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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

HAMILTON BREWING CO. v. THOMPSON.

Sale of Goods—Bottled Beer Sold in Cases—Contract—Invoices—Return of Empty Cases and Bottles—Credit for Part Returned—Evidence in Reply—Custom of Trade—Admissibility.

Appeal by the defendant from the judgment of SUTHERLAND, J., who tried the action, without a jury, at Sandwich, in favour of the plaintiff company.

The defendant became a customer of the plaintiff company early in 1915, and continued to deal with the plaintiff company down to September, 1916. The commodity purchased was lager beer of the plaintiff company's manufacture. The beer was shipped to the defendant in cases, each of which contained two dozen bottles. A large number of cases, after having been emptied were returned by the defendant to the plaintiff company; and the action was brought to recover the price of the cases that had not been returned.

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

J. H. Rodd, for the appellant.

W. R. Smyth, K.C., for the plaintiff company, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that it appeared not to be disputed that the prices quoted in the letter of the respondent of the 11th January, 1915, which brought about the inception of the business transactions between the parties, did not include the cases in which the beer was contained; and the difference between the parties was to the

extent of the liability of the appellant to return the empty cases and bottles.

The appellant pleaded that during the whole course of the dealings he was never called upon to pay for any of the cases or bottles in which the beer was shipped; that the trade custom (the appellant was a retailer) was not to charge the purchaser with cases or bottles, but to be content with a return of such as might reasonably be returned in the course of business; that there was a distinct arrangement with the respondent's agent that the appellant would not be responsible for the cases or bottles, but would return such of them as got back into his possession; and that the dealings were carried on in accordance with that understanding. There was no allegation that the cases and bottles that got back to the appellant were returned by him to the respondent.

The trial Judge found that the special arrangement set up by the appellant was not proved; and there was no reason for revising his finding of fact in that respect.

The invoices plainly indicated that both the beer and the cases were sold to the appellant—the former at the price quoted in the letter aforesaid, and the latter at the price mentioned in the lower part of the invoice.

It must be taken that the terms upon which the parties were dealing were those stated in the invoices, subject to this, that, in accordance with the custom of the trade, the appellant would be entitled to credit for what he had been charged for cases and bottles which he returned.

Evidence given by the respondent of the custom of the trade as to the payment for and the return of cases and bottles was not strictly admissible in reply; but the trial Judge had a discretion to permit the respondent to reopen its case; and the appellant could not have been taken by surprise, because he had made the custom of the trade an issue in the action.

The judgment should be varied by providing that the appellant shall have the privilege of returning, at any time within 60 days, any of the empties not previously returned, and shall be credited for such as he so returns at the price charged for them.

Otherwise the judgment is affirmed, and the respondent will be entitled to enforce it, unless the appellant gives security that he will pay what may ultimately be found to be owing by him and the costs of the action, or pays into Court the amount of the judgment and costs, subject to further order. The appellant is to pay the respondent's costs of the appeal.

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

*LEES v. MORGAN.

Trustee—Account—Release—Innocent Mistake—Limitations Act, R.S.O. 1914 ch. 75, sec. 47—Interest of Beneficiary—Interest in Possession—Time when Statute Began to Run in Favour of Trustee.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of LENNOX, J., 11 O.W.N. 222.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. D. Bissett, for the defendant.

H. D. Petrie, for the plaintiff.

FERGUSON, J. A., reading the judgment of the Court, said that the trial Judge had directed that the plaintiff should recover from the defendant $936.61, and that the defendant, as trustee of the estate of Andrew Thompson, deceased, should convey certain lands, on a sale thereof by the plaintiff—the proceeds to be paid into Court subject to further order. Andrew Thompson died in 1882, and by his will devised and bequeathed one half of his estate to the defendant in trust, to pay the income thereof to Mary Lees during her life, and to divide the corpus among the children of Mary Lees who should attain the age of 26 years. The plaintiff is the only child of Mary Lees.

