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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 18TH, 1915.

RE BECK TRUSTS.

Trusts and Trustees—Executors—Over-payment to Beneficiaries—Trustees of Insurance Fund—Moneys Due to same Beneficiaries—Set-off—Different Parties—Insolvency of Trust Company—Rights of Liquidator.

Appeal by the Toronto General Trusts Corporation and Robert Maxwell Dennistoun, executors of the will of Geoffrey Strange Beck, from an order of MIDDLETON, J., of the 15th November, 1915, made upon appeal from the report of the Master in Ordinary; and cross-appeal by the liquidator of the Dominion Trust Company from the same order.

The Dominion Trust Company and Mr. Dennistoun were the original executors; upon that company going into liquidation, the Toronto General Trusts Corporation were substituted by order.

The appeal to MIDDLETON, J., was by the liquidator, and was heard by the learned Judge on the 23rd September, 1915; judgment theron was delivered on the 1st October, 1915, dismissing the appeal (see ante 48); but the learned Judge afterwards, upon counsel appearing before him, reconsidered the matter, and allowed the appeal in part, and varied the report of the Master by striking out the first and second paragraphs thereof and substituting new paragraphs therefor.

The executors' appeal to the Divisional Court was upon the following grounds: (1) that the report of the Master was correct; (2) that under an order of the Court of the 20th February, 1915, the Dominion Trust Company were bound to pay over all moneys to the executors, and the fact of the insolvency of the company gave the liquidator no right to be recouped from in-

come coming to the hands of the present executors until the trust estate should be paid the moneys found due by the Dominion Trust Company on capital account; (3) that the order varied the report on grounds not taken by the liquidator in the notice of appeal or raised by him on the argument, and violated established equitable rules governing the administration of estates and of equitable set-off and the accounting of defaulting executors; (4) that no commission or costs should be allowed the liquidator or the Dominion Trust Company until full payment had been made to the estate of all moneys found in their hands; and (5) that the Dominion Trust Company should be in no better or different position regarding accountability to the trust estate by reason of their being a corporation, and no individual executor would, on being discharged from his office, be given a charge on income until he had paid over all capital in his hands.

The cross-appeal of the liquidator was on the following grounds: (1) that no set-off should have been allowed of the moneys held by the Dominion Trust Company as trustees for Helen Beck and Doris Beck, as against the amounts advanced by the Dominion Trust Company as executors of the will of Geoffrey Strange Beck to Helen and Doris on account of income, for the reason that no set-off in law could arise, because the trusts and the parties to the trusts were different, the debts were not mutual debts, and did not arise in the same right; (2) that the application of the moneys received by the executors on account of income to the payment of taxes and the annuity to Mrs. Beck should not have been disturbed, and the executors should not have been directed to pay these sums out of capital.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. T. Beck, for the appellants in the main appeal and for Helen Beck.

E. C. Cattanach, for the Official Guardian, representing Doris Beck, an infant.

N. W. Rowell, K.C., and D. B. Sinclair, for the liquidator, respondent.

RIDDELL, J., delivering the judgment of the Court, after stating the facts, said that, whatever the hand which paid the money of the two daughters, it was paid for the two executors and trustees, the Dominion Trust Company and Mr. Dennistoun,

jointly; the company alone was trustee of the insurance moneys; therefore the two had a claim for money paid to the use of the daughters, but only the company owed the insurance fund. No set-off could be allowed where the parties were not the same: McEwan v. Crombie (1883), 25 Ch.D. 175.

The main appeal should be dismissed with costs.

The other difficulties in the way of allowing a set-off were not considered.

Cross-appeal dismissed without costs.

HIGH COURT DIVISION.

BOYD, C. DECEMBER 13TH, 1915.

*EXCELSIOR MINING CO. v. LOCHEAD.

