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APPELLATE DIVISION.

October 25th, 1915.

*REX v. SPERA.

Criminal Law—Offence upon Young Woman—Criminal Code, sec. 212—Proof of Age—Best Evidence not Obtainable—Hearsay Testimony—Admissibility—Effect of sec. 984 of Code.

Case reserved by the Senior Judge of the County Court of the County of Wentworth upon an indictment and conviction of the prisoner, under sec. 212 of the Criminal Code, R.S.C. 1906 ch. 146, for an offence committed upon an unmarried female under 21 years of age; the sole question being whether there was any evidence to prove that she was under 21.

The evidence given was that of the girl herself, who testified that she was only 19 years old, and gave her exact age; and the evidence of a Mrs. Coleman, to live with whom the girl had gone when quite young, and who deposed that the girl was 19; Mrs. Coleman's opinion was formed from information she had received when the girl came to her, and also from her own observation and judgment. The girl's mother was dead.

The case was heard by Meredith, C.J.O,. Garrow, Maclaren, Magee, and Hodgins, JJ.A.

E. F. B. Johnston, K.C., for the prisoner.

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

Meredith, C.J.O., delivering the judgment of the Court, referred to Hall's Law relating to Children, 3rd ed., p. 155, note (*l*); Regina v. Cox, [1898] 1 Q.B. 179; Cheever v. Congdon

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

(1876), 34 Mich. 296; Loose v. The State (1903), 120 Wis. 115; and said that the evidence was admissible, and the question must be answered in the affirmative.

It was argued for the prisoner that the omission to include sec. 212 of the Code in the provision (sec. 984) which makes it competent for a Judge or jury to infer the age of a person from his appearance, shewed that this class of evidence was not admissible. That contention was not well-founded. The section does not exclude any other class of evidence by law admissible, but provides a means of determining the age where other competent evidence is not obtainable.

Conviction affirmed.

OCTOBER 28TH, 1915.

*HUTH v. CITY OF WINDSOR.

Highway—Nonrepair—Cement Sidewalk in City Street—Neglect to Roughen Surface—Dangerous Condition—Notice to City Corporation—Injury to Person—Knowledge of Dangerous Condition—Reasonable Care—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 460.

APPEAL by the defendants from the judgment of SUTHERLAND, J., 8 O.W.N. 574, 34 O.L.R. 245.

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

F. D. Davis, for the appellants.

G. A. Urquhart, for the plaintiff.

THE COURT dismissed the appeal with costs.

OCTOBER 29TH, 1915.

*BRYMER v. THOMPSON.

Landlord and Tenant—Lease of Flat in Building—Implied Stipulation to Furnish Heat—Collateral Contract—Statute of Frauds—Damages for Inadequate Heating.

Appeal by the defendant from the judgment of MIDDLETON, J., 34 O.L.R. 194, 8 O.W.N. 527.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.
A. McLean Macdonell, K.C., for the appellant.
G. N. Shaver, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LATCHFORD, J. OCTOBER 23RD, 1915.

RE VIDAL.

Infant—Maintenance and Education—Directions of Will—Application of Interest upon Share of Estate—Encroachment upon Corpus—Refusal to Allow.

Application by the widow of one Vidal, deceased, for an order authorising the payment to her, by the administrators with the will annexed of the estate of the deceased, of the sum of $800, out of the share of Madeleine Vidal, the infant daughter of the deceased and the applicant, for travelling expenses to England and the infant's maintenance and education there.

The application was heard in the Weekly Court at Ottawa.
A. F. May, for the applicant and the administrators.
A. C. T. Lewis, for the Official Guardian, representing the infant Madeleine Vidal.

LATCHFORD, J., said that the share of the infant Madeleine amounted to $1,276.55; that Mrs. Vidal desired to take her daughter to London, where her son was employed in the office of the Paymaster of the Canadian Overseas Forces, and have Madeleine there attend school, while she herself would reside with her son. Her only means of support was a pension granted by the Department of Militia and Defence of Canada—the amount of it was not stated. Madeleine was 18 years of age on the 30th March, 1915, and consented to the payment of the $800 to her mother.