In 1899, the defendant proposed to pass his accounts, whereupon the plaintiff and his mother agreed with the defendant to take from him an affidavit verifying the proposed accounts and to take over their share of the estate and give him a release. On the 5th October, 1899, the plaintiff and his mother executed a release under seal discharging the defendant from all accounting and from all demands. Mary Lees died in February, 1913; and on the 4th January, 1915, the plaintiff commenced this action, alleging that the defendant had not converted all the residuary estate of Andrew Thompson, but was still in possession of certain lands; that the defendant had failed to account to the plaintiff for his share of the estate; and that he had executed the release improvidently. The claim was for consequential relief.

The trial Judge did not set aside the release, but allowed it to stand as a receipt or accounting for the amount named therein,

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

and gave judgment for the plaintiff for $936.61, which he found had been by mistake paid to other beneficiaries under the will. The defendant's appeal was from that part of the judgment; and the plaintiff's cross-appeal was to increase the amount to $1,136.61.

No fraud on the part of the defendant in the procuring of the agreement, in the making of the affidavit, or in the procuring of the release, was alleged or proved. Innocent error was admitted. Under In re Garnett (1885), 31 Ch. D. 1, that was sufficient to set aside the release; but, no fraud being alleged or proved, and the defendant not having converted to his own use any part of the trust property, he is entitled to the benefit of sec. 47 of the Limitations Act, R.S.O. 1914 ch. 75. By sub-sec. (2) (*b*), the statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

The effect of the transaction of 1899, as indicated in the affidavit of the defendant, and the release given by the plaintiff and his mother, was such as to convert, as it were, the plaintiff's interest in remainder into an interest in possession as of the date of these documents; the plaintiff might, at any time after the making of the arrangements set out in these documents, have sued the defendant for the accounting that he now sues for and for the administration of the estate; therefore, the statute commenced to run against the plaintiff on the 5th October, 1899; and the plaintiff's right to recover was, at the time of the commencement of this action, barred. See How v. Earl Winterton, [1896] 2 Ch. 626; In re Davies, [1898] 2 Ch. 142; Thorne v. Heard & Marsh, [1895] A.C. 495, 504; Halsbury's Laws of England, vol. 28, p. 201.

The defendant's appeal should be allowed, and the plaintiff's cross-appeal should be dismissed; no costs in this Court or in the Court below.

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

*MIZON v. POHORETZKY.

Covenant—Restraint of Trade—Sale of Business—Undertaking of Vendor not to Carry on Business in same City—Restraint Unlimited as to Time—Reasonable Necessity—Goodwill—Injunction—Damages.

Appeal by the defendant from the judgment of LATCHFORD, J., ante 167.

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

P. Shulman, for the appellant.
J. Earl Lawson, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that it was contended for the appellant that his agreement was invalid—that it was too wide both as to time and space—and that so wide a restriction upon the appellant's right to carry on business was unnecessary for the protection of the respondent in the enjoyment of the right he was intended to enjoy as the purchaser of the business and its goodwill.

The parties were Ruthenians, and it was conceded by the appellant's counsel that people of that race prefer to deal with each other and usually do so. It was shewn that the local business done at the Richmond street store was comparatively small, and that it had customers at points out of the city of Toronto. In other respects the evidence was meagre. There was nothing to shew the number of Ruthenians dwelling in Toronto or whether scattered over the city or living in particular districts.

There is a marked distinction, as to the nature and extent of the restriction that may be imposed, between cases such as this, where the agreement is entered into by the vendor of a business and cases where the agreement is entered into by an employee or servant—the limit of the restriction that may be imposed in the latter class of case being much narrower than in the former: Herbert Morris Limited v. Saxelby, [1916] 1 A.C. 688. The law applicable in the latter class of case was considered in George Weston Limited v. Baird (1916), 37 O.L.R. 514.

Quotations from the report of the former case, pp. 700, 701.

The cases shew that a restraint unlimited as to time—as the restraint here was—is not necessarily invalid, and that the question in each case is, whether the restraint imposed was reasonably necessary for the protection of the person in whose favour it was imposed. In the circumstances of this case, the protection which the restraint was designed to afford was not greater than was reasonably necessary for the protection of the respondent in the enjoyment of the goodwill; and the contract of the appellant was, therefore, a valid and binding contract, unless it was shewn that, though reasonable as between the contracting parties, it was injurious to the public. The onus of shewing this was upon the appellant; and there was nothing in the evidence or in the circumstances which warranted a finding that it was injurious to the public.