Assessment and Taxes—Sale of Land for Taxes — Assessment Act, 1904, 4 *Edw. VII. ch.* 23—*Clerk's Return—Sec.* 122—*"Not Occupied"——"Built upon"—Question of Fact—Derelict Derrick of Small Value—Advertising — Time of Sale—Sec.* 144—*Inadequacy of Sale-price — Sale Openly and Fairly Conducted—Duty of Treasurer to Inquire as to Value of Land—Sec.* 142—*Notice to Owner—Sec.* 165—*Address not Furnished—Effect of secs.* 172 *and* 173—*Curative Provisions—Sale not Attacked within two Years—Commencement of Period.*

Action to set aside a sale to the defendant of the plaintiffs' land (lot 10 in the 9th concession of Loughborough) for taxes in arrear.

The action was tried without a jury at Kingston.

A. B. Cunningham, for the plaintiffs.

J. L. Whiting, K.C., for the defendant.

THE CHANCELLOR read a lengthy judgment dealing with the objections to the sale. The validity had to be considered in the light of the provisions of the Assessment Act of 1904, 4 Edw. VII. ch. 23 (O.) The sale was on the 7th November, 1912, when the taxes of 1909, 1910, and 1911, were unpaid.

The Clerk's return, under the corporate seal, to the Treasurer, dated the 20th July, 1912, of lands liable to be sold, con-

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

tained the plaintiffs' lot, described as "not occupied," and that was based on the Assessor's return, under oath, to the Clerk—of evidential force by sec. 122 of the statute. That, not having been displaced by superior evidence, formed a sufficient basis for the sale of the lot. The description of the lot as "not occupied" was not, according to the plaintiffs' contention, correct; it should have been described as "built upon," and notice should have been sent to the owners. This contention rested upon the question of fact, whether the land was "built upon," and the weight of evidence was against that. The only thing approaching a structure was an old derrick attached to the soil, formerly used in mining, but a mere derelict, worth less than $50. It was a fixture, no doubt, but it did not amount to a building.

Another objection was as to the advertising and time of sale. According to sec. 144 of the Act, the day of the sale "shall be more than 91 days after the first publication of the list in the Ontario Gazette." The first publication in the Gazette was on the 10th August, and the sale was on the 7th November—four days too soon. This was an error; but as regarded the publication in a newspaper the statute was complied with.

The next objection was, that the sale was carried on in an unfair and unconscionable manner. Granting a considerable discrepancy between the sale price, $18.62, and the actual value, which might be $200 or $300 if the land was regarded as a farm, and was uncertain if looked upon as mining land, there was no ground for interference. In tax sales, the Court does not interfere on the ground of inadequacy of price: Henry v. Burness (1860), 8 Gr. 345, 350; Borell v. Dann (1843), 2 Hare 440, 450, 451.

The sale was openly and fairly conducted. The defendant bought at a venture; he knew no more of the lot than did the Treasurer. The law does not cast any duty on the officer who sells to inquire, before the sale, as to the value of the land: sec. 142. This statutory provision displaces what was said by Spragge, V.-C., in Henry v. Burness, 8 Gr. at p. 357; see also per Lennox, J., in Errikkila v. McGovern (1912), 27 O.L.R. 498, at p. 501. Reference also to Scholfield v. Dickenson (1863), 10 Gr. 226, 229; Donovan v. Hogan (1888), 15 A.R. 432, 447.

The statute does not speak of a "fair sale," but of a "sale fairly and properly conducted." See Eagleton v. East India Co. (1802), 3 B. & P. 55; Metropolitan Street R. Co. v. Walsh (1906), 94 S.W. Repr. 860.

On the 10th November, 1913, a notice was sent by the Treas-

urer to the plaintiffs in a letter addressed to them, by their corporate name, at "Toronto" merely. This was returned marked "not found—not asked for." This was a notice that the land, if not redeemed in a month, would be conveyed to the purchaser (sec. 165). It was not shewn that the plaintiffs had given any notice of their correct address, or that the municipal authorities knew it. The sale was completed without any notice coming home to the plaintiffs. This was the plaintiffs' own fault, and was not a good ground of objection.

