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COURT OF APPEAL.

MARCH 4TH, 1912.

REX v. CHILMAN.

Criminal Law — Receiving Stolen Money — Evidence — Judge's Charge—Application for Stated Case.

Application on behalf of the prisoner by way of appeal from the refusal of TEETZEL, J., the trial Judge, to state a case, and for a direction to him to state a case, for the opinion of the Court, under the provisions of secs. 1015 and 1016 of the Criminal Code, raising the questions whether there was evidence upon which the jury might properly find the prisoner guilty on the 3rd count of the indictment (for receiving stolen money), and whether the Judge rightly directed the jury in respect of such evidence. The prisoner was acquitted upon the other two counts, robbery with violence, and theft.

The application was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LATCHFORD, J.

G. Lynch-Staunton, K.C., and C. W. Bell, for the prisoner.

H. D. Gamble, K.C., for the Crown.

The judgment of the Court was delivered by MOSS, C.J.O.:— Upon the hearing of the application both the facts and law were discussed at considerable length. We have since considered the matter and referred to the evidence and the learned Judge's charge, and are of opinion that it would serve no useful purpose now to grant leave to appeal and direct the learned Judge to reserve the questions.

The application is, therefore, refused.

MARCH 6TH, 1912.

*WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Accident Insurance—Temporary Total Disability—Double Indemnity—"Riding as a Passenger"—Injury to Assured in Alighting from Street Car.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 25 O.L.R. 80, ante 232.

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

N. W. Rowell, K.C., for the defendants.

D. Urquhart, for the plaintiff.

MEREDITH, J.A.:—The first question is, whether the plaintiff, at the time of the injury, was "riding as a passenger in or upon" the street car: and is not the broader one, whether, at that time, he might be considered merely a passenger as against the railway company.

He had been a passenger riding in and upon the street car, but had reached his destination, the car had been stopped to let him down, and he had alighted upon the public road, severing entirely all actual connection between himself and it; but, being put in imminent danger by a rapidly approaching motor car, he caught at the street car again, though it had by that time been started again, and was in motion, and, in endeavouring to escape injury from the motor car by getting upon the street car, fell, or was thrown down, coming in contact with the moving motor car, and so was severely injured. His purpose in trying to get upon the street car again was not to resume his journey—that was ended—nor was it to begin a new journey; it was solely to escape injury by the negligently driven motor car. It is idle to say that there was negligence on the part of the railway company, if that would make any difference: how could their servants foresee and be blameable for the misconduct of the driver of the motor car: it was at the plaintiff's instance, and upon his signal, that the street car was stopped at this alighting place; an entirely proper place to stop for that purpose; the danger was something not foreseen by the plaintiff or any one else, because doubtless not apparent until the motor car was almost upon him; avoidable, with any sort of care on the part of its driver, up to almost the last moment.

*To be reported in the Ontario Law Reports.

Under these circumstances, it is impossible for me to find that the man was "riding in or upon" the street car when he was injured; if he had been in or upon the street car, he would not have been injured as he was. The case would have been different if he had, after alighting, boarded the car again with the intention of resuming his journey, or of beginning a new one; but nothing like that was the case. Their plain meaning ought to be given to plain words, even though the result be different from that which one would prefer. And such is the effect of the cases in the Courts of the State of New Jersey, which, though very much in point, were not referred to at the trial.

The case, therefore, is not one for "double indemnity" under the policy in question, but of single indemnity; and the amount of the judgment entered for the plaintiff ought to be reduced accordingly.

The appeal upon the other ground fails entirely; there is ample evidence to support the finding that the plaintiff's injury caused him "temporary total disability" within the meaning of those words contained in the policy.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., also concurred.

Appeal allowed in part; no costs.

MARCH 6TH, 1912.

*REX v. SOVEREEN.

Criminal Law—Keeping Disorderly House—Indictment at Sessions—Conviction—Evidence to Sustain—Judge's Charge—Reference to Previous Conviction—Right of Prisoner, after Bill Found, but before Arraignment and Plea, to Elect Trial without Jury—Criminal Code, sec. 827.

Case stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereen, was indicted at the Sessions in December, 1911, for that he on the 23rd July, 1911, and on other days and times before that date, did keep a disorderly house, that is to say, a common bawdy house, contrary to secs.

*To be reported in the Ontario Law Reports.

228 and 225 of the Criminal Code, and was found guilty by the jury.

The indictment was not preferred at the instance of the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the Chairman, under sec. 873 of the Criminal Code. After a true bill had been found by the grand jury, but before arraignment or plea, the prisoner desired to elect to be tried before the County Court Judge without a jury, under the Speedy Trials sections of the Code. On its being held that he was not entitled so to elect, he pleaded "not guilty."

The Chairman, on the application of the prisoner's counsel, reserved for the Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?

2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?

3. Was the prisoner, in the circumstances stated, entitled to make an election for speedy trial?

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LATCHFORD, J.

J. B. Mackenzie, for the prisoner.

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

MOSS, C.J.O.:—We are all agreed that the questions submitted by the learned Chairman of the General Sessions should be answered adversely to the contentions made on behalf of the prisoner.

As to the first and second questions, having regard to the evidence and the charge to the jury, which are made part of the stated case, here can be no reasonable doubt.

The third question affords more room for difference of opinion—not, however, as to what the proper conclusion should be, but rather as to grounds upon which it should be based.

Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that when, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a Judge without a jury, he is not entitled, upon bill found and arraignment thereon, to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to

render futile all that has been done by the grand jury, and necessitate a compliance with all the forms prescribed by sec. 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827(3).

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury; on the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person and thereby save the delay which waiting for a trial by jury might involve.

And I do not think the legislation extends the right beyond that point.

The first question should be answered in the affirmative, and the second and third in the negative, and the conviction should stand.

MACLAREN and MAGEE, JJ.A., each gave reasons in writing for the same conclusion.

GARROW, J.A., and LATCHFORD, J., also concurred.

Conviction affirmed.

MARCH 6TH, 1912.

*RE VILLAGE OF BRUSSELS AND McKILLOP MUNICIPAL TELEPHONE SYSTEM.

RE VILLAGE OF BLYTH AND TOWNSHIP OF McKILLOP.

Ontario Railway and Municipal Board—Jurisdiction—Separate Telephone Systems in Adjacent Territories—Order for Connection—Ontario Telephone Act, 1910, *secs.* 8, 9—*Agreement with Bell Telephone Company—Applications to Board—Parties.*

Appeals by the McKillop Municipal Telephone System and the Corporation of the Township of McKillop from orders or decisions pronounced by the Ontario Railway and Municipal Board.

*To be reported in the Ontario Law Reports.

The appeals were heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

M. K. Cowan, K.C., and R. S. Hays, for the appellants.

W. M. Sinclair, for the Corporation of the Village of Brussels, respondents.

H. D. Gamble, K.C., for the Corporation of the Village of Blyth, respondents.

MOSS, C.J.O.:—. . . The first two in point of time of the orders complained of were pronounced upon an application made by the Corporation of Brussels, in which they named as respondents "The McKillop Municipal Telephone System." This was not a proper proceeding. While it seems that there is an association of individual subscribers who for convenience act under that name, it does not appear that there is any corporate body or company known to the law capable of responding by that name to the application made by Brussels to the Board for the orders now in question. Having been constructed and installed in 1908 under the provisions of the Local Municipal Telephone Act, 1908, the system and all works and property acquired, erected, or used in connection therewith, became vested in the Municipality of McKillop in trust for the benefit of the subscribers. The opposition to the application was made through the municipality, but it may be questioned whether, in the form in which the proceedings now stand, the orders made could be effectively enforced. if capable of enforcement under any circumstances.