The trial Judge assessed the damages at $300, which was the price paid for the goodwill. That would seem to be a large sum

to allow, but it was probable that it was allowed because, in the view of the learned Judge, the action of the appellant had already resulted practically in the destruction of the goodwill.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

KARCH v. EDGAR.

Fraudulent Conveyances—Sham Considerations—Intent to Defraud Creditors—Action by Judgment Creditor to Set aside Conveyance of Land and Assignments of Mortgages—Judgment Debtor Divesting himself of all his Property—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendant Ernestina Edgar from the judgment of FALCONBRIDGE, C.J.K.B., at the trial at Guelph, in favour of the plaintiff, the wife of the defendant Charles Frederick Karch, in an action brought by her, after a judgment for alimony obtained by her, on behalf of herself and all other creditors of her husband, to set aside as fraudulent against creditors a conveyance by him to the appellant (his sister) of a lot in the town of Hespeler and assignments by him to her of two mortgages.

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

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

P. Kerwin, for the plaintiff, respondent.

MEREDITH, C.J.O., read the judgment of the Court . He said that the land conveyed and mortgages assigned comprised the whole of the husband's property except a debenture for $1,900 and one for $500. The $1,900 debenture was parted with by the husband to his brother Henry; and the $500 debenture was assigned to Henry in trust for the husband's two children. The allegation of the appellant as to all these transactions was that they were made in good faith and for the considerations expressed, and that the considerations were actually paid at the time when they were executed.

It was clear upon the evidence that it was in the mind of the husband as early as 1912 to put the lot in Hespeler and the mort-

gages out of his hands in order to defeat the claims of his wife, from whom he had separated, and who had brought the action for alimony against him. The wife's judgment was recovered on the 19th June, 1912; and the conveyance and assignments to the appellant were dated the 3rd December, 1912. These deeds were made to carry out the plan which the husband had in contemplation; and the result of the whole of the transactions was to divest the husband of everything he possessed which had been available to creditors.

The stories told by the appellant and by Henry Karch as to the source from which came the money said to have been paid to the husband by them, were very improbable; they were disbelieved by the trial Judge, who saw and heard the witnesses, and who came to the conclusion that the impeached transactions were colourable and fraudulent; he was also of opinion that, even if the expressed considerations had actually passed, the intent of the husband and of the appellant and Henry Karch was to defeat, hinder, delay, and defraud creditors; and with these conclusions the Court agreed.

Appeal dismissed with costs

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

*CLARKSON v. DOMINION BANK.

Banks and Banking—Securities Taken by Bank from Manufacturing Company—Bank Act, 3 & 4 Geo. V. ch. 99, secs. 88, 90 (D.)—Insolvency of Company—Validity of Securities—Promissory Notes—Negotiation—Substitution or Consolidation—Goods Manufactured by Company—Goods Dealt in by Company, Manufactured by Others—Written Agreements to Give Securities—Time of Negotiation of Notes—Land-mortgages—Previous Agreement to Execute—Validity—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 37 O.L.R. 591, 11 O.W.N. 2.

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

Sir George Gibbons, K.C., and J. B. Davidson, for the appellants.

D. L. McCarthy, K. C., and A. W. Langmuir, for the defendant bank, respondent.

MACLAREN, J. A., in a written judgment, said that the action was brought by Clarkson, the liquidator, and the National Match Company, a creditor, of an insolvent manufacturing company, to set aside the claim of the respondent bank to certain goods pledged to it, by securities under sec. 88 of the Bank Act, and also two mortgages on real estate in St. Thomas and Montreal.

After setting out the facts and referring to sub-sec. 3 of sec. 88 and to sec. 90 of the Bank Act, the learned Judge distinguished Bank of Hamilton v. Halstead (1897), 28 S.C.R. 235, negativing the appellants' argument that the demand notes given by the company to the bank in this case were never negotiated at all.

It was also argued for the appellants that the securities in question were bad because the written promises or agreements to give the securities were not made at the time the demand notes were negotiated or the debt or liability contracted, and that an antecedent promise or agreement was of no value. But clauses (*a*) and (*b*) of sec. 90 provide for two distinct classes of cases, quite independent of each other. For the purposes of this case, the section should be construed as if clause (*a*) were not in it at all.