The sale was on the 7th November, 1912; the tax sale deed was dated the 11th December, 1913; and this action was begun on the 12th October, 1915.

The Chancellor expressed the important opinion that secs. 172 and 173 operated in favour of the tax sale and made it unassailable. The action was not brought within two years of the date of sale, though within two years from the date of the deed. Donovan v. Hogan, 15 A.R. 432, was a decision of the Court of Appeal that the two years did not begin to run until the date of the deed, but that was not binding owing to a change in the wording of the section. Section 173, as it now stands, makes it clear that the two-year period begins to run at the date of the sale.

Reference was made to Blakey v. Smith (1910), 20 O.L.R. 279, 283; Dalziel v. Mallory (1888), 17 O.R. 80, 94; McConnell v. Beatty, [1908] A.C. 82; Toronto Corporation v. Russell, [1908] A.C. 493, 501; Cartwright v. City of Toronto (1913-14), 29 O.L.R. 73, 76, 50 S.C.R. 215; Temple v. North Vancouver (1914), 6 W.W.R. 70, 103; Burrows v. Campbell (1912), 23 O.W.R. 271, 4 O.W.N. 249; Sutherland v. Sutherland (1912), 3 O.W.N. 1368; Errikkila v. McGovern, 27 O.L.R. 498.

Action dismissed with costs.

BOYD, C., IN CHAMBERS. DECEMBER 15TH, 1915.

ANGLO-AMERICAN FIRE INSURANCE CO. v. INTERNATIONAL STEEL CORPORATION.

Discovery—Examination of Officer of Corporation-party—Place of Examination—Discretion of Judicial Officer—Rule 329—Appeal.

Appeal by the plaintiffs from an order of the Master in Chambers refusing to direct the manager of the defendants to attend at Toronto for examination for discovery.

George H. Shaver, for the plaintiffs.
J. R. Roaf, for the defendants.

THE CHANCELLOR said that an application was made by the plaintiffs for an order for the attendance of the defendants' manager "at such place and in such manner as the Court may order," and the Master made the order directing the examination to be had at the manager's place of residence, New York. The plaintiffs now appealed from that order, on the ground that the Master should have ordered the examination to take place at Toronto. It was rather anomalous that the applicants, having obtained the order asked for by them, should appeal because the Master did not exercise his discretion in their favour as to the place of examination. The reason for the appeal was explained to be that the plaintiffs had obtained judgment against the defendants for the sum of $633, and in the order granting such judgment the Master directed a stay of execution until the counterclaim of the defendants should be disposed of; and the object of the examination was to obtain discovery on this counterclaim. It was said that both parties carried on business in this Province, but that the manager of the defendants conducted the operations of that company in the United States.

The place of examination was left by the Rules within the discretion of the judicial officer. Regarding the International Steel Corporation as to all intents defendants in the action, or as quasi-plaintiffs by virtue of the counterclaim, still either way Rule 329 applied. This corporation-party had an officer who resided out of the jurisdiction, and he might be ordered to attend for examination at such place and in such manner as might be deemed just and convenient, and in case of default the corporation, whether plaintiff or defendant, would suffer the appropriate penalty.

Rule 329 was framed in 1911, and was intended to equalise the position of plaintiff and defendant as to making discovery. See Lefurgey v. Great West Land Co. (1906), 11 O.L.R. 617.

Appeal dismissed; costs in the cause to the defendants.

BOYD, C., IN CHAMBERS. DECEMBER 15TH, 1915.

RE ADAIR.

Devolution of Estates Act—Election of Widow to Take Distributive Share of Estate of Intestate — Lands Sold under Mortgage—Surplus Proceeds of Sale—Agreement—Option —Estoppel.

Motion by Christy Ann Adair, widow of Joseph Henry Adair, deceased, for an order for payment to her of her distributive share, under the Devolution of Estates Act, of moneys in Court, she having elected to take her distributive share of the estate of the deceased, in lieu of her dower in his lands. The moneys paid into Court were the surplus proceeds of a mortgage sale of the lands.