But more formidable objections appear when the substantial questions between the parties are examined.

The respondents the Corporation of the Village of Brussels, as trustees for the subscribers to the local telephone system known as "The Brussels Morris and Grey Telephone System," made application in October, 1910, to the Ontario Railway and Municipal Board for an order for connection, intercommunication, or reciprocal use in the transmission of business between the telephone systems of the respondents and the appellants. The applicants alleged that their system was located in the territory immediately adjacent to the appellants', and that they had been, for some months previous to their application, desirous of entering into an agreement with the appellants for such connection, intercommunication, or reciprocal use, but the latter had declined to do so. Apparently the application was based upon sec. 9 of the Ontario Telephone Act, 1910, 10 Edw. VII. ch. 84 —which seems to be the only enactment that appears to afford any warrant for the application.

It is very difficult, however, to give an intelligible meaning to the language of the section. Read literally, it does not comprehend this case; on the contrary, it would seem to be providing for some case of a company or person, as defined by sec. 2(c) of the Act, having two or more systems or lines located in territory adjacent to each other. Doubtless, this was not the intention; but, in its present form, the real intention is not clearly expressed. The order of the Board, dated the 10th March, 1911, which directs connection, intercommunication, joint operation, reciprocal use, and transmission of business, purports to be made in pursuance of sec. 9; but, as pointed out above, that section is halting and uncertain in expression, and in strictness it does not confer jurisdiction in this particular case.

There still remains the question of jurisdiction dependent upon the existence of an agreement between the appellants and the Bell Telephone Company, substantially for the purposes recognised and authorised by sec. 8 of the Ontario Telephone Act, 1910, and which had been approved of by the Board prior to the application by Brussels.

The appellants and the Bell Telephone Company were working under this agreement when the orders now in question were made by the Board. It is said that there was no intention to interfere with that agreement, and that there is in fact no interference with it.

But it is obvious that compliance with the order by the appellants does seriously alter their relations to the Bell Telephone Company. It exposes them to the consequences of a breach of the agreement, and may deprive them of the benefits and advantages which they now enjoy under it.

And, while the agreement remains as an existing agreement, sanctioned and approved by the Board, the Bell Telephone Company are entitled to assert their rights under it and to claim that they should remain undisturbed and unaffected as long as the agreement stands. The Board has undoubted power to rescind the order for good cause, but the jurisdiction to do so should only be exercised upon a properly framed application for that purpose, to which all those who are interested are parties or of which they are properly notified.

At present the agreement is a valid subsisting agreement; and, while, upon an application regularly framed and constituted as to parties, the Board may determine its true meaning, yet, while it stands, the Board is without power or jurisdiction to alter or vary it.

And the important question is, whether the Board has, in

the present state of the legislation, any power or jurisdiction to order the performance of work of construction and connection with the Brussels system, involving the expenditure of money upon capital account by the subscribers to the appellants' system. There are no express provisions covering such a case; and the different sections to which we were referred by counsel for the respondents fall far short of supplying the necessary machinery for imposing or collecting funds to meet the outlay which obedience to the orders imposes.

Apart from these latter considerations, however, the want of jurisdiction to deal with the applications made on behalf of Brussels, based upon the other grounds referred to, is sufficient reason for allowing the appeal.

There is no difference in substance between the case of Brussels and the case of the application by the Corporation of the Village of Blyth. Except as to the form of the application with respect to the parties respondent, all the objections to the power and jurisdiction of the Board apply with the same force as in the Brussels case. The order complained of in the Blyth case is to the same effect as that pronounced in the Brussels case. The appeal is upon the same grounds, and the result should be the same.

Both appeals should be allowed, and the order complained of be set aside with costs to the appellants in each case.

MACLAREN, MEREDITH, and MAGEE, JJ.A., each gave reasons in writing for the same conclusions.

GARROW, J.A., also concurred.

Appeals allowed.

HIGH COURT OF JUSTICE.

MIDDLETON, J. MARCH 1ST, 1912.

GOODFRIEND v. GOODFRIEND.

Husband and Wife—Alimony—Desertion—Costs.

Action for alimony, tried at Kingston on the 28th February.

J. A. Hutcheson, K.C., for the plaintiff.
J. L. Whiting, K.C., for the defendant.

MIDDLETON, J.:—The plaintiff and defendant were married on the 28th October, 1907. The plaintiff is thirty-six years of age and her husband forty-eight. There is no issue of the marriage. The husband owns a farm worth $3,500, unincumbered, and the usual stock and cattle.

In the spring of 1909, the defendant was attacked by paralysis. He became, and still remains, utterly unable to work. His condition is said to be slightly improving, but it is as yet uncertain whether he will ever be able to do anything.

The plaintiff did her best to face the situation in which she found herself with her invalid husband, but in the fall of 1909 she realised that it was impossible to continue farming, as she had not the physical strength and could not afford help. Some of the farm chattels had been sold in the meantime, and she made up her mind that the best thing was to sell the remaining stock, etc., and move to the village of Gananoque, where she would rent a house and take in boarders. In this way she hoped to be able, with the assistance of the rent of the farm, to maintain herself and her husband. The husband's condition at this time prevented him from taking any active part, but he appears to have concurred in all that his wife was doing.

A house was rented in the village, the farm was rented, and when the time for moving came the furniture was taken to Gananoque. The husband desired to remain for a few days with his father, mother and sister, who lived on an adjoining farm; and the wife left him, understanding that he would follow her in a few days. He did not come, and she has made various attempts to induce him to move to the village, but he prefers to stay where he is. It is said that he is induced to adopt this course by his relatives, and that in his enfeebled condition he has become subject to their domination. On his behalf it is said by his counsel that he prefers to stay upon a farm, that he has been brought up and lived all his life upon a farm, and that he does not think his chance for recovery would be as good if compelled to live in the village.

There is no evidence to indicate that the husband and wife cannot live happily together. It does appear that the wife and her sister-in-law cannot agree. It is entirely out of the question for the wife to live with her husband where he now is.

At the trial I went out of my way to try and bring about a settlement; but neither party would give way, and each asserted his or her right; so that I am compelled to deal with the problem, thus presented, in accordance with the strict rights of the parties, trusting that in the end good sense may prevent what I feel would be a disastrous result.

At the time of the removal to Gananoque, all outstanding liabilities were paid, and the wife then found herself in possession of $376, which included $90 rent of the farm for the first year. She used a portion of this $376 in furnishing the house; and she has from time to time encroached upon what remained, so that now this fund is entirely exhausted. She has been keeping four boarders, and has not been able to make sufficient to maintain herself without resorting to the capital fund. The husband has received the second year's rent of the farm, $140, and apart from this he has been maintained by the charity of his relatives.

When asked her plans for the future, the plaintiff said that she desired to have husband live with her in the village. This would necessitate getting rid of two of the boarders. She thinks that with the rental of the farm and the profit from the two remaining boarders she would be able to maintain her husband, who can do nothing for his own maintenance. It is quite obvious that she is mistaken in this, and that the result will be that the farm will be sold or incumbered and will ultimately be lost. It seemed to me that she would have been wiser if she allowed her husband to be maintained by his father until it could be ascertained whether he would ever be able to take up farming again; but she is not ready to assent to this.

I think that the plaintiff has done nothing to disentitle her to her rights, and that she has a right to be maintained by her husband. I think his conduct amounts to a desertion, and that he has no right to take up his own residence in a place where his wife cannot go, and then tell her to maintain herself.