By his will, the deceased directed that the shares of his infant children (including Madeleine) should be held in trust

and invested by his executor—a son—who renounced probate. The administrators were bound to carry out the trusts expressed in the will. The trust as to the share of Madeleine, so directed to be held and invested, was that the interest thereon should during her minority be applied in her maintenance and education, and that the share itself should be paid over to her, with any unapplied interest, upon her attaining the age of 21 years.

The learned Judge said that he could disregard the unequivocal direction of the testator as to the share he bequeathed to his daughter. He had the right in law to determine, as he did determine, that she should be entitled to such share only upon her attainment of her majority. The case seemed a hard one; but he could not alter it without making a new will for the testator —and that he was not permitted to do. If any interest, on Madeleine's share was in the hands of the administrators, it might be paid out to Mrs. Vidal.

The motion must be dismissed. As the infant consented to the application, the costs of the Official Guardian (fixed at $5) should be paid out of such interest (if any); otherwise out of her share.

LENNOX, J., IN CHAMBERS. OCTOBER 25TH, 1915.

BETHUNE v. BIGGAR.

Trial—Notice of Trial—Jury Sittings—Non-jury Sittings—Rule 246—Practice.

Appeal by the plaintiff from an order of George M. Lee, one of the Registrars of the High Court Division, holding Chambers in lieu of the Master in Chambers, dismissing the plaintiff's application to set aside a notice of trial served by the defendant for the Hamilton jury sittings. The plaintiff had previously given notice of trial for a non-jury sittings at Hamilton. At that time, no jury notice had been served. The first day of the jury sittings was to be the 26th October; the jury sittings was to be held later.

Grayson Smith, for the plaintiff.
C. V. Langs, for the defendant.

LENNOX, J., said that the case could be set down for either Court, if regularly brought on. It was alleged that the case was

one which must be tried by a Judge alone, and it probably was. It was also said that it could not conveniently be tried at the jury sittings owing to the number of cases set down; but that did not affect the question. The learned Judge, with great respect, was of opinion that the Registrar was wrong. It was said that he regarded the case of Shaw v. Crawford (1889), 13 P.R. 219, as substantially identical; and thought that the present Rule, 246, providing that either party can give a notice of trial, was broader than Rule 654, under which the Shaw case was decided. The learned Judge could not see it in that light, as regards the circumstances of this case. It would lead to great inconvenience if parties were allowed to do what was sought to be done by the defendant here.

The appeal should be allowed and the notice of trial set aside; but, as it was not shewn that any decision had been given as to the scope of the new Rule in this respect, there should be no costs of the appeal or the motion below.

McGill v. McDonell (1892), 14 P.R. 483, Hogaboom v. Lunt (1892), 14 P.R. 480, and Leyburn v. Knoke (1897), 17 P.R. 410, were referred to.

MEREDITH, C.J.C.P., IN CHAMBERS. OCTOBER 25TH, 1915.

*RE CARNAHAN'S CONVICTION.

*RE RICHARDSON'S CONVICTION.

Municipal Corporations — Hawkers and Pedlars' By-law of County—Convictions for Offences against—Sale of Coal Oil by Travelling Salesmen—Binding Contracts of Sale—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 416—*Amendment by* 5 *Geo. V. ch.* 34, *sec.* 32.

Motions by S. A. Carnahan and A. E. Richardson to quash their convictions by a magistrate for offences against a hawkers and pedlars' by-law of a county, regulating, inter alia, "all persons, agents for persons not residing within the county, who sell or offer for sale . . . coal oil."

The defendants were agents of the Columbus Oil Company of Ohio.

Section 416 of the Municipal Act, R.S.O. 1914 ch. 192, as amended by 5 Geo. V. ch. 34, sec. 32, provides that "by-laws

may be passed by the councils of counties . . . (1) for licensing, regulating and governing hawkers, pedlars and petty chapmen . . . who go from place to place or to other men's houses to take orders for coal oil or other oil which is to be delivered afterwards from a tank car moved on a railway line or who go from place to place or to a particular place to make sales or deliveries of coal oil or other oil from such tank car."

