forms one step towards it:*" Paxton v. Douglas (1812), 19 Ves. 225, at p. 227. See also D'Ivry v. World Newspaper Co. (1897), 17 P.R. 387; Re Askwith (1899), 31 O.R. 150; National Association of Operative Plasterers v. Smithies, [1906] A.C. 434.

Motion dismissed. No costs.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. JANUARY 25TH, 1917.

REX v. REINHARDT SALVADOR BREWERY CO. LIMITED.

REX v. McFARLINE.

Ontario Temperance Act—Sale of Intoxicating Liquor by Brewer to Person not Entitled to Sell—Receiving for Purpose of Reselling—Secs. 41, 49—"Unlawfully"—Convictions—Motions to Quash—Evidence—Question for Magistrate—Mistake—Executive Clemency.

Motions on behalf of the defendants respectively to quash convictions made against them by the Police Magistrate for the City of Toronto for the unlawful selling and delivering by one of them and the receiving by the other of intoxicating liquor, the latter not being entitled to sell, and having bought for the purpose of reselling, contrary to the Ontario Temperance Act, 1916.

R. T. Harding, for the defendants.
J. R. Cartwright, K.C., for the Crown.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that secs. 49 and 41 of the Ontario Temperance Act were very clear and explicit. The word "unlawfully" is not used. The only question is, whether there was evidence on which the magistrate could convict—a pure question of fact.

Should it be established to the satisfaction of the Crown that there was a mistake in shipping temperance beer to Montreal and strong beer to McFarline, without the knowledge and contrary to the intention of the parties, executive clemency might interpose to remit these fines.

But, on a principle acted on every day, a Judge cannot interfere: Regina v. Cunerty (1894), 26 O.R. 51.

Motions dismissed with costs.

CLUTE, J. JANUARY 25TH, 1917.

RE HANNA.

Will—Construction — Devise of Farm — Mistake in Number of Concession—Falsa Demonstratio—Infant Devisee—Duty of Executors—Legacies Charged on Lands Devised—Application to Court—Conditional Devise—Vested Estate Subject to Divestment in Case Devisee should not Return from War—Temporary Return—Enjoyment of Land Subject to Condition.

Motion by the executors, upon originating notice, for an order determining questions arising upon the will of John Hanna, deceased.

The motion was heard in the Weekly Court at Ottawa.

A. H. Armstrong, for the executors.

J. F. Smellie, for the Official Guardian, representing Albert Hanna, an infant.

R. J. Slattery and S. R. Broadfoot, for adults interested.

CLUTE, J., in a written judgment, set out the terms of the will. The testator first gave devised and bequeathed all his real and personal estate "in manner following." Then followed a devise to his son Albert of "the north or north-west half

of lot number one in the seventh concession" of Fitzroy. The testator did not own the lot thus specified, but did own the north-west half of lot one in the sixth concession of the same township; and the learned Judge said that, having regard to the whole will, by which *all* the testator's lands were devised, and to the other lands specifically devised, it should be considered that there was *falsa demonstratio* in using "seventh" instead of "sixth:" Smith v. Smith (1910), 22 O.L.R. 127; Re Clement (1910), *ib.* 121; Re Fletcher (1914), 31 O.L.R. 633; Re Devins (1915), 8 O.W.N. 540; and that the lot which the testator owned vested in Albert.

It is the duty of the executors to manage and control the lands and personalty devised to Albert Hanna until he attains his majority; and, if it be in the interest of the infant, to sell or dispose of the personalty, after consulting with him, and with the sanction of the Court.

The legacies bequeathed to the three daughters of the testator are charged upon the lands devised to the sons William and Albert, and are directed to be paid in equal shares by William and Albert. That does not relieve the executors from seeing that the legacies are paid, inasmuch as the land in the meantime is vested in them for the purposes of the will. If the devisees neglect or refuse to pay the legacies, application should be made to the Court for leave to sell or mortgage.

The testator devised land to his son William, "with the conditions as hereinafter stated." Then followed the direction that the legacies charged on the land devised should be paid in equal shares by William and Albert. And then the "condition" that if William should die while in the overseas war at present, or should die "before he returns to his property hereinbefore mentioned," the executors should dispose of the lands devised to him and divide the proceeds among the other five children. Under these clauses, the devise to William became vested on the death of the testator, subject to its being divested in case he should die while in the war or die before his return. His temporary return from the war did not cause the property to vest in him absolutely. In the meantime he is entitled to receive the rents and profits.