I have not been referred to any case at all like this in its circumstances, and I have not been able to find any. The general rule is, that the wife is entitled to one-third of the income of the husband. His income will, of course, include his earnings. If the wife has an independent income, then this is to be taken into account in making her allowance; but I can find nothing to warrant the statement that the wife's share of the income is to be cut down by reason of her own earning capacity. Nor can I find anything that indicates that where the husband is by illness incapacitated from earning, the wife is entitled to resort to the corpus of his estate for her maintenance. I, therefore, conclude that the most I can give the wife, under the circumstances, is one-third of the rental of the farm, say, $50 per annum. This should be paid to her quarterly. I do not think that any allowance should be made for arrears, because since the separation she has received and spent $376, while her husband has only received $140.

The wife is also entitled to her costs; but I am told that the litigation has been conducted very inexpensively, and I feel sure that the plaintiff's solicitor will not feel himself aggrieved when I fix the costs at $75—a sum which is quite inadequate as indicating the value of his services rendered, but which will, I fear, bear all too heavily upon the unfortunate defendant.

I do not desire that there should be any proceeding taken which would bring about a sale of the farm. That at the present time would be disastrous to both parties. I will, therefore, listen favourably to any application for a temporary stay of execution for these costs if payment cannot be arranged between the parties. It goes without saying that this allowance to the wife must be regarded as in the nature of a temporary arrangement only; and that, if the husband recovers and does not then make adequate provision for his wife, she will be at liberty to apply to a Judge in Chambers for an increased allowance. At present, there is nothing to indicate that, if the husband is fortunately restored to health, he will not make a home for his wife.

DIVISIONAL COURT. MARCH 2ND, 1912.

*McMULKIN v. TRADERS BANK OF CANADA.

Attachment of Debts—Moneys Deposited in Canadian Chartered Bank at Branch out of Ontario — Service of Attaching Order on Bank at Head Office in Ontario—Con. Rules 911 *et seq.—Garnishee out of Ontario—Con. Rule* 162.

An appeal by the plaintiff (judgment creditor) from the judgment of FINKLE, Co. C.J., Oxford, in favour of the defendants (garnishees) upon the trial of a garnishee issue.

On the 8th August, 1911, the plaintiff recovered a judgment against one Couldridge for $211.33. On the 17th August, 1911, the plaintiff obtained a garnishee order nisi attaching any debt due from the garnishees, the defendants in the issue, to the judgment debtor. That order was served on the manager of the Traders Bank of Canada at Ingersoll on the 17th August, and upon the manager at the head office at Toronto on the 18th August.

The issue was directed between the attaching creditor and the garnishee for the purpose of determining whether, at the time of the service of the order, there was any amount owing from the

*To be reported in the Ontario Law Reports.

garnishees to the judgment debtor, and whether the garnishee order "was a valid attachment of such debt."

The County Court Judge found against the attaching creditor, who appealed.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and MIDDLETON, JJ.

J. B. Clarke, K.C., for the appellant.

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

The judgment of the Court was delivered by MIDDLETON, J.:— It appeared that at the time of the recovery of judgment the judgment debtor had $3,415 upon deposit in the branch of the Traders Bank of Canada at Ingersoll. This sum was withdrawn, and on the 9th August was deposited with the branch of the bank at Calgary. When the attaching order was served, it was accompanied by a notice, addressed to the bank, warning the bank that the money sought to be attached was upon deposit with the Calgary branch. The general manager forwarded the attaching order to Calgary. It reached the Calgary office before banking hours on the 24th. Notwithstanding this, the bank permitted the withdrawal of the whole $3,415, and it was, upon the same day, re-deposited by the judgment debtor to his own credit "in trust;" and, later on in the same day, the money so deposited was again withdrawn.

There is no doubt that, at the time of the service of the garnishee order, the garnishees were indebted to the judgment debtor. The only question is, whether this indebtedness was subject to attachment at the instance of the judgment creditor, in the Ontario Courts. This falls to be determined on Con. Rules 911 et seq. . . . validated by 58 Vict. ch. 13, sec. 42, and 59 Vict. ch. 18, sec. 15. No notice has been served, as required by sec. 60 of the Judicature Act, if it is intended to contend that this legislation is ultra vires of Ontario.

By the Rules in question it is plain that the intention was to make exigible to answer a judgment recovered in Ontario (*a*) any indebtedness to the judgment debtor where the garnishee was within Ontario, or (*b*) where the garnishee was not within Ontario but the case would fall within the provisions of Con. Rule 162 if the judgment debtor was himself seeking to assert his rights within Ontario. The Rules do not proceed upon any theory as to the situs of the cause of action to be taken in execution. . . . This narrows the question for determination to an inquiry whether the debtor could, himself, sue in Ontario to recover the debt due him by the garnishees.

Before the decision of the Privy Council in Rex v. Lovitt, [1912] A.C. 212, no one would have doubted this right. . . . Had our Rules been based upon the locality of the debt to be taken in execution, that judgment would be conclusive against the attaching creditor; but, if I am right in thinking that this is not the test, then the decision has no application. . . . The debtor would not be exempt from suit at the instance of his original creditor, if found and served within Ontario, because the Courts of Ontario have universal jurisdiction in all personal actions, subject only to their ability to effect service within their own jurisdiction: Tytler v. Canadian Pacific R.W. Co., 29 O.R. 654. . . .

It was suggested that foreign Courts might not accord to the judgment of the Ontario Court any extra-territorial recognition. . . . This is a question of policy, affecting those who make the law . . . it cannot be considered by the Courts, who are called upon to administer the law as they find it: Western National Bank of City of New York v. Perez Triana & Co., [1891] 1 Q.B. 304. But it is not likely that in this case any such question can arise, because at the time of the original suit the judgment debtor was resident within Ontario, and he appears to be still here. . . .

The appeal should be allowed, and the garnishees should be directed to pay to the judgment creditor sufficient to satisfy the judgment debt and the costs of the attachment proceedings, of the issue, and of this appeal.

DIVISIONAL COURT. MARCH 4TH, 1912.

*FRÉMONT v. FRÉMONT.

Husband and Wife—Alimony—Separation Deed—Payment of Gross Sum—Absence of Provision for Maintenance—Misconduct of Husband Justifying Separation.

Appeal by the defendant from the judgment of CLUTE, J., at the trial, awarding the plaintiff alimony.

The marriage took place on the 16th May, 1904. The parties cohabited until the 16th November, 1906, upon which day a separation agreement was entered into. Since then, the plaintiff has been maintaining herself and her two children.

*To be reported in the Ontario Law Reports.

The trial Judge found, upon conflicting evidence, that the plaintiff was justified in leaving her husband by reason of his cruelty and misconduct.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and MIDDLETON, JJ.

G. H. Watson, K.C., for the defendant.

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

The judgment of the Court was delivered by MIDDLETON, J.:—The sole question argued before us was as to whether the provisions of the separation deed preclude the action.

By the terms of this deed, the parties agree to live separate from each other, and each agrees not to take any proceedings against the other for restitution of conjugal rights or to annoy or interfere with the other in any manner whatsoever. The husband agrees to pay the wife $250. . . The wife agrees to pay her own debts, save three named accounts, and to support the two children. . . . There is no provision in this deed relating to the maintenance of the wife. She does not covenant not to claim alimony from her husband, nor does she covenant to maintain herself.

The trial Judge has taken the view that the mere agreement to live separately does not relieve the husband from the obligation to support and maintain his wife. With this we agree.

A husband, by the act of marriage, undertakes to maintain and keep his wife, unless she commits adultery. . . . If the husband fails to maintain her, she has what has been called "authority of necessity" to pledge her husband's credit. Mr. Watson is probably right when he takes the position that the same test can be applied to determine the wife's right to alimony as in the case of an action brought against the husband by one who has supplied his wife with necessaries—the creditor in the latter case deriving his claim entirely from the wife's implied authority. . . .