The applications were heard at London on the 16th October, 1915.

G. S. Gibbons, for the applicants, contended that they merely took orders for coal oil, which orders their masters were not bound to fill or accept, and without an acceptance there could be no sale.

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

Meredith, C.J.C.P., said that a careful consideration of the whole evidence had made it quite plain that the oil was sold—that completed binding contracts of sale were duly entered into. There was, in each case, a sale, plainly evidenced in writing over the signatures of the buyer and the seller's salesman. These salesmen were hawkers, although they did not cry their wares nor carry their packs, for so the Legislature had declared; and it was nowhere said there must be a delivery, as well as a sale, to constitute an offence against this legislation; on the contrary, it is said that merely offering for sale is an offence: see Spanish Fork City v. Mortenson (1890), 7 Utah 33; City of New Castle v. Cutler (1901), 15 Penn. Super. Ct. 612.

The learned Judge referred also to Rex v. St. Pierre (1902), 4 O.L.R. 76; Rex v. Borror (1915), 9 O.W.N. 64; Rex v. Pember (1912), 3 O.W.N. 1216.

The applications should be dismissed with costs, if the respondent asked for costs.

Britton, J. October 26th, 1915.

*Re FAULKNER LIMITED.

*CITY OF OTTAWA'S CLAIM.

Company—Winding-up—Claim of City Corporation for Business Tax—Preferential Claim on Assets of Company in Hands of Liquidator—Failure of Corporation to Distrain before Winding-up Order—Winding-up Act, R.S.C. 1906 *ch.* 144, *secs.* 20, 23, 84.

Appeal by the Corporation of the City of Ottawa from the refusal of the Local Master at Ottawa, in a reference for the winding-up of Faulkner Limited, an incorporated company, to allow the claim of the appellant corporation for the amount of taxes upon a business assessment against the company, as a preferential claim upon the assets of the company.

The appeal was heard at the Ottawa Weekly Court.

F. B. Proctor, for the appellant corporation.

W. L. Scott, for the liquidator.

Britton, J., said that it was admitted that the business tax was properly imposed, and the amount of it was not disputed; it was also admitted that, before the winding-up order, there were goods and chattels upon the company's premises sufficient to allow of the taxes being made thereout by distress, and that some of these goods and chattels, since sold by the liquidator, were in the possession of purchasers upon the premises formerly occupied by the company; and it was also admitted that the claim of the appellant corporation as an ordinary creditor was a proper one.

The learned Judge referred to the Assessment Act, R.S.O. 1914 ch. 195, sec. 109, and its sub-sections; Fuches v. Hamilton Tribune Co. (1884), 10 P.R. 409; Re Fashion Shop Co. (1915), 33 O.L.R. 253; and said that preference had not yet been given by legislation in winding-up proceedings under the Dominion Winding-up Act, R.S.C. 1906 ch. 144; but, on the contrary, secs. 20, 23, and 84 seemed expressly to prevent a liquidator from allowing a preference or priority unless it was impressed upon the assets before they were taken possession of by him.

In re Ottawa Porcelain and Carbon Co. Limited (1909), 31 O.R. 679, was referred to; but in that case the claim was filed only as the claim of an ordinary creditor.

Appeal dismissed with costs.

Britton, J. October 27th, 1915.

Re CITY OF PETERBOROUGH AND PETERBOROUGH ELECTRIC LIGHT CO.

Arbitration and Award—Compensation for Electric Works Expropriated by City Corporation — Claims Excluded by Statutes from Consideration of Arbitrators—Statement as to Claims Considered by Arbitrators—Appeal from Award.

Appeal by the Corporation of the City of Peterborough from the award of three arbitrators.

After the interim opinion expressed by BRITTON, J., on the 3rd July, 1915—see 8 O.W.N. 564—the arbitrators signed a statement, under protest, in which they said that they neither considered nor allowed anything for prospective profits or for loss of profit or because or by reason of the exercise or non-exercise by the city corporation of the rights or any of the rights under the statutes, by-law, and agreement referred to in the previous report; and that they did not at any time consider any items excluded by the statutes.