D. Inglis Grant, for the applicant.
J. M. Ferguson, for two adult beneficiaries.
F. W. Harcourt, K.C., for the infants.

THE CHANCELLOR said that upon a careful reading of a certain agreement dated the 17th August, 1908, to which the applicant and all the heirs at law and next of kin of Joseph Henry Adair were parties, he did not think that it operated to preclude the applicant from claiming a distributive share of her husband's estate—now represented by the surplus mortgage moneys paid into Court. She, by that document, released her dower in a lot conveyed to her son William N. Adair by her husband, in consideration of which he forwent all his interest in the rest of the estate. It was further stipulated, in the interest of the widow (all the heirs concurring), that she had the privilege of occupying and of renting another lot which had been mortgaged by the deceased during her life, and at her death that lot was to be sold and the proceeds divided equally among the children. But this object was defeated by the sale of the lot under the mortgage—the default of the estate in paying the mortgage led to this result—and the benefit intended could not be enjoyed in specie by the widow. It was indeed made optional by the agreement of 1908 whether she would claim to occupy or rent the mortgaged lot; and the same option should extend to the present situation—so that she might take either the income from the surplus and implement the agree-

ment *cy près*, or, as an alternative claim, her distributive share. That would accelerate the distribution of the surplus; it might be presently distributed; and the agreement should not be read as estopping her from rightfully claiming her share therein, i.e., one-third.

An order might go to ascertain the amount of her share, and distribution of the balance among those entitled might be made.

BOYD, C., IN CHAMBERS. DECEMBER 15TH, 1915.

WALKEY v. YURTAS.

Mortgage—Action for Foreclosure—Application for Summary Judgment—Leave to Defend—Suggested Defence—Deception Practised on Foreigners — Purchase of Land with Agreement for Rescission if Purchasers Dissatisfied — Agreement Superseded by Conveyance and Mortgage.

Appeal by the defendants from an order of the Master in Chambers, made upon the summary application of the plaintiff, in a mortgage action, for judgment of foreclosure.

J. F. Boland, for the defendants.
W. H. Ford, for the plaintiff.

THE CHANCELLOR said that the summary judgment under Rule 57 should be vacated and a defence allowed. The aspect of the transaction, as disclosed by the defendants and the solicitor for the plaintiff, appeared highly unsatisfactory. The defendants were ignorant persons, the husband with little knowledge of English. The sale was negotiated by a land agent, Trollope, who gave contemporaneously an agreement to take the place back, if the defendants were not satisfied, within a year. That is not an uncommon expedient to accelerate a sale to a hesitating and uncertain purchaser. Trollope was said to have been really the owner, but he dropped out in some way, and Walkey, the plaintiff, appeared as the owner. This was a change of situation of which no explanation was vouchsafed, as neither the plaintiff nor Trollope made affidavits—and, if they had done so, the matter was so unusual and so likely to mislead an ignorant person, that it demanded investigation upon viva voce evidence. Though not expressed in the mortgage, yet if they were proved, the representations of Trollope

as agent or owner would be binding on the plaintiff, who took advantage of them. On the ground of the mortgage superseding the other writing and representation, the Master gave speedy judgment. But, if deception was practised on the foreigners, the form of the transaction ought not to shield the perpetrators from discovery.

Judgment vacated, and the defendants allowed to defend as advised; costs in the cause.

MASTEN, J. DECEMBER 17TH, 1915.

*DAVEY v. CHRISTOFF.

Landlord and Tenant—Lease of Theatre with Furniture and Equipment—Surrender of Lease—Acceptance—Refusal of Lessee to Transfer License—Damages—Retention of Sum Deposited by Lessee as Security — Rent of Premises — Inadequacy of Heating—Implied Stipulation—Fitness for Human Habitation—Breach—Rule as to Letting of Furnished Houses—Damages—Deceit—Counterclaim.