Costs of all parties out of the estate—those of the executors as between solicitor and client.

MIDDLETON, J. JANUARY 25TH, 1917.

RE SCHREIBER.

Will—Construction — Codicil — Revocation of Bequest in Will—Revocation of Bequest to Children of Testatrix—Doubt as to Extent of Application of Revoking Clause.

Motion by the executors and trustees under the will of Beatrice May Schreiber, deceased, for an order determining a question arising upon the will and codicil thereto.

The motion was heard in the Weekly Court at Toronto.
D. T. Symons, K.C., for the executors and trustees.
W. D. Gwynne, for an adult son of the testatrix.
F. W. Harcourt, K.C., for an infant child of the testatrix.
H. R. Frost, for Edward Howard-Gibbon *et al.*

MIDDLETON, J., in a written judgment, said that the testatrix, who died on the 11th January, 1897, made her will on the 9th May, 1882. She was then a married woman without children. Her will was in two sections: "Firstly, in the event of my dying without issue of our marriage," in which case the husband is to have a life estate, and on his death the estate is to be divided between the children of Charles Howard-Gibbon and Mary C. Howard-Gibbon. "Secondly, in event of my dying leaving issue of our marriage," in which event the husband is given a life estate (to determine on remarriage) and upon his death or remarriage the estate is to be divided among the children.

On the 7th July, 1886, while yet childless, the testatrix made a codicil by which she said: "I hereby revoke and cancel the bequest to Mary Caroline Howard-Gibbon in my said will named and after the death of my husband Herbert H. Schreiber I give devise and bequeath the whole of my estate both real and personal to the children of my uncle Charles Howard-Gibbon share and share alike. This codicil to be taken and acted upon as part of my last will and testament as if it had been included in it at the time of execution thereof."

Five children were afterwards born—the eldest on the 6th May, 1887.

The children of Charles Howard-Gibbon contended that the codicil was not a mere change in the first part of the will dealing with the disposition of the testatrix's property in the event of her dying without issue, but that it supersedes the whole will, and gives to them the whole property, subject to the husband's

life interest, revoking not only the gift to Mary C. Howard-Gibbon but also the gift to the children of the testatrix.

With this contention the learned Judge did not agree. By the codicil the bequest to Mary C. Howard-Gibbon was cancelled and that alone; the testatrix then proceeded, linking the words that followed to the revocation with the word "and." The codicil was then said to be part of the will, and to be read as if included in the will at the time of execution.

This was repugnant to the idea that this was to constitute the whole will save formal parts only.

Reference to Hearle v. Hicks (1831), 1 Cl. & F. 20, at p. 24.

The clause in the codicil was never intended to be more than a revocation of the gift to Mary C. Howard-Gibbon; and it certainly could not be said to be free from doubt when it was urged as a revocation of the gift to the children.

Declaration that the clause "secondly" of the will was not revoked by the codicil; and that, the husband having now married again, the children of the testatrix take.

Costs out of the estate.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. JANUARY 26TH, 1917.

ST. JEAN v. LAURIN.

Costs—Set-off—Separate Awards of Costs in Same Action—Solicitor's Lien—Security for Costs—Delivery out of Bond and Payment of Money out of Court.

Motion by the plaintiff for delivery up of the bond for security for costs and for payment out of moneys paid into Court for the same purpose.

G. H. Sedgewick, for the plaintiff.

H. G. Smith, for the defendant Laurin and his solicitor.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the disposition of the case, which was tried in two branches—(1) on a promissory note, (2) interpleader issue—appeared in 7 O.W.N. 702.

In the final result, after giving credit to the defendant Laurin for costs awarded to him, there was a large balance due to the plaintiff in respect of his judgment and costs.

Costs of the other defendants had been paid by the plaintiff.

But the defendant Laurin's solicitor contended that the order asked for by the plaintiff ought not to be made to the prejudice of the solicitor's lien for costs.