Reference to Imperial Paper Mills of Canada Limited v. Quebec Bank (1912), 26 O.L.R. 637, affirmed by the Privy Council, S.C. (1913), 110 L.T.R. 91, Townsend v. Northern Crown Bank (1912-13), 27 O.L.R. 479, 482, 28 O.L.R. 521; S.C. (1914), 49 S.C.R. 394, 401.

Upon the facts of this case, it was unnecessary to consider the question of the substitution of goods. As the law stood up to the 1st July, 1913, when the present Bank Act came into force, a bank holding securities from a manufacturer could not claim a lien upon goods substituted for those covered by his securities. The new law would apply to all securities given after the 1st July, 1913; and, as the advances made and new securities taken after that date amounted to over $300,000, and the goods on hand at the suspension were valued at only $83,687.92, the bank might have a double title to the whole of the goods—it might claim them under the individual securities by virtue of clause (*a*) of sec. 90 or under the last blanket security by virtue of sub-sec. 4 of sec. 88 and clause (*b*) of sec. 90.

The validity of the two land-mortgages depended largely upon the credit to be given to the testimony of the then manager of the bank; and the trial Judge had given the manager credit, and had based on his evidence findings in favour of the bank—findings which the Court would not be justified in reversing.

The appeal should be dismissed.

MAGEE, HODGINS, and FERGUSON, JJ.A., concurred.

MEREDITH, C.J.O., in a short written judgment, said that he agreed with the conclusion of MACLAREN, J. A.; and merely added that, but for the decision in Imperial Paper Mills of Canada Limited v. Quebec Bank, 110 L.T.R. 91, he would have thought it open to serious doubt whether counsel for the appellants was not right in his contention that, in order to validate a security under clause (*b*), the advance must be made at the time the written promise or agreement is given.

Appeal dismissed with costs

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

*RE McALLISTER AND TORONTO AND SUBURBAN R.W. CO.

Railway—Expropriation of Land—Compensation—Award—Quarry of Stone—Jurisdiction of Arbitrators—"Minerals"—Ontario Railway Act, R.S.O. 1914 ch. 185, secs. 90 (15), 133, 135—Determination of Question by Court on Appeal from Award.

Appeal by the land-owner, McAllister, from an award made by the majority of the arbitrators appointed to determine, under the Railway Act of Ontario, the compensation to be paid to him for land expropriated by the railway company for the purposes of its railway, and for the severance of his land by the taking of part, and by reason of injury and loss to that part of the property known as "the quarry," and by cutting off access to the river Speed, and by interference with the land and means of approach at the westerly end of the property, and otherwise injuriously affecting his other lands by the exercise of the company's powers.

The majority award fixed the compensation at $4,573.70; and the land-owner appealed upon the ground that an additional sum of $4,860 and interest should have been allowed.

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

M. K. Cowan, K.C., and W. E. Buckingham, for the appellant.

R. B. Henderson and Christopher C. Robinson, for the respondent company.

The judgment of the Court was read by MEREDITH, C.J.O., who said that as to the claim of the appellant for compensation for the part of the quarry taken and for the damage caused to the remainder, the arbitrators said in their award that, if they had jurisdiction to award compensation in that respect, the amount of their award should be increased by $4,860 and interest. The respondent company contended that the "quarry" consisted of minerals within the meaning of sec. 133 of the Ontario Railway Act, R.S.O. 1914 ch. 185, and the arbitrators had no jurisdiction to award compensation in respect of it, that jurisdiction being, by sec. 135, vested in the Ontario Railway and Municipal Board; and, if that contention was not well-founded, that the rock, being the ordinary rock of the district, had been fully compensated for in the allowance made by the award.

The learned Chief Justice said that he agreed that, if the rock of which the quarry was composed was a mineral within sec. 133, the respondent company had not expropriated it; and he would assume that, if it was a mineral, the arbitrators had no jurisdiction to award compensation in respect of it.