In this case there is no provision whatever for maintenance, and there has been no release by the wife of her right to be maintained. The wife is entitled to be separately maintained, not merely because the husband had agreed to her living apart, but also because the misconduct found by the Judge justifies a separation. . . .

[Reference to Eastland v. Burchell, 3 Q.B.D. at p. 435.]

Here the parties have not made their own terms for the separate maintenance of the wife. The husband has made no adequate

provision for her, and she is justified in resorting to the Court for an alimentary allowance. This case differs from any reported decision: in all the reported cases where there was separation, either voluntary or on account of the husband's misconduct, the separation deed contained an alimentary provision. It is impossible to regard the lump sum of $250 as being intended for the maintenance of the wife. The deed does not so stipulate; and, apart from the fact that that sum is clearly inadequate for the purpose, it may have been a payment made to induce the wife to assume care of the children.

In Atwood v. Atwood, 15 P.R. 425, and 16 P.R. 50, the Chancellor says: "A separation deed may be well upheld by the payment of a sum in gross, and a provision to arise de anno in anno is not essential." No authority is referred to, and I can find no case in which such a provision was made. A lump sum so paid, enough to produce an adequate income or to supplement the wife's own income, might well be sufficient; but a sum such as that paid here would be so grossly inadequate as to afford in itself conclusive evidence either of duress or improvidence.

In this case, it is sufficient to say that, upon the deed itself, the sum is not accepted in lieu of alimony.

The appeal should be dismissed with costs.

KELLY, J. MARCH 4TH, 1912.

THOMSON v. McPHERSON.

Contract—Sale of Interest in Mining Company—Indefinite and Incomplete Agreement — Interest and Sale-price Unascertained — Fluctuating Character of Subject-matter — Time Deemed to be of Essence—Abandonment—Rescission—Registration of Caution against Company's Mining Claim—Destruction of Subject-matter.

Action for specific performance of an agreement, or, in the alternative, for damages for breach, or, in the further alternative, for payment of $14,666.66 and interest.

The agreement was dated the 25th September, 1909. By it, the plaintiff agreed to sell to the defendants his "interest in the Mac Mining Company, upon a basis of $80,000 for the claim, less an amount, not to exceed $6,500, for charges against the $80,000. Terms: one-quarter cash in 15 days from date; one-eighth in 30 days thereafter; one-eighth in 60 days

thereafter; and one-eighth in 90 days thereafter; the balance to be paid in two payments, one in 6 months thereafter and one in 9 months thereafter (after said 15 days). The shares to be delivered as paid for or secured, or buyers to give promissory notes for payments at said dates; stock to be delivered on delivery of notes at the option of the buyers." This was signed by the plaintiff, and "accepted, one-half each," by the two defendants, over their signatures.

R. C. H. Cassels and J. F. Lash, for the plaintiff.

S. H. Bradford, K.C., and A. D. Crooks, for the defendant McPherson.

W. N. Tilley and G. W. Mason, for the defendant Lobb.

KELLY, J. (after setting out the facts):—The company's sole asset was a mining claim—part of broken lot No. 8 in the 4th concession of the township of Coleman.

On the 5th October, 1909, a caution was registered by one Milne against the claim, alleging, amongst other things, ownership of an interest therein. All parties conceded that this registration had a very detrimental effect on the value of the property.

The defendants have set up that the agreement sued on is indefinite and incomplete and cannot be enforced. I agree with that contention. In House v. Brown, a decision of a Divisional Court, reported in 14 O.L.R. 500, Mr. Justice Anglin, at p. 525, says: "That the want of a definite provision in a contract fixing the amounts and dates of payment of deferred instalments of purchase-money renders a contract incomplete and unenforceable, where it is contemplated that these matters shall be the subject of further negotiations and future settlement between the parties thereunder, is well established."

It is well-settled law that to render a contract for sale complete there must be a price ascertained or ascertainable: Logan v. Mesurier, 6 Moo. P.C. 116, at p. 132.

The price payable to the plaintiff was not and is not yet ascertained.

That was to be determined in further negotiations between the parties. From the 23rd September, 1909, until April, 1910, the plaintiff did not meet or have any communication of any kind with the defendants. Arthur Thomson (the plaintiff's brother and representative), however, during that time, did see the defendants, when the question of coming to an agreement settling upon the numbers of shares, or the interest, which the defendants should receive, came up. . . .

[The learned Judge here set out a portion of the evidence of Arthur Thomson.]

This, of itself, apart from the other facts, shews that an unsuccessful attempt was made, after the signing of the document of the 25th September, 1909, to open up negotiations to determine these interests; that the interests of the parties had not been determined; and that an essential element of a completed contract was wanting. There is the evidence, too, of the plaintiff, on cross-examination, that he never offered to deliver any shares to the purchasers, and was not in a position to do so.

Moreover, even if the number of shares receivable by these parties had been determined, there was still to be ascertained the amount to be deducted from the $80,000 for charges. The document sued upon says this was not to exceed $6,500, but it is not otherwise fixed, and for this reason also the amount to which the plaintiff was entitled could not be definitely arrived at.

It seems reasonable to conclude, too, that if, at the time the agreement for sale by the plaintiff was under consideration, it had been clear and certain what number of shares, or what interest, the plaintiff was entitled to, this agreement would have stated the exact price he was to receive, instead of making use of the more roundabout and more cumbersome method of stating a selling value of the whole claim as a basis of calculating the value of the plaintiff's interest.

For these reasons, I think the plaintiff's action fails.

The defendants also set up that the property owned by the Mac Mining Company was really the subject of the sale by the plaintiff, and that the filing of the caution by Milne, in effect, operated as a destruction of the subject-matter of the contract; and, further, that, from the filing of the caution, all parties treated the contract as rescinded. Even if the agreement had been complete, I would feel bound to conclude that, under the circumstances of what followed the filling of the caution, it was rescinded.

In MacBryde v. Weekes, 22 Beav. 533, Sir John Romilly, at p. 539, says: "This, in my opinion, is one of those cases in which time was, from the nature of the property, necessarily of the essence of the contract, in this sense and to this extent that it was incumbent on the owner to use his utmost diligence to complete his part of the contract, and that if he failed in so exerting himself, the defendant might decline having anything further to do with the matter;" and this he states to be the owner's duty, although no time is specified in the contract. This was a case in which the subject of the contract was in part a lease for working a mine, which Sir John Romilly says

"is a trade of fluctuating character," and the rest of the property contracted for was not merely for the same purpose, but was leasehold, having a short period to run.

The subject of the contract now under consideration was certainly of a fluctuating character, and the words of Sir John Romilly are applicable to it.

In Morgan v. Bain, L.R. 10 C.P. 15, Lord Coleridge says: "It is clear that the omission to perform certain acts incumbent upon the party to a contract may justify the other party in coming to the conclusion that, in point of fact, the party guilty of the omission intends to abandon the contract, and is himself treating it as abandoned, and rescinding it."

Here the plaintiff, from the filing of the caution on the 5th October, 1909, until April, 1910, did not see the defendants or personally do anything in recognition of the agreement; and, though his brother, who represented him, says he communicated by telephone with the defendant Lobb a number of times, in the latter part of 1909, asking for payment, Lobb's evidence is to the effect that these communications had reference to the settling of what shares or interest the plaintiff was entitled to. This latter is, I think, the more probable view, having in mind the evidence of Arthur Thomson quoted above.