There was but one writ and one action. The plaintiff sued on a judgment obtained on a note in the Province of Quebec. He issued his writ on the 19th May, 1914, and on the 20th obtained an interim injunction to stop payment by the defendants the Canadian Pacific Railway Company to the defendant Lefebvre of moneys payable by the company to Laurin, which he had assigned to Lefebvre.

On the 27th May, 1914, an order was made by a Judge in Chambers allowing the company to pay $1,200 into Court, and directing the trial of an issue between the plaintiff and Lefebvre.

The orders for security for costs, the payments into Court, and the filing of the bond of a fidelity company, all took place after the 27th May.

The two branches of the case were tried at the same time, and judgment was given on the 22nd January, 1915 (7 O.W.N. 702).

Although separate records were necessarily passed and entered for the purposes of the trial, yet all the proceedings were in the same action, and the set-off ought to be allowed without regard to the solicitor's lien: Pringle v. Gloag (1879), 10 Ch.D. 676; Brown v. Nelson (1884), 11 P.R. 121; and cases cited in Holmested's Judicature Act, pp. 911, 912, to which may be added Puddephatt v. Leith, [1916] 2 Ch. 168.

Order as asked.

LENNOX, J. JANUARY 27TH, 1917.

BOYER v. BRIGHT.

Vendor and Purchaser—Agreement for Exchange of Properties—Statute of Frauds—Actual Bargain not Evidenced by Writing—Fraud and Misrepresentation—Secret Commission—Action for Specific Performance—Unfounded Charges—Costs.

An action for specific performance of an alleged agreement for an exchange of properties.

The action was tried without a jury at Chatham.

W. N. Tilley, K.C., and A. Clark, for the plaintiff.

J. G. Kerr, for the defendant.

LENNOX, J., in a written judgment, said that the essentials of an agreement in writing had not been shewn. There was some discussion about an exchange of properties between the plaintiff and defendant before the meeting of Mr. Duncan, the defendant's father-in-law, and Mr. King, the agent of both parties. The first writing in evidence was dated the 3rd March; it was an agreement by which the plaintiff authorised King to obtain an exchange of the plaintiff's hotel property for the defendant's farm and chattels and $750 in cash. All obtained above this was to go to King in payment of commission. The second stage was reached when King and the plaintiff went to the defendant's farm and obtained a formal agreement, signed by the defendant, with a list of chattels attached. The third stage was reached when a written agreement was signed and sealed by the parties on the 11th April. None of the writings contained the true bargain, and the agreement or agreements evidenced by writing was or were not enforceable according to their terms because the writing did not shew what was actually agreed to, and the actual bargain was not enforceable because it was not in writing: Halsbury's Laws of England, vol. 25, p. 290, para. 294; vol. 7, p. 373, para. 769. This finding disposed of the action.

The charge of the defendant that the plaintiff fraudulently represented that the hotel was a "money-maker" was not to be seriously entertained.

The plaintiff acted honestly, though unguardedly, and only by inadvertence made the statement that he paid $14,000 for the hotel property—which was not true, because the $14,000 included furniture and fittings which the defendant was not to have.

Another defence was, that the plaintiff had promised King a secret commission. The learned Judge came to the conclusion that upon that ground also the plaintiff failed.

The defendant was not justified in making wholesale charges of fraud. The plaintiff did not enter into the agreement with King with any idea of wronging the defendant, nor was he actuated by any dishonest intent. The action should be dismissed without costs if the plaintiff gives notice before settlement of the judgment that he will not appeal; otherwise with costs.

LENNOX, J. JANUARY 27TH, 1917.

*UNION NATURAL GAS CO. v. CHATHAM GAS CO.

Contract — Supply of Natural Gas — Construction—"City of Chatham"—Inclusion of Territory Subsequently Annexed to City—Estoppel—Injunction—Costs.

Action for a declaration as to the proper interpretation of an agreement of the 3rd November, 1906, between H. D. Symmes and D. A. Coste and the defendants for supplying natural gas for the city of Chatham, and for an injunction and other relief.

The action was tried without a jury at Chatham.