After receipt of this statement, further argument was heard in the Weekly Court at Toronto.

M. K. Cowan, K.C., and G. N. Gordon, for the appellants.

W. N. Tilley, K.C., for the company.

Strachan Johnston, K.C., for bondholders of the company.

BRITTON, J., after setting out the facts at length, said that, having in view the provisions of the Ontario statutes 2 Geo. V. ch. 117, 3 & 4 Geo. V. ch. 114, and 4 Geo. V. ch. 87, he was unable to say that the award should be set aside.

Appeal dismissed with costs.

LENNOX, J., IN CHAMBERS. OCTOBER 27TH, 1915.

REX v. PURE MILK CORPORATION LIMITED.

Municipal Corporations—Transient Traders' By-law of Town—Persons Occupying Premises in Town—Police Magistrate's Convictions—Inapplicability of By-law—Quashing Convictions—Costs.

Motions by the defendant in this and three other cases to quash their convictions by the Police Magistrate for the Town of Burlington for offences against a transient traders' by-law of the town.

C. V. Langs, for the defendants.

W. Morison, for the prosecutor and magistrate.

Lennox, J., said that, if the magistrate had read by-law No. 282 of the Town of Burlington, he would not have made any of the convictions. The evidence in no sense brought any of the defendants within the provisions of the by-law—a by-law which purported to deal only with a "transient trader or other person *who occupies premises* in the town of Burlington for a temporary period." The defendants never occupied any premises in Burlington, either temporarily or otherwise.

The Municipal Act, R.S.O. 1914 ch. 192, sec. 420(6), perhaps authorises a by-law which would cover acts such as were charged against the defendants, although a by-law under sec. 416, concerning hawkers and pedlars not vending their own manufactures and products, would be more appropriate. By-law No. 282, although passed on the 26th February, 1915, was evidently framed on the law as it stood before the enactment of sec. 30 of the Municipal Amendment Act of 1906, 6 Edw. VII. ch. 34, and without reference to the wider powers conferred by the statute as it now is.

Regina v. Caton (1888), 16 O.R. 11, Regina v. Applebe (1899), 30 O.R. 623, and Regina v. Roche (1900), 32 O.R. 20, referred to upon the argument, were only remotely relevant. Rex v. Preston Co-operative Association, 1 O.W.N. 983, was decided in 1910, but apparently without reference to 6 Edw. VII. ch. 34, sec. 30.

The convictions should be quashed; but, as in Regina v. Applebe, without costs; and with protection to the magistrate, if needed.

Mulock, C.J.Ex. October 29th, 1915.

PEPPIATT v. REEDER.

Damages—Deceit—Measure of Damages—Profits — Services—Reference—Appeal—Costs.

Appeal by the defendant from the report of the Master in Ordinary finding that the plaintiff sustained damages to the extent of $2,951.17 by reason of the defendant's fraud.

The defendant was the owner of certain premises where he conducted a moving picture theatre business. By fraudulent misrepresentations, he induced the plaintiff to acquire the business by purchasing from the defendant the chattel property

connected with the business at the price of $3,500, and taking a lease of the premises for the term of 5 years at a monthly rental of $258.33, the plaintiff as part of the consideration for obtaining the lease paying to the defendant the sum of $1,000 cash.

By the judgment of the Court of Appeal, 8 O.W.N. 257, the bill of sale, chattel mortgage, and lease were found to have been procured to be made and entered into by the false and fraudulent statements, representations, and actions of the defendant, and the action was referred to the Master to inquire and report what damages the plaintiff had sustained by reason of such false and fraudulent statements.

The Master charged the defendant with the sum of $5,310.19, made up of items of moneys actually paid by the plaintiff to the defendant in respect of the transaction in question, with interest thereon, and including also the sum of $740, being an allowance for the plaintiff's time and services in carrying on the theatre business, and from this sum of $5,310.19 he deducted the sum of $2,359.02, being profits which he found the plaintiff had made whilst carrying on the business.

The appeal was heard in the Weekly Court at Toronto.
J. J. Gray, for the defendant.
Edward Meek, K.C., for the plaintiff.

Mulock, C.J.Ex., read a judgment in which, after setting out the facts, he said that the measure of damages in an action of deceit is the difference between the purchase-price of the property and its actual value at the time of the purchase: Lamont v. Wenger (1911), 22 O.L.R. 642; and the learned Master erred in bringing into the account any profits made by the plaintiff or allowances to him for services.

The finding of the Master of the sum of $2,951.17 as the amount of the damages was, therefore, set aside, and the action was referred back to the Master to take the accounts in accordance with the view now expressed.

The learned Chief Justice added that the reference has been an expensive one, and it would be advisable for the parties, if possible, to make such admissions as would minimise further costs.

The costs of this appeal to be included in the costs of the reference, and as such disposed of by the Master.

CHAPLIN V. CHAPLIN—BRITTON, J., IN CHAMBERS—OCT. 25.

Money in Court—Money to Credit of Execution Debtor — Payment out to Sheriff for Distribution among Creditors — Claims by Assignees of Debtors—Consideration—Invalidity — Costs.]—Motion by the Sheriff of the United Counties of Northumberland and Durham for an order for payment out of Court to him of that portion of the moneys therein in this action standing to the credit of Valentine J. Chaplin, to be distributed among his execution creditors. Alexander Anderson claimed the money under an assignment to him made by Valentine J. Chaplin on the 19th June, 1914; and the wife of Chaplin claimed under an assignment to her, dated the 24th April, 1913, purporting to be in consideration of $400. On the argument counsel for Anderson expressed his willingness that the money should be paid out to the Sheriff. Upon reading the affidavit of Mrs. Chaplin and her cross-examination thereon, the learned Judge is of opinion that her claim cannot be maintained. The alleged assignment, he says, was not for valuable consideration, and it is not valid as against the creditors of her husband. Upon the argument, the learned Judge was asked to say to which of the execution creditors or others the Sheriff should pay; but there was no material upon which such an order could be made; and the Sheriff must take the responsibility of distribution. Order made for payment out to the Sheriff of the money in Court for distribution among such of the creditors as are entitled thereto; no costs to or against the claimants; the Sheriff's costs to be deducted by him from the money paid out, before distribution. Grayson Smith, for the Sheriff. M. C. Purvis, for the wife. J. H. Spence, for Alexander Anderson.

NEW YORK AND PENNSYLVANIA CO. V. HOLGEVAC—LENNOX, J., IN CHAMBERS—OCT. 28.

Company—Action Brought by Extra-Provincial Company—Stay of Proceedings—License Obtained pending Action—Leave to Proceed—Terms—Costs—Extra-Provincial Corporations Act, R.S.O. 1914 *ch.* 179, *secs.* 4, 16.]—Appeal by the defendants from an order of the Local Judge at Haileybury dismissing the defendants' motion to strike out the statement of claim, or for the dismissal of the action, and providing for and directing as to the delivery of the statement of defence and notice of trial

and the date of the trial of the action. The learned Judge said that the order should not have been made. The plaintiff company was an extra-provincial corporation, within the meaning and subject to the provisions of secs. 4, 7, 9, and 16 of the Extra-Provincial Corporations Act, R.S.O. 1914 ch. 179. At the time of the motion and appeal, the plaintiff company had not obtained a license to do business in the Province of Ontario, as required by sec. 4, and was not entitled to maintain an action in any Court in Ontario. Upon the argument of the appeal, it was stated that an application for a license had been made and was pending; and it appeared now that an order in council was passed on the 26th October instant, directing the issue of a license to bear date as of that day. Sub-section 2 of sec. 16 provides that upon the granting of a license a pending action may be prosecuted as if the license had been granted before the action was instituted. Order of Local Judge set aside, and order made staying proceedings until an affidavit is filed proving the granting of the license, together with an office copy of the license, verified by the affidavit, or until a certificate from the office at the Provincial Secretary shewing the issue of the license, is filed; directing that upon proof of the issue of a license in the manner mentioned, the plaintiff company