Both the plaintiff and Lobb knew the disastrous effect of the filing of the caution, and that it was useless to endeavour to sell while the caution remained undischarged. A remarkable circumstance is, that, though from the time the caution was filed until the plaintiff met Lobb in April, 1910, Arthur saw the plaintiff weekly or oftener, and at times stopped in the same house with him, he did not tell him of the caution. Arthur knew of it soon after it was filed. It is difficult to find an explanation of such indifference to a matter of so serious import, and in a transaction of a nature requiring prompt attention and the utmost diligence, unless on the assumption that the plaintiff, realising the disastrous effect of the caution, considered and treated the whole matter of the sale as at an end. It is quite clear that the defendant Lobb, and, I think, the defendant McPherson also, so treated it, and I think they were justified in coming to the conclusion that the plaintiff looked upon it as abandoned or rescinded. The defendants would have the right to rescind if the plaintiff had rescinded, or if the plaintiff, having so behaved himself as to give them reasonable ground to conclude that he had abandoned the contract, they did so conclude (Morgan v. Bain). I think the plaintiff and his representative did so behave; and that the defendants concluded he had abandoned.

The plaintiff's claim is dismissed with costs.

MIDDLETON, J. MARCH 5TH, 1912.

JENNISON v. COPELAND.

Vendor and Purchaser—Disputed Claim to Partnership Interest in Land Contracted to be Sold—Completion of Sale pending Determination of Issue—Order of Court—Terms—Security to Claimant—Costs.

Motion by the plaintiff for an order allowing a sale of lands to be carried out pending trial.

M. R. Gooderham, for the plaintiff.
J. J. Maclennan, for the defendant Copeland.
G. G. Plaxton, for the defendant Lea.

MIDDLETON, J.:—The title to the land is in the plaintiff. She has sold to Copeland, and Copeland is ready to complete the purchase. Lea has served a notice claiming to be a joint owner of the lands, and that a partnership exists between the plaintiff and himself. The plaintiff has advanced substantially all, if not all, the money for the purchase of the land and the building of the house. According to Lea, he has collected all money disbursed by him from the plaintiff, save $150, and she has paid the rest, some $6,000.

The house has been vacant and unsold for over a year, and the plaintiff has made a binding agreement with Copeland, and he refuses to wait the end of the litigation, because, under the agreement, he is entitled to the immediate possession of the house, and must move from his present residence. Lea's rights, if any, are capable of measurement in money, and consist of a claim to this $150 and half the difference between what the plaintiff advanced and the selling value. His outside figure is $600 or $750 in all.

Lea's claim is at best problematical. The Statute of Frauds may be an answer. See Cody v. Roth, 28 N.Z. 565. And the injury done in the event of the sale going off may be in fact irreparable, as he declines to give any security or even to undertake as to damages if the claim turns out to be unfounded.

I think there is power to order the sale to be carried out, upon proper terms to secure Lea, if he has a claim.

The terms should be: $1,000 should be paid into Court, unless the parties agree to deposit to a special account, to answer any claim he may have. If Lea has an interest in the property,

the plaintiff must justify to the satisfaction of the trial Judge that the sale is at an adequate price, and must account upon the basis of the real value, and not merely upon the price realised.

Upon these terms, the lands will be vested in the purchaser for all the estate of both parties; and, if necessary, a receiver may be appointed to convey. In this case the receiver will retain the $1,000 pending the litigation.

There would not seem to be any object in the purchaser further attending the litigation; and his costs may be directed to abide the result of the litigation, i.e., to be paid by the party failing upon the issue to be tried, as to Lea's interest in the lands.

Costs in the cause as between the plaintiff and Lea.

KELLY, J. MARCH 5TH, 1912.

MALOUF v. LABAD.

Company—Shares—Seizure and Sale under Execution—Want of Proper Service of Notice—Execution Act, 9 Edw. VII. ch. 47, secs. 10, 11—Change of Place of Head Office—Resolution—By-law—Place for Service—Situs of Shares—Collusion—Setting aside Sale.

Action to set aside a sale made by the Sheriff of the District of Nipissing of 75,000 shares of the capital stock of the defendants the Gold Pyramid Mining Company of Larder Lake Limited, and other interests in that company owned by the plaintiff Malouf, under an execution in an action brought by the defendant Labad against him, and to cancel the entry of transfer thereof in the books of the company in favour of the defendants the Malouf Realty Company, and that the plaintiff Malouf, or the plaintiffs McCrae and Kouri, be entered as owners of these shares and interests.

G. A. McGaughey, for the plaintiffs.
A. G. Browning, K.C., for the defendant Varin.
G. R. Brady, for the other defendants.

KELLY, J. (after setting out the facts and detailing the proceedings taken):—It is declared by sec. 10 of the Execution Act, 9 Edw. VII. ch. 47, that "shares and dividends and any equitable or other right, property, interest, or equity of redemp-

tion in or in respect of shares or dividends in an . . . incorporated company having transferable shares, shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property."

Sub-section 1 of sec. 11 provides that "the Sheriff . . . shall forthwith serve a copy of the execution on the . . . company, with a notice that all the shares of the execution debtor are seized thereunder; and from the time of service the seizure shall be deemed to be made; and no transfer of shares by the execution debtor shall be valid unless and until the seizure has been discharged," etc.

Sub-section 2 of sec. 11 is, that "such seizure may be made and notice given by the Sheriff where the . . . company has within his bailiwick a place at which service of process may be made."

The Gold Pyramid Mining Company of Larder Lake Limited was incorporated by letters patent under the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34. Notwithstanding that the letters patent named Ottawa as the place of the company's head office, and that there is no evidence that authority was given, as required by sec. 44 of the Act, to hold meetings of directors or of shareholders outside of the province of Ontario, all the meetings of both directors and shareholders, down to the time of the trial, were held in Montreal; moreover, the books of the company were kept in Montreal, contrary to the requirements of sec. 114 of the Act.

The records of the company shew that on the 8th May, 1911, the directors passed a resolution authorising the transfer of the head office from Ottawa to Cobalt, and that, in Cobalt, Sol White, barrister, be appointed legal representative of the company to receive legal notice addressed to the company.

The words referring to the authority of Mr. White to receive legal notices were written in the margin of the company's minute-book some time after the minutes were written. The secretary's explanation of this is, that his clerk omitted these words when writing the minutes.

It is quite clear to me that what the directors had in mind was formally to make the change of head office to Cobalt, and, as meetings would continue to be held in Montreal, where the chief officers of the company were (and the occurrences subsequent to the 8th May shew that this state of things continued), Mr. White, as the company's legal representative in Cobalt,

would, on the change of the head office being made, in some way be associated with it. The company failed, however, to carry this into effect.

The by-law required by sec. 86 of the Ontario Companies Act, in changing the place of the head office, was not passed, nor were the other requirements of that section complied with; nor can I find that, under the circumstances, the company had established, or, if so established, that there was existing at the time of the seizure, a place within the bailiwick of the Sheriff of the District of Nipissing at which service of process could be made, as required by sub-sec. 2 of sec. 11 of the Execution Act.

Assuming even that the resolution of the 8th May was sufficient to constitute Mr. White a proper person on whom to make such service as it was necessary for the Sheriff to make upon the company, I find that the service made by the Sheriff on MacPhie was not a compliance with the requirements of the Act. Mr. White was absence, and at a distance of hundreds of miles, not only from Cobalt, but from this Sheriff's bailiwick, at the time of the alleged service, and for weeks both before and after it; his place of business was closed and locked, and the key thereof in the possession of another person on whom the alleged service was made, but who had no authority to accept service of process for or on behalf of Mr. White; and it is not shewn that the notice served on MacPhie ever reached Mr. White.

The head office of the company not having been changed to Cobalt, and there being no place within the Sheriff's bailiwick where process could then be served upon the company, how can it be said that the seizure was properly made or that the shares are properly found within that bailiwick?