Reference to Great Western R.W. Co. v. Carpalla United China Clay Co. Limited, [1910] A.C. 83; North British R.W. Co. v. Budhill Coal and Sandstone Co., [1910] A.C. 116; Caledonian R.W. Co. v. Glenboig Union Fireclay Co., [1911] A.C. 290; Symington v. Caledonian R.W. Co., [1912] A.C. 87.

Section 133 of the Ontario Act is substantially the same as the corresponding provisions of the English and Scottish Acts; and the decisions in the cases cited are applicable to the interpretation of the Ontario enactment.

There was evidence before the arbitrators to shew that the stone in the quarry was a mineral within the meaning of the Act, and evidence to shew that it was not. The result of the evidence, and in effect the finding of the arbitrators who joined in the award, was that the McAllister quarry, so far as the rock composing it was concerned, was the same as others in the neighbourhood. It was a part of a geological formation which was widely spread at Guelph and in the surrounding district. This amounted to a finding that the evidence established that the rock in question was the ordinary rock of the district, and was therefore not a mineral within the meaning of the Act. The further findings of the arbitrators did not warrant the conclusion that the rock was a mineral.

The arbitrators did not assume to decide the question whether the rock was a mineral. They should have decided it; and the question now was, what course should be taken by the Court in

disposing of the appeal. All the evidence that the parties desired to adduce was before the Court; and the Court ought not to remit the case to the arbitrators to decide the question which they had not decided; but the Court should, on the evidence, determine it: sec. 90 (15); and it should be determined that the quarry was not composed of minerals; the compensation should be increased by $4,860; and the appellant's costs of the appeal should be paid by the respondent company.

Appeal allowed.

FIRST DIVISIONAL COURT. JULY 4TH, 1917.

RE O'BRIEN & CO. AND NEPIGON CONSTRUCTION CO.

Contract — Railway Work — Construction and Effect of Agreement—Stated Case—Costs.

Case stated by an arbitrator.

The Commissioners of the Transcontinental Railway had on the 28th March, 1908, entered into a contract with E. & G. Fauquier for the construction of about 75 miles of railway. On the 6th April, 1908, this contract was turned over to the Nepigon Construction Company on the basis that they would pay the Fauquiers 4 per cent. of the amount received for performing it. The Nepigon Construction Company did certain of the work, and arranged for some portions to be done by others, and on the 30th April, 1910, made an agreement with O'Brien & Co. to complete what the Nepigon Construction Company itself had still to undertake, except a part which that company retained, and which was defined and excepted.

The questions stated by the arbitrator were as to the construction of the contract between the parties, as applied to the work done thereunder.

The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. H. Moss, K.C., for O'Brien & Co.

W. N. Tilley, K.C., and Strachan Johnston, K.C., for the Nepigon Construction Company.

The judgment of the Court was read by HODGINS, J.A., who said, after stating the facts, that the first question was, whether,

as between the parties, O'Brien & Co. were, when the rails were ready to be delivered, entitled to a grade kept fit for tracklaying. The answer was, that O'Brien & Co. were not entitled to make any claim for loss of time and extra expense by reason of the grading not being fit for laying tracks when they began that part of their work. And this question (A.) was decided in favour of the Nepigon Construction Company.

The answers to the other questions (B., F., and I.) were against the company.

In the circumstances, and as the discussion of question A. was the most important, the parties should each bear their own costs of the stated case, unless there was some arrangement as to costs.

HIGH COURT DIVISION.

LENNOX, J. JULY 4TH, 1917.

RE GRENIER.

Will—Construction—Creation of Trust Fund for Purpose of Placing Memorial Window in Designated Church—Impossibility of Carrying out Purpose—Disposition of Trust Fund—Application of Part for Inscription on Family Monument—Balance after Payment of Costs Falling into Residue.

Sarah Grenier by her will provided, first, for the payment of her debts and funeral and testamentary expenses. "Second, I will devise and bequeath unto my executor in trust the sum of $350 the same to be expended towards providing a memorial window in the Roman Catholic Church . . . and $100 for masses for my brother Robert and myself." Third, she gave $300 absolutely to Isaac Grenier; fourth, all her real estate in Perth to Michael P. Adams absolutely; and, "All the rest and residue of my real and personal estate not hereinbefore bequeathed I will devise and bequeath to my niece Mary Adams wife of the said Michael P. Adams her heirs and assigns absolutely." By a codicil, the testatrix provided that, if there was not sufficient personal estate to meet the money legacies, including a bequest of $1,000 provided for by the codicil, the real estate was to be sold and converted into money, and that "the residuary clause mentioned in my said will shall not be operative until all legacies shall be fully paid."