The plaintiff was the lessee from the defendants of a moving picture theatre, that is, of the premises on which the plant was situated, of which the defendants were themselves lessees from one Vogan, the owner of the freehold, and of the plant and equipment, of which they were the owners. The lease was dated the 8th October, 1914. The plaintiff alleged (1) that he was wrongfully ejected from the premises by the defendants, and claimed a return of $400 put up by him with the defendants as security; (2) that, during the currency of the lease there was a breach of express covenant in the lease for quiet enjoyment, also a breach of a proviso in the lease that the lessors were to leave "all other necessary equipment for the operation of the theatre," and also a breach of the implied covenant of the defendants that the premises should be fit for operation as a moving picture theatre—having been handed over as a going concern—that the furnace was insufficient, and it was impossible to heat the theatre properly, and for that the plaintiff claimed damages; and (3) the plaintiff claimed damages for deceit based upon alleged false representations made to him by the defendants at the time the lease was entered into.

By counterclaim the defendants alleged that the plaintiff had wrongfully abandoned the premises and committed a breach of the obligations contained in the lease, and they claimed $1,000 damages.

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

J. W. Payne, for the plaintiff.

W. A. Henderson, for the defendants.

MASTEN, J., read a judgment, in which he set forth the facts at length, and stated as his conclusion on the first branch of the case that the lease was effectively surrendered by the plaintiff to the defendants on or before the 11th January, 1915; but that the plaintiff did not hand over the license, and, when the defendants re-opened the theatre and carried it on for two days, the plaintiff notified them that they must desist from so doing, because the license stood in his name; that the plaintiff refused to transfer the license; that this was a breach of the terms of surrender; and damages therefor should be assessed at $200. The plaintiff had no right to require that the $400 put up as security should be applied upon the month's rent which had fallen due. The defendants had the legal right to resume possession; the plaintiff did not resist the giving up of possession, but acceded to it by delivering up the key; the defendants took and accepted the key; they took actual possession and subsequently dealt with the premises in a manner inconsistent with any right of the plaintiff to resume possession; and the plaintiff had never sought at any time to resume possession or to be restored to his rights as lessee. Reference to Phené v. Popplewell (1862), 12 C.B.N.S. 334; Gold v. Ross (1903), 10 B.C.R. 80. Upon these findings, the defendants were entitled to retain the $400; and were not entitled to recover upon their counterclaim.

Upon the second branch of the case, the learned Judge was of opinion that, on considering the terms of the contract and the surrounding circumstances in a reasonable and business-like manner, an implication necessarily arose that the parties must have intended that the whole undertaking was to be turned over in a fit state for continuous operation: Hamlyn & Co. v. Wood & Co., [1891] 2 Q.B. 488. He found as facts that the basis of the contractual relation between the parties was, that the premises should be reasonably fit for the purpose of carrying on a moving picture theatre, and that, as part of such fitness, the heating plant, forming part of the leased premises, should be adequate to heat them in a reasonable manner; that the heating plant on the premises was inadequate for this pur-

pose; that, in consequence, the theatre became excessively cold after the middle of November; and that the plaintiff suffered damage. Upon these findings, the learned Judge held that the plaintiff's claim came within the artificial rule that in the letting of furnished houses and apartments an undertaking is implied on the part of the lessor that they are reasonably fit for the purposes of habitation: Smith v. Marrable (1843), 11 M. & W. 5; Wilson v. Finch-Hatton (1877), 2 Ex.D. 356; Carstairs v. Taylor (1871), L.R. 6 Ex. 217; Blake v. Woolf, [1898] 2 Q.B. 426; Robertson v. Amazon Tug and Lighterage Co. (1881), 7 Q.B.D. 598; Macleod v. Harbottle (1913), 11 D.L.R. 126; Gordon v. Goodwin (1910), 20 O.L.R. 327. But, if this case did not come within that rule, it came within the broader principle enunciated in the cases quoted in Brymer v. Thompson (1915), 34 O.L.R. 194, 196, 543, and applied in that case. The understanding formed a condition the breach of which would have entitled the lessee to rescission; but, the plaintiff having gone into possession and occupied the premises, it might be treated also as a warranty, and the plaintiff could recover damages for its breach: Harrison v. Malet (1886), 3 Times L.R. 58; Charsley v. Jones (1889), 53 J.P. 280. It was not material that the difficulty did not become apparent to the plaintiff until the cold weather arrived in November; the defect did in fact exist from the date of the lease—the heating plant was then deficient, as it had been all the previous winter. Maclean v. Currie (1884), Cab. & El. 361, distinguished. The damages for breach of the implied covenant should be assessed at $350.