For this reason, I am of opinion that the attempted sale by the Sheriff was and is void.

The plaintiff contends, too, that the sale is void by reason of the arrangement come to between Hartman & Smiley and White to leave the settlement in abeyance; that the sale should have been postponed under the instructions to that effect which Mr. MacNamara says he gave the Sheriff; that the interest of the plaintiff Malouf in the agreement of the 29th March, 1910, was not saleable under execution; and that the defendants other than the Sheriff acted fraudulently and in collusion.

The sale of the 25,000 shares by the plaintiff Malouf to the plaintiff Kouri was a bonâ fide sale, without notice of the assignment to Hartman & Smiley; and, as between vendor and purchaser, Kouri, before the issue of the execution, became the

owner of these shares, represented by certificate number 632. These shares were not saleable by the Sheriff.

The defendants E. K. Malouf (who was also the agent of the defendants the Malouf Realty Company) and the Gold Pyramid Company were aware of this sale to Kouri, and, with that knowledge, E. K. Malouf took an active part in having the execution issued and in bringing about the Sheriff's sale, and at the sale became the purchaser for the Malouf Realty Company; he and the secretary of the Gold Pyramid Company were parties to the calling of the meeting of directors held on the 18th October; and, with all this knowledge, the company sanctioned the transfer by the Sheriff and ordered entry thereof to be recorded in the company's books, and the plaintiff Malouf's certificates cancelled; and immediately the Malouf Realty Company purported to sell the whole 75,000 shares to Cahill, the brother-in-law of E. K. Malouf. These facts, considered with the telegram and other communications which passed between E. K. Malouf and the company, or its secretary, beginning on the 30th September, the very day the secretary says Kouri had presented the stock transfer for entry, the meeting between the defendants Labad and E. K. Malouf at North Bay (which I find difficulty in believing was accidental), and the close touch kept between E. K. Malouf and the company, or its secretary, during the proceedings leading up to and following the sale, convince me beyond doubt that the defendants, other than the Sheriff, acted in such a manner and with such knowledge as to give good grounds for holding that there was collusion such as makes it impossible to uphold the validity of the Sheriff's sale.

There will, therefore, be judgment setting aside the sale by the Sheriff and cancelling the entry made in the books of the defendants the Gold Pyramid Mining Company of Larder Lake Limited, of the transfer to the defendants the Malouf Realty Company of the 75,000 shares and other interests of the plaintiff Malouf, and directing that the certificate issued to the Malouf Realty Company for such shares be delivered up to be cancelled; that the plaintiff Kouri be entered in the books of the company as owner of the 25,000 shares represented by certificate number 632; and that a certificate for these shares be issued by the company and be delivered to him; that the plaintiff Malouf be entered in the books of the company as owner of the remaining 50,000 shares, and that certificates numbers 630 and 631, representing the 50,000 shares, be delivered to the plaintiff Malouf. The defendants the Malouf Realty Company are restrained from delivering over, transferring, selling, or otherwise dealing with

the shares and interest purporting to have been sold to them by the Sheriff.

As against the defendants, other than the defendant Varin, the plaintiffs are entitled to their costs of action, including the costs of and incidental to the injunction. No costs against the defendant Varin.

FALCONBRIDGE, C.J.K.B. MARCH 6TH, 1912.

McCONNELL v. VANDERHOOP.

Contract—Advertising—Breach—Damages.

Action by advertising agents against manufacturers of druggists' special preparations to recover damages for breach of an advertising contract and moneys expended.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff.
W. J. Elliott, for the defendants.

FALCONBRIDGE, C.J.:—The plaintiffs are advertising agents; the defendants are manufacturers of "standard pharmaceutical preparations," which is translated by a witness as meaning patent medicines.

The plaintiffs allege that their "client" gets the advantage of their expert knowledge, and that it does not cost him, "the client," any more—the newspaper paying the agent a commission averaging twenty per cent.

The plaintiffs and defendants had had some business relations for about two years before August, 1910; but the defendants had been doing much or all of their advertising through a rival firm (A. McKim Limited); and a contract was entered into by the defendants with the plaintiffs, dated the 8th or 9th August. . . .

The plaintiff McConnell swears that this contract was to run for a year; and I find this to be a fact; but he did not take the trouble to make this part of the written contract, which the plaintiffs must abide by.

E. S. Vanderhoop swears that the agreement was, that the "ads," as they call them, were to be given the same position or of the same class as with McKim. The defendants, in turn, must abide by the writing, which says *as good positions* as are now being given.

The ostensible ground of complaint put forward by the defendants is, that they preferred the advertisements to appear *as* reading matter, whereas the plaintiffs inserted them *among* the reading matter, with display headings. The reading matter costs more, but the plaintiffs had no interest in this. They got their commission, less the five per cent. which they were to allow the defendants.

If it is at all material, there is no evidence to shew me which form of advertisement is more likely to attract purchasers or customers; nor were any copies of newspapers produced in illustration.

Personally, I should rather buy from the man who frankly heads his advertisement with the display than from the one who, under false pretences, induces the unwary to peruse half a column of more or less interesting matter and to come suddenly on an announcement of the merits of a patent medicine. Against this person one feels a certain amount of resentment.

I find, therefore, that the defendants had no real grievance; but that, coming into touch again with the McKim company (whose agent, saying that their interests were identical, promised that McKim would see that the defendants "got through the suit"—"would see them through") unreasonably assumed to cancel this contract.

The plaintiffs contend, alternatively, that the contract is to last as long as the defendants have any advertising to do. I do not so hold; but I think that the defendants ought to have presented their alleged grounds of complaint and asked that they be remedied, and, in default of remedy, after a reasonable time, proceeded to cancel.

As to damages, the plaintiffs claim the commission which they would have earned on the year's business. This I do not allow. All the arrangements are very loose. No newspaper has held or tried to hold the plaintiffs on their alleged contracts for the year.

But the plaintiffs ought to get a reasonable allowance for their personal trouble and expert knowledge in making the initial contracts with the newspapers—and otherwise in getting matters going. The year's work would have gone through automatically through the medium of the clerical staff in their office.

I am awarding them a modest sum when I give them $2,500 for this. The judgment will be for this sum, plus the amount paid into Court—with costs all through on the High Court scale.

I refuse the defendants' application to plead the Statute of Frauds. I do not think it would help them.

DIVISIONAL COURT. MARCH 7TH, 1912.

WARD v. SANDERSON.

Building—Encroachment on Neighbour's Land—Bonâ Fide Belief of Ownership—1 Geo. V. ch. 25, sec. 33—Retention of Land—Compensation—Amount of—Counterclaim—Amendment—Form of Judgment—Vesting Order—Rights of Mortgagee—Damages for Injury to Trees—Amount of.

An appeal by the defendant from the judgment of DENTON, Jun. J.C. Co. York, which was partly in favour of the defendant upon her counterclaim. By her appeal she sought to increase the sum awarded to her.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and MIDDLETON, JJ.

N. F. Davidson, K.C., for the defendant.

W. Proudfoot, K.C., for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—The defendant is the owner of the house known as No. 32 on the north side of Oxford street, and adjoining lands forming the westerly portion of lot No. 3 on the north side of Oxford street, in the city of Toronto. The plaintiff is the owner of the rear part of the lands immediately to the east.

Early in 1909, the plaintiff contemplated the erection of a warehouse, several storeys in height, upon his land. At this time the defendant had a quantity of earth upon the rear portion of her lot, which could not conveniently be removed, by reason of there being no way of access. An agreement was made by which advantage was taken of the situation, and the plaintiff agreed to remove this earth across his land before his building was completed. The earth was removed, but some dispute arose as to the price to be charged for its removal; and the action was brought to recover the plaintiff's claim in respect thereof.