W. N. Tilley, K.C., and J. G. Kerr, for the plaintiffs.

T. G. Meredith, K.C., and J. M. Pike, K.C., for the defendants.

LENNOX, J., in a written judgment, said that in 1915 the Dominion Sugar Company purchased a block of land of about 61 acres in the township of Raleigh and built a sugar factory upon it. On the 24th November, 1915, the Ontario Railway and Municipal Board, under powers conferred by sec. 21 of the Municipal Act, R.S.O. 1914 ch. 192, describing the land by metes and bounds, made an order purporting to annex it, as on that day, to the city of Chatham. On the 13th December, 1915, the Board made an order correcting the description. The question to be determined was, whether the plaintiffs, under their agreement with the defendants, were bound to furnish natural gas for the operation of the Dominion Sugar Company's plant, as an industry within the limits and forming part of the city of Chatham. The question should be dealt with upon the basis that the 61 acres had been duly annexed to, incorporated in, and formed part of the city. The only issue fairly debatable upon the evidence was the proper interpretation of the expression "the city of Chatham" in the agreement of the 3rd November, 1906.

The agreement does not compel the plaintiffs to supply the gas for customers outside the city of Chatham within the meaning of the agreement to be construed. There had been no acts on the part of the plaintiffs since the execution of the agreement which affected its interpretation. There was no estoppel. There was nothing in the evidence to shew that both parties were not aware of their legal rights—they were presumed to know the law, they professed to know it, and were at arms' length.

The proper interpretation of the agreement was that, in

referring to "the city of Chatham," the parties meant land subsequently annexed as well as land then within the boundaries of the city; but the agreement between the defendants and the Dominion Sugar Company was not within the scope of the agreement of 1906, and the plaintiffs were not called upon to comply with it.

Reference, among other authorities, to Manning v. Carrique (1915), 34 O.L.R. 453; Toronto General Trusts Corporation v. Gordon Mackay & Co. Limited (1915), 34 O.L.R. 101; Wallis Sons & Wells v. Pratt & Haynes, [1911] A.C. 394; Toronto Electric Light Co. v. City of Toronto (1916), ante 169, 171, 38 O.L.R. 72 (P.C.); Toronto Corporation v. Toronto R.W. Co., [1907] A.C. 315, 320 (P.C.)

Judgment for the plaintiffs restraining the defendants from diverting gas to the Dominion Sugar Company under the agreement. No order as to costs.

HANLEY v. OTTAWA PUBLIC SCHOOL BOARD—SUTHERLAND, J. —JAN. 22.

Water—Flow of Surface Water from Neighbouring Land—Injury to Premises—Evidence—Onus—Failure to Satisfy.]—Action by Henry Hanley and wife against the school board for damages and an injunction in respect of injury to the plaintiffs' house and land and injury to health by reason of surface water brought upon the plaintiffs' premises, alleged to be caused by the filling in of the defendants' adjoining lot and the erection of a wall. The action was tried without a jury at Ottawa. SUTHERLAND, J., in a written judgment, stated the facts and said that the onus was upon the plaintiffs, and the proper conclusion upon the evidence was, that the injury of which they complained was not caused by anything done by the defendants. Action dismissed, with costs if asked. A. E. Fripp, K.C., for the plaintiffs. G. F. Henderson, K.C., for the defendants.

RE MAILLOUX—MIDDLETON, J.—JAN. 23.

Will—Determination of Question Arising upon—Direction for Trial upon Oral Evidence—Rule 606 (1).]—Motion by the sons of Rose St. Louis for an order determining a question arising as to the construction of the will of Hypolite P. Mailloux, deceased. The motion was heard in the Weekly Court at Toronto. MIDDLETON, J., in a written judgment, said that the matter was in a most unsatisfactory position, and he could see no course open save to direct (under Rule 606 (1)) that the question now raised be tried upon oral evidence at the non-jury sittings at Sandwich. Upon that trial, all questions, including that as to the effect of a certain former judgment, will be open—and the Judge will deal with costs. John Sale, for the applicants. H. G. Smith, for Eugene Mailloux. F. W. Harcourt, K.C., for the infants.

GRAIN GROWERS EXPORT CO. v. CANADA STEAMSHIP LINES LIMITED—MIDDLETON, J.—JAN. 24.