It was shewn by affidavit that it was impossible to carry out the wishes of the testatrix in regard to the memorial window, all the windows in the church having been appropriated; and it was proposed to expend $25 or $30 in having the testatrix's name engraved upon a monument in the churchyard.

The executor moved for an order determining the following questions:—

(a) Does the bequest of $350 to the executor in trust lapse?

(b) Does it go to the residuary legatee or does it go to the heirs or next of kin equally as on an intestacy?

(c) Has the executor any power to expend the whole or any portion in having a monument erected or placing an inscription upon a monument?

The motion was heard in the Weekly Court.

Wilson McCue, for the executor and others interested.

LENNOX, J., in a written judgment, said that an executor is not limited to a literal execution of the terms of the will. If literal compliance is impossible, it is his duty to carry out substantially the lawful purposes of the testatrix if this is possible. "Where literal compliance with the condition becomes (or is) impossible from unavoidable circumstances, and without the default of the party, it is sufficient that it be complied with as nearly as it practically can be, i.e., *cy-près:*" Wharton's Law Lexicon.

The monument referred to is, no doubt, to the memory of some member of the testatrix's family; there can be no reason why the executor should not expend the moderate sum proposed in having the name, &c., of the testatrix inscribed thereon; and the expenditure of a sum not exceeding $30 of the $350, for this purpose, should be sanctioned.

"A general residuary gift includes all interests, not themselves interests in the general residue, which are otherwise undisposed of or which fail in any manner, unless the testator provides otherwise:" Halsbury's Laws of England, vol. 10, p. 605, para. 1187.

No contrary intention was to be gathered from the terms of this will. The testatrix intended to dispose of the whole of her estate and effects by her will, and that whatever should be left, after providing for the other purposes set out in the will and codicil, and having regard to conditions as they might arise, should go to her niece Mary Adams.

A sum not exceeding $30 should be applied in the manner

directed; the trust fund should bear the costs of this application, to be taxed on the basis of solicitor and client; and the net residue should be paid to the residuary legatee.

DIXON v. SCHELL—FALCONBRIDGE, C.J.K.B.—JUNE 30.

Judgment—Rule 322—Admissions—Practice—Right to Trial.]—Motion by the defendants the Mackenzie & Mann Company for judgment under Rule 222. The motion was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the admissions were not so clear and definite as to take away the plaintiffs' right to a trial upon viva voce evidence: Holmested's Judicature Act, 4th ed., pp. 683 to 686, and cases cited. This opinion, already formed, as to the propriety of the case being allowed to proceed to trial, was confirmed by the receipt of a copy of the order of the Master at Ottawa in Chambers of the 2nd April, 1907. Motion dismissed; costs in the cause to the plaintiffs and the defendants Schell and Kennedy, as against the applicants, in any event.

CYCLONE WOVEN WIRE FENCE CO. v. TOWN OF COBOURG—BRITTON, J.—JUNE 30.

Landlord and Tenant—Distress for Rent—Chattels Seized Bought in by Bailiff—Legal Seizure—Improper Conduct of Bailiff in Buying in—No Resulting Damage—Offer to Return Chattels—Costs of Distress—Costs of Action for Wrongful Distress.]—Action for damages for breach of contract and wrongful distraint and sale of the plaintiffs' goods; tried without a jury at Cobourg. BRITTON, J., in a written judgment, said that the defendants, the Municipal Corporation of the Town of Cobourg, leased a certain property—land and building—to the plaintiffs, for 5 years, with an option of purchase, and the plaintiffs took possession of the premises and carried on a small manufacturing business thereon. Before the 22nd June, 1916, the plaintiffs set out about removing the chattels which they had in the building; and on that day the defendants issued to their bailiff a warrant to distrain the chattels upon a claim for rent, $700. The bailiff seized the chattels, sold a part, and bought in the rest. The learned Judge finds that the plaintiffs