The action was commenced on the 11th July, 1911, and at this time no counterclaim was filed; but on the 21st November, 1911, leave was obtained, pursuant to which the counterclaim was delivered, claiming damages for injury done to certain trees and vines during the course of the erection of the warehouse, and also alleging that the wall of the warehouse trespassed upon and occupied four inches of the defendant's land, and that an excavation had been made beyond this four inches during

the construction of the wall, which had been filled up with broken brick and rubbish.

At the trial it clearly appeared that the defendant's claim was much exaggerated. For the injury to the shrubs, trees, and vines, the Judge allowed $35. Upon the argument of the appeal we thought the amount allowed was ample. The Judge also found that the wall encroached slightly upon the defendant's land; and, pursuant to the statute 1 Geo. V. ch. 25, sec. 33, he allowed to her $10 as the value of the land encroached upon, which he permitted the plaintiff to retain.

Upon the appeal the defendant contends that the case is not brought within the provisions of the statute in question, and that the amount awarded is entirely inadequate. She also asks leave to adduce further evidence for the purpose of shewing that the footing of the wall and some weeping tiles encroach further upon her land.

The statute provides that, "where a person makes lasting improvements on land under the belief that the land is his own," the Court may direct that person to retain the land, making compensation therefor, if, in the opinion of the Court, this is just.

The principle governing the interpretation of the statute is indicated in Chandler v. Gibson, 2 O.L.R. 442; where it is said that it is "a question in each case for the tribunal to determine whether the person claiming for the improvements made them under the bonâ fide belief that the land was his own."

In this case, the boundary between the land of the plaintiff and the land of the defendant was a fence that had been standing for some thirty years. This fence was probably not upon the true boundary line. The evidence of the plaintiff is, that he intended to recognise this fence as correctly defining the boundary; that he took the fence down—or at any rate removed the boards from the posts—thinking that the wall of his building would supersede it; that he marked the location of the fence by a line; and that his intention was to build up to the boundary; and he believes that he has not in any way encroached on the defendant's land.

No complaint was made for more than two years, although the defendant was residing in her house during the erection of the building.

The County Court Judge has found that there was a bonâ fide belief on the part of the plaintiff that the land was his own.

It is not very clear, from the reasons given by the learned Judge, what the exact extent of the encroachment found by him

was. We are inclined to the view that it was somewhat greater than he thought.

According to a survey made in 1891, the defendant's lot had a frontage of 26 feet 2 inches, and a width at the rear of 26 feet 4 inches. Her deed calls for 26 feet only. According to recent surveys, the width at the rear is 25 feet 9 inches; and, as the old western fence is still in the same place, this indicates an encroachment of 8 inches, although in the action an encroachment of 4 inches only is charged; the discrepancy possibly arising from a comparison of the recent survey with the requirements of the deed.

We do not think that we should interfere with the finding of the learned Judge that the plaintiff acted in good faith. It is in the first place unlikely that he would erect the wall of a four-storey warehouse upon property to which he knew he had no claim; but we think the amount to be allowed for the land occupied ought to be increased. Leave should be given to the defendant to amend her counterclaim so as to claim an encroachment of 8 inches instead of 4 inches; and the title to this 8 inches is to be vested in the plaintiff, upon payment of $50 as the price of the land. But, as this amendment is an indulgence to the defendant, and as she has failed in the branch of her appeal relating to the value of the fruit trees, we think that there should be no costs of the appeal.

We, therefore, direct that the judgment below be varied as indicated, and that, save as aforesaid, the appeal be dismissed without costs.

We draw attention to the form of the judgment in the Court below. Where the trespasser is allowed to retain the lands encroached upon, he making compensation, the judgment should direct that the land be vested in the trespasser.

At the trial, no inquiry appears to have been made whether the defendant's lands are free from mortgage. If there is an incumbrance, the allowance by way of compensation should be paid to the mortgagee, unless his consent to payment to the defendant is filed.

WARNER v. NORRINGTON—MASTER IN CHAMBERS—MARCH 1.

Security for Costs—Con. Rule 1198(*d*)—*Costs of Former Action Unpaid.*]—Motion by the defendant for security for costs under Con. Rule 1198 (d): "Security for costs may be ordered . . . (d) Where the plaintiff . . . has had judgment or order passed against him, in another action or proceed-

ing for the same cause in Ontario or in any other country, with costs, and such costs have not been paid." The action of Norrington v. Warner was tried at the sittings of the District Court of Nipissing in June, 1911. It was on an agreement between the parties, as to which there was no defence. But Warner set up in his statement of defence a right to an account from Norrington in respect of another mining claim, not included in the agreement. This was the subject of the present action, brought in the High Court. It was not set up by way of counterclaim in the former action, and the trial Judge refused to give any effect to it, nor did he in any way pass upon it. He said: "It was a private enterprise not covered by the agreement." The Master said that this action did not seem to be within the Rule; and the motion should be dismissed, but without costs, as the pleadings should have been amended either by having the claim of Warner struck out or set up as a counterclaim—in which case it would have taken the whole matter into the High Court under sec. 186 of the Judicature Act, if desired by either party. See Henders v. Parker, 11 O.W.R. 211, 315, and case cited. McDonald (Day, Ferguson, & O'Sullivan), for the defendant. Cuddy (W. M. Douglas), for the plaintiff.

FARMERS BANK OF CANADA v. HEATH—CLUTE, J., IN CHAMBERS —MARCH 1.

Writ of Summons—Service out of the Jurisdiction—Cause of Action, where Arising—Place of Payment—Conditional Appearance.]—Appeal by the defendants from the order of the Master in Chambers, ante 682, in one of the actions only, that upon the 1909 policy. CLUTE, J., dismissed the appeal with costs. Shirley Denison, K.C., for the defendants. M. L. Gordon, for the plaintiffs.

IRWIN v. STEPHENS—MASTER IN CHAMBERS—MARCH 2.

Trial—Postponement—Terms—Change of Venue—Con. Rule 529(d)—Convenience—Foreign Commission — Costs.]—Motion by the defendant for an order postponing the trial, notice of trial having been given by the plaintiff for the sittings at Cobourg on the 5th March, and for a commission to take the evidence of a witness residing at Calgary. The action was for libel of the plaintiff, alleged to be injurious to him in respect of his business

as an undertaker. It arose from an incident on the 6th January, 1912, over the removal from the Campbellford station of the body of the father of the absent witness. Through some mistake, both undertakers had been instructed to take charge of the corpse. The plaintiff and defendant both resided at Campbellford, so that the case came within Con. Rule 529(*d*), and the venue was properly laid at Cobourg in the first instance. The plaintiff alleged that the publications complained of were causing him much damage, and that it was essential that he should be vindicated as speedily as possible. He offered to have the trial at the Peterborough sittings commencing on the 9th April. He said that that place was just as convenient for the witnesses and parties as Cobourg. The Master said that this was corroborated by the railway time tables, and the expense of the journey from Campbellford to Cobourg would appear to be more than twice that of the journey to Peterborough. If the trial took place there, the witnesses and parties would have to stay a night. But, if it was at Cobourg, they would have to spend one night there and be travelling the next night so to reach home on the third day of absence. In these circumstances, the Master thought, a case was made out under Con. Rule 529(*d*), as defined in Pollard v. Wright, 16 P.R. 505, and other cases, to change the place of trial to Peterborough as a term of granting the commission asked for by the defendant, and postponing the trial until the 9th April to allow the evidence to be returned. The order should require the commission to be despatched from Calgary not later than the 25th March, so as to be available to the parties in good time. The costs of this motion to be in the cause, and the other costs of the commission to be in the taxing officer's discretion, unless dealt with by the trial Judge.