Ship—Carriage of Grain—Damage by Water—Hole Made in Barge by Collision with Dock—Inspection and Repair—Due Diligence—Negligence—Peril of Navigation—Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, sec. 6 (D.)—Merchants Shipping Act.] — Action by the owners of grain against the owners of a barge to recover damages for injury by water to the grain, sustained during carriage. The amount of the damages was agreed upon—$16,319.85—but the defendants disputed the plaintiffs' right to recover, alleging that a hole in the barge was the cause of the flow of water into the hold, and the hole was the result of some peril of navigation for which the defendants were not liable. The action was tried without a jury at Toronto. MIDDLETON, J., in a written judgment, set out the facts and referred to the evidence, upon a consideration of which, he said, he had come to the conclusion that the hole was the cause of the damage; and that, as the barge left the elevator and was being towed out of the slip, she was blown against the corner of a dock, and the hole was made; this was after the voyage had begun. These findings of fact brought the case within sec. 6 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61 (D.) The inspection and repair made by the defendants, including the caulking of the seams, was due diligence to make the ship sea-

worthy, and the damage resulted from some fault or error in navigation or the management of the ship, if the hole was the result of the collision with the dock. If the hole was the result of some unknown obstacle, then it was made without negligence, and was a peril of navigation. The provisions of the Merchants Shipping Act also afforded a defence. Action dismissed with costs. J. H. Moss, K.C., and W. Lawr, for the plaintiffs. N. W. Rowell, K.C., and Casey Wood, for the defendants.

PEPPIATT v. REEDER—MIDDLETON, J.—JAN. 25.

Costs—Taxation — Report of Master — Allowance of Costs—Report Set aside—Reference back—Costs not yet Awarded—Motion to Set aside Appointment for Taxation—Costs of.]—Motion by the defendant to set aside an appointment issued by the Taxing Officer for the taxation of the plaintiff's costs awarded to him by the Master in Ordinary. MIDDLETON, J., in a written judgment, said that costs were in the discretion of the Master, and the Master has awarded them to the plaintiff, by a report which had been "set aside and vacated" by the Appellate Division, and the matter had been referred back to the Master. On the reference back, the Master was not to reconsider the whole matter, and was to regard certain findings already made. Until he shall have made his report and again awarded costs, there is nothing under which a taxation can be had. The appointment must be set aside, but without costs, as the situation should have been placed before the Taxing Officer for a ruling before the expense of a motion was incurred. J. J. Gray, for the defendant. E. Meek, K.C., for the plaintiff.

IMPERIAL BANK OF CANADA v. REID—LENNOX, J.—JAN. 27.

Assignments and Preferences—Transfer of Company-shares by Insolvent Debtor—Action by Judgment Creditors to Set aside as Preferential—Evidence—Substance of Transaction—Sale of Shares and Payment of Creditor's Claim—Dismissal of Action—Costs.]—Action by judgment creditors of the defendant W. J. Reid to set aside a transfer of certain shares of the stock of an incorporated company by that defendant to his co-defendant Laura K. Reid, and for other relief. The action was tried without a jury at London. The learned Judge finds upon the evidence that the substance of the transaction was a sale of the shares owned by the defendant W. J. Reid (before the plaintiffs' judgment against him), through the agency of one Smart, and the payment of the proceeds to the defendant Laura K. Reid, who was a creditor of the defendant W. J. Reid, in part satisfaction of her claim. Action dismissed without costs. W. R. Meredith, for the plaintiffs. G. H. Kilmer, K.C., for the defendants.

LORSCH & CO. v. SHAMROCK CONSOLIDATED MINES LIMITED—LENNOX, J.—JAN. 27.

Company—Shares—Transfer on Books of Company—Issue as to Ownership—Brokers—Share-certificates—Unlawful Issue—Findings of Fact—Costs.]—Issue directed to try the question whether the plaintiffs were entitled to the transfer on the books of the defendant company of 1,500 fully paid-up shares of the capital stock. The issue was tried without a jury at Toronto. LENNOX, J., in a written judgment, said that it was impossible to direct that the defendant company should register the share-certificates in question in the name of the plaintiffs as owners—the plaintiffs not being the owners, but agents or brokers for another, and having no *locus standi* to maintain a claim against the defendant company. The defendants contended that the share-certificates were not lawfully issued—that the alleged shares had no legal existence; and this defence was fully established by the evidence. Judgment for the defendant company finding the issue in their favour with costs, including the costs of the application for a summary order out of which the issue arose. William Laidlaw, K.C., for the plaintiffs. P. White, K.C., for the defendant company.