had resolved not to purchase the property and intended to remove the chattels from the premises without paying any rent; and that the defendants had reasonable grounds for believing that the plaintiffs did not intend to purchase the property or pay rent, and in that belief directed the distress. All that the defendants did was done in good faith and in the honest belief that the plaintiffs intended to resort to whatever might be necessary to avoid paying rent. The plaintiffs in fact sustained no damage by what the defendants did. The defendants ought not to have bought in the chattels; but no harm resulted, as the defendants offered to restore the chattels and pay over the money received for the chattels sold to the plaintiffs, or to their chattel-mortgagees or to the person entitled, upon payment of the rent and costs of distress; and the plaintiffs rejected that offer. Judgment declaring that there was rent due from the plaintiffs to the defendants; that the seizure was not illegal; and that the defendants had a lien upon the chattels seized. The defendants may return to the plaintiffs all the goods and chattels seized, except those that were sold, and pay to the plaintiffs the cash received, upon payment by the plaintiffs to the defendants of the rent for which the seizure was made and the costs of distress and the defendants' costs of this action (fixed for this purpose only at $175) and interest at 5 per cent. from the 22nd June, 1916. The payment is to be made within 20 days from the date of this judgment; and, if made and accepted, it is to be in full and final settlement of all matters in difference between the parties. If not made within 20 days, the action is to be dismissed with costs on the Supreme Court scale without set-off. J. T. Loftus, for the plaintiffs. F. M. Field, K.C., and W. F. Kerr, for the defendants.

SELLERS v. SULLIVAN—MASTEN, J.—JULY 6.

Will—Due Execution—Testamentary Capacity—Undue Influence—Fraud—Findings of Fact of Trial Judge—Costs.]—Action to establish a testamentary writing as the last will and testament of Thomas Garniss, late of the township of Morris, in the county of Huron, farmer. The defences were: (1) that the will was not duly executed in accordance with the provisions of the Wills Act; (2) that the testator, at the time of the execution of the document propounded, was incompetent to make a will, and did not understand the nature and effect of the writing which he signed; (3) that the preparation and execution of the document were

procured by the fraud and undue influence of the plaintiff Sellers and others associated with him. The document was executed in March, 1916; the testator died in August, 1916, being then upwards of 80 years of age. The action was tried without a jury at Goderich. MASTEN, J., in a written judgment, said that the three contentions of the contestants dovetailed into each other and stood or fell together, so that they could not well be considered separately. After a careful examination of the evidence, the learned Judge stated his conclusion thus: "To uphold the contentions of those contesting the will, it would be necessary to find: (1) a conspiracy on the part of five persons . . . (2) the successful carrying out of a complicated plot on the 10th August; and (3) deliberate perjury of at least four persons at the trial. The evidence does not warrant me in making these findings." Judgment directing the admission to probate of the will propounded by the plaintiffs. There were so many circumstances of suspicion that the litigation was justified; but only the costs of the executors (as between solicitor and client) should be paid out of the estate, i.e., out of the residue. Otherwise, no costs. R. Vanstone, for the plaintiffs. W. Proudfoot, K.C., for the defendant Joseph J. Sellers. H. Guthrie, K.C., for the other defendants.

PRATT v. RAY—SUTHERLAND, J.—JULY 7.

Vendor and Purchaser—Agreement for Sale of Land—Default in Payment of Purchase-money—Provision Making Time of Essence—Waiver—Relief against Forfeiture—Terms—Specific Performance—Costs.]—Action by the purchaser of land for specific performance of the agreement of sale and purchase and for other relief. The plaintiff brought $586.50 into Court to cover arrears due under the agreement. The plaintiff had also improved the property by building thereon and otherwise. The action was tried without a jury at Sandwich. SUTHERLAND, J., in a written judgment, after setting out the facts, said that, while time was made of the essence of the contract, it was clear that neither the plaintiff nor the defendants Ray and Curtis so treated it—those defendants did not insist on the plaintiff making his payments according to the terms of the contract; and the plaintiff, in making such payments as he did make, did not make them in the amounts or at the times stipulated in the contract. The plaintiff was undoubtedly dilatory and negligent. Having regard to all the circumstances, relief should be given against the forfeiture and the

plaintiff be allowed to redeem. Since the beginning of the action, the defendants Ray and Curtis had obtained from Peltier a deed of the land in question, and were in a position to convey: Devlin v. Radkey (1910), 22 O.L.R. 399. An amendment of the pleadings may be made, if necessary. It was made evident at the trial that the parties to the action other than the defendant St. Onge had throughout treated the latter as having been released from any interest in or liability arising out of the agreements for sale made by him. If the plaintiff, therefore, will, within two weeks, pay to the defendants all principal and interest unpaid on the agreement (inclusive of the amount in Court) together with the costs of the defendants, he will be entitled to receive from the defendants Ray and Curtis a conveyance of the land which he purchased; in default of payment, the action will be dismissed with costs. J. H. Rodd, for the plaintiff. E. A. Cleary, for the defendants.

MEMORANDUM.

Results of Recent Judgments of the Supreme Court of Canada in Ontario Cases.

1st May, 1917.

Barry v. Stoney Point Canning Co.—Judgments were read by Fitzpatrick, C.J.C., Davies, Idington, and Anglin, JJ. The judgment of the Second Divisional Court of the Appellate Division, *Stoney Point Canning Co. v. Barry* (1916), 36 O.L.R. 522, 10 O.W.N. 130, was reversed; Fitzpatrick, C.J.C., dissenting.

Clergue v. Plummer—Judgments were read by Fitzpatrick, C.J.C., Idington and Anglin, JJ. The judgment of the Second Divisional Court of the Appellate Division, *Clergue v. Plummer* (1916), 38 O.L.R. 54, 11 O.W.N. 85, was affirmed; Fitzpatrick, C.J.C., and Davies, J., dissenting.

Euphrasia, Township of, v. Township of St. Vincent—Judgments were read by Davies, Idington, Duff, and Anglin, JJ. The judgment of the Second Divisional Court of the Appellate Division, *Township of Euphrasia v. Township of St. Vincent* (1916), 36 O.L.R. 233, 10 O.W.N. 21, was affirmed.

Palmer v. City of Toronto—Judgments were read by Idington and Anglin, JJ. The judgment of the Second Divisional

Court of the Appellate Division, *Palmer v. City of Toronto* (1916), 38 O.L.R. 20, 11 O.W.N. 79, was affirmed; IDINGTON, J., dissenting.

SMITH v. DARLING—Judgments were read by FITZPATRICK, C.J.C., IDINGTON and DUFF, JJ. The judgment of the First Divisional Court of the Appellate Division, *Smith v. Darling* (1916), 36 O.L.R. 587, 10 O.W.N. 161, was affirmed; IDINGTON, J., dissenting.

2nd May, 1917.

COWAN v. CITY OF TORONTO—Judgments were read by FITZPATRICK, C.J.C., DAVIES and ANGLIN, JJ. The judgment of the First Divisional Court of the Appellate Division, *Cowan v. City of Toronto*, 3rd March, 1916, not reported or noted, was affirmed.

JONES v. TOWNSHIP OF TUCKERSMITH—Judgments were read by IDINGTON and ANGLIN, JJ. The judgments of the First Divisional Court of the Appellate Division, *Jones v. Township of Tuckersmith, Re Jones and Township of Tuckersmith* (1915), 33 O.L.R. 634, 8 O.W.N. 344, was reversed.

TORONTO, CITY OF, v. BROWN & CO.—Judgments were read by DAVIES, IDINGTON, DUFF, and ANGLIN, JJ.—The four Judges composing the Second Divisional Court of the Appellate Division, *Re J. F. Brown Co. Limited and City of Toronto* (1916), 36 O.L.R. 189, 10 O.W.N. 19, upon appeal from an award, were divided in opinion, with the result that the award was affirmed. A majority of the Judges of the Supreme Court of Canada were of the opinion that the award should not be interfered with; DAVIES, J., dissented.

TORONTO, CITY OF, v. MURCH—Judgments were read by FITZPATRICK, C.J.C., IDINGTON and ANGLIN, JJ. The judgment of the Second Divisional Court of the Appellate Division, *Murch v. City of Toronto* (1916), 10 O.W.N. 141, was affirmed.