BROTHERS v. MCGRATH—DIVISIONAL COURT—MARCH 5.

Sale of Goods—Contract—Fraud—Warranty.]—An appeal by the plaintiff from the judgment of the County Court of the County of Perth dismissing an action to recover $353, the price paid by the plaintiff to the defendant for a horse and for $200 damages for breach of warranty. The plaintiff alleged that the horse was unsound, to the knowledge of the defendant. The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and MIDDLETON, JJ. The judgment of the Court was delivered by TEETZEL, J., who said that the learned County Court Judge, at the close of the plaintiff's case, was of opinion that the plaintiff

had failed to establish either that the defendant was guilty of fraud, or that there was any warranty, express or implied, that the horse was sound; and he dismissed the action without calling upon the defendant. A careful consideration of the evidence and of the argument upon the appeal, had failed to convince the Court that the judgment was wrong. The appeal was, therefore, dismissed with costs. R. T. Harding, for the plaintiff. F. H. Thompson, K.C., for the defendant.

RE CAMERON AND HULL—SUTHERLAND, J.—MARCH 6.

Vendor and Purchaser—Title to Land—Application under Vendors and Purchasers Act—Doubtful Question of Construction of Will—Refusal to Construe—Order for Representation of Possible Claimants under Will.]—An application by a vendor under the Vendors and Purchasers Act to have it declared that an objection made by the purchaser to the title to land contracted to be sold by agreement dated the 8th November, 1911, were invalid. The purchaser's objection was, that the fee in the land did not, under the will of Andrew Henderson, deceased, vest in Samuel James Henderson, through whom the plaintiff derived title. The clause in the will relied on by the vendor was this: "I give to my mother Mary Jane Henderson and to my brother Samuel James Henderson jointly the share I have in the farm on which we live, to have and to use or to sell as they may choose, each to be entitled to the benefits of one-half of the product of my share in the farm and chattels—but it is hereby clearly understood and designed that my mother shall have no power to sell or convey any part . . . but is only to have a share of the proceeds for her use during her life—and at my mother's death then the whole of my interest in this estate and whatever else I may die possessed of is to be given to my brother Samuel James Henderson, as above, to have and to hold as and for his own or to dispose of as he may wish." By an interim order made by a Judge of the High Court on the 17th February, 1912, in the matter of the application under the Act, reciting that Mary Jane Henderson was dead and had left certain named children and grandchildren, and directing that one of the children and two of the grandchildren should represent in the proceeding the children and grandchildren and heirs and next of kin of Mary Jane Henderson, who should be bound by any order which might be made. The representatives named were served, but did not appear. There was a dispute as to whether

the vendor had released the purchaser from the agreement. SUTHERLAND, J., said that he was inclined to the opinion that, under the clause quoted, Mary Jane Henderson took merely a life estate, but was unable to say that a different opinion might not be fairly and reasonably come to by another; and he was not at all clear that parties could, on an application of this kind, be brought in as under the order of the 17th February. He could not, therefore, come to the conclusion that the application should be granted; and he dismissed it with costs, leaving the vendor to seek such other remedy, if any, as he might be advised. G. N. Weekes, for the vendor. T. G. Meredith, K.C., for the purchaser.

DEAN v. WRIGHT—SUTHERLAND, J.—MARCH 6.

Contempt of Court—Disobedience of Injunction—Excuse—Punishment Limited to Payment of Part of Costs of Motion.]—Motion by the plaintiff to commit the defendants for contempt of Court. SUTHERLAND, J., said that the defendants were in contempt for disregarding the terms of an interim injunction order, apparently regular. An affidavit of their solicitor was filed by which it was sought to explain that any violation by the defendants of the terms of the order was but for one day, and in the circumstances set out therein. The learned Judge was of opinion that the excuse was not altogether adequate; but he did not think that it was a case in which the defendants ought to be committed. They should, however, pay in part the costs of the motion. When it came on first, the plaintiff's proceedings were not regular. The notice had been given for a Chambers instead of a Court day. Leave was asked and granted to bring on the motion in Court, and, if necessary and if the defendants required, after the service of a new notice. In these circumstances, the motion should be dismissed, but costs, fixed at $5, should be paid by the defendants to the plaintiff. Eric N. Armour, for the plaintiff. R. McKay, K.C., for the defendants.

CLARKSON v. MCNAUGHT—MASTER IN CHAMBERS—MARCH 7.

Practice — Motion for Consolidation of Actions — Order for Trial of Actions together—Terms—Costs.]—Motion by the defendants in the above action and three other actions (the facts of which appear in the notes ante 638, 670, 741) for an order con-

solidating the four actions, similar to the order made in Campbell v. Sovereign Bank of Canada, ante 334, which was affirmed by Falconbridge, C.J.K.B., on the 22nd December, 1911. The plaintiff contended that the cases were quite different, and that the proper and only order to be made—an order to which he was willing to consent—was that made by the Master in Clarkson v. Allen, on the 8th January, 1912, which, on appeal by the defendants, was not interfered with by the Chancellor, but simply referred to the trial Judge. The Master said that in the present actions the object was to recover one sum of $60,000 for which the four defendants were primâ facie liable and for which notes had been given as security, amounting in all to nearly $120,000; and these facts made it desirable that the whole matter should be investigated at one and the same time. The only question for decision was, how that was to be done. These cases were more like Clarkson v. Allen than Campbell v. Sovereign Bank of Canada. It was not clear how the four actions could be consolidated, as the liabilities of the defendants were not identical, and the results of the trial might be different in each case—some might be held to be liable and some not. An order should, therefore, be made as in Clarkson v. Allen, counsel for the plaintiff consenting that (subject to the direction of the trial Judge) the four actions be tried together, and counsel for all parties consenting that only one set of costs shall, in that event, be taxable in respect of the trial of the four actions. Upon these terms, motion dismissed; costs in the cause. F. Arnoldi, K.C., for the defendants. F. R. MacKelcan, for the plaintiff.

BARBER v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.—MASTER IN CHAMBERS—MARCH 7.

Trial—Postponement—Action for Damages for Personal Injuries—Surgical Examination of Plaintiff.]—Motion by the defendants to postpone the trial, for the surgical examination of the plaintiff, and for further examination of the plaintiff for discovery. The action was for damages for injuries sustained by the plaintiff by reason of a collision of two of the defendants' cars, in one of which he was being carried. Notice of trial had been given by the plaintiff for the Sandwich jury sittings beginning on the 11th March. The Master said that liability was admitted, and it was only a question of what damages, if any, the plaintiff was entitled to recover. The plaintiff did not object

to being examined by a surgeon on behalf of the defendants, and this examination could be held at once. There did not seem to be any necessity for postponing the trial. At the argument, the Master thought that it might be right to direct a trial at Chatham on the 9th April; but, in view of the possible inability of the plaintiff to get his witnesses there (as pointed out in McDonald v. Dawson, 8 O.L.R. 72), he now thought the motion should be referred to the trial Judge at Sandwich, if a trial should become necessary. The trial Judge could then, if he saw fit, impose such terms as were approved of in Seaman v. Perry, 9 O.W.R. 537, 761, and in other cases not reported. The main, if not the whole, evidence here would be that of three or four medical gentlemen. It would be a serious matter for the plaintiff, earning only $2.50 a day, to take these witnesses nearly 50 miles away from Windsor, with a possibility of being kept there one or even two days or longer. As said in McDonald's case, supra, at p. 73, "the plaintiff's difficulty is to get to a distant place of trial." Featherston Aylesworth, for the defendants. Frank McCarthy, for the plaintiff.