The third claim of the plaintiff, for damages for deceit, failed upon the evidence.

Judgment for the plaintiff for $350 with costs.

MIDDLETON, J. DECEMBER 18TH, 1915.

WILLIAM SHANNON CO. LIMITED v. CRANE.

Contract—Restraint of Trade—Master and Servant—Termination of Contract of Hiring — Restriction upon Servant's Exercise of Trade for Limited Period—Oppressive Restriction—Master not Carrying on Business—Trade Secrets—Purchase of Shares—Rescission—Purchase of Machinery—Set-off—Costs.

Action for damages and an injunction in respect of breaches of a contract.

Counterclaim to set aside a transaction by which five shares of the stock of the plaintiff company were sold to the defendant, and for the return of the money paid.

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

A. McLean Macdonell, K.C., for the plaintiff company.

R. W. Hart, for the defendant.

MIDDLETON, J., said that under an agreement dated the 15th January, 1915, the defendant, as a skilled braid-maker, entered the employment of the plaintiff company, for an indefinite period, terminable upon 7 days' notice, with a provision that on the termination of the agreement the defendant should not, during the period of one year carry on or be interested in, directly or indirectly, any business competing with or interfering with the plaintiff company's business. The employment lasted two weeks only; the actual manufacture of braid was not begun. The defendant saw an opening which he regarded as more favourable, and asserted his right to terminate the employment. The plaintiff company had never established a braid-making department of its business; but the defendant and his associates were carrying on precisely the same business as the plaintiff company had contemplated.

The main question was the right of the plaintiff company to an injunction restraining the defendant from carrying on this business from now till the 1st February, when the year will have expired.

The agreement was ambiguous in its terms. The defendant contended that the business he was carrying on did not compete or interfere with any business actually carried on by the plaintiff company, and that that was the only thing which the contract prohibited. The plaintiff company contended that the contract was intended to cover, not only the business as it existed on the date of the agreement, but the business with its added braid department, which the defendant was to establish.

If the agreement, said the learned Judge, had the wider significance contended for by the plaintiff company, it would offend against the rules laid down in respect to agreements in restraint of trade. The plaintiff company, not being engaged in the manufacture of braids, could not reasonably require for its protection the prohibition of the defendant from carrying on the business of braid-maker: Herbert Morris Limited v. Sax-

elby, [1915] 2 Ch. 57. Where the employer is not in fact carrying on the business, it would be oppressive to prohibit the employee from carrying on his trade; and it is clearly detrimental to the public interest.

It was not shewn that there was any breach or threatened breach of the covenant against disclosing trade secrets.

As to the stock transaction, no case of fraud was made out; but the plaintiff company agreed to refund the $500 paid by the defendant—as the stock-holding was intended to be incidental to the employment. The defendant, on his part, agreed to take over certain machinery purchased by the plaintiff company for the braid-making, at $150.65. These two sums should be set off pro tanto, and the stock and machinery should be transferred.

There should be no costs: for each party had failed on some issue; the defendant had unnecessarily and improperly charged fraud; and his conduct was shabby.

ARONI v. WILSON—MIDDLETON, J.—DEC. 14.

Vendor and Purchaser—Sale of Land—Access — Right of Way—Private Way Unnecessary if Highway Available—Acceptance of Dedication Proffered by Registration of Plan—Municipal By-law—Costs of Action.]—Action for a declaration as to a right of way, tried without a jury at Welland. The learned Judge said that at the trial it clearly appeared that the purchaser was entitled to have access to his property and that the sale had been made on the basis of a right of way existing. The learned Judge was inclined to the view that, notwithstanding the facts appearing in evidence, the right of way did exist; but the position was exceedingly unsatisfactory, owing to claims made by persons not parties to the record. A simple solution of the matter was possible if the township council would accept the dedication proffered by the registration of the plan of that part of the street laid out necessary to ensure free access to the land. The matter stood over to allow the situation to be brought before the township council; and the council had since passed a by-law as suggested. The only question remaining for decision was that of costs; and the learned Judge retained the view expressed at the trial, that there should be no costs. It might well be that the purchaser would have been able satisfactorily to resist the claim made by one Stayzer that he had the right to close the

street; but this difficulty was one which the vendor ought not to cast upon the purchaser; and it constituted, if not a defect in, at least a cloud on, the vendor's title, and was a matter which the vendor was bound to clear up. L. B. Spencer, for the plaintiff. W. M. German, K.C., for the defendant.

VANSICKLE v. RATCLIFFE—MIDDLETON, J.—DEC. 14.

Fraudulent Conveyance—Insolvency of Grantor—Scheme to Defeat Claims of Creditors—Findings of Fact of Trial Judge.] —The plaintiff, a creditor of the defendant Ratcliffe, sued to set aside a certain transaction by which, on the 2nd September, 1914, Ratcliffe conveyed to the defendant Ward, his sister-in-law, nine houses in the city of Hamilton, and upon the same day assigned to her eight mortgages upon other houses in the same city. The action was tried without a jury at Hamilton. The learned Judge, in a written opinion, states the facts, and finds as follows: (1) that on the 2nd September, 1914, Ratcliffe was entirely insolvent and unable to pay his debts; (2) that the whole transaction was a deliberate scheme and conspiracy on the part of Ratcliffe, his sister-in-law, and his wife, to defeat the claims of his creditors under certain mortgage assignments and to prevent them from reaching the property. Judgment declaring the conveyance and assignment void and directing that they be set aside with costs. G. Lynch-Staunton, K.C., for the plaintiff. A. M. Lewis, for the defendants.

BRADISH v. CITY OF LONDON—FALCONBRIDGE, C.J.K.B.—DEC. 18.

Highway—Nonrepair—Injury to Traveller—Notice to City Corporation—Contributory Negligence — Findings of Fact of Trial Judge—Evidence—Conflict between Witnesses—Weight of Negative Statements—Damages.]—Action by a farmer to recover damages for personal injuries sustained by being thrown from a waggon loaded with hay while travelling along Wellington street, in the city of London, the plaintiff alleging a defective condition of the roadway by reason of nonrepair. The action was tried without a jury at London. The learned Chief Justice said that he had experienced some doubt about the proper disposition of the case, the evidence being conflicting; but, carefully weighing all the evidence, he was of opinion that

the scale turned sufficiently in the plaintiff's favour to entitle him to judgment. Great importance was attached by the learned Chief Justice to the evidence of D. H. Porter, who lived in the immediate vicinity of the locus, and of J. W. Laidlaw, ex-reeve of Westminster. The accident and the plaintiff's injuries were caused by the nonrepair of the highway, of which the defendants had notice, both on the evidence of Porter and by reason of the long-continuance of the state of nonrepair. The defendants had failed to establish negligence or contributory negligence on the plaintiff's part. Damages assessed at $2,500. —Referring to the authorities who prefer positive to negative statements—assuming a reasonable degree of honesty all round —the learned Chief Justice felt bound to say that some of the ancient dicta go too far, especially in view of the fact that he who denies, inferentially affirms: e.g., the man who denies that a road is out of repair, declares that it is in good repair. Not giving undue weight to this aspect of the case, it had some influence on the mind of the Chief Justice.—Judgment for the plaintiff for $2,500 with costs. E. Meredith, K.C., and W. R. Meredith, for the plaintiff. T. G. Meredith, K.C., and R. G. Fisher, for the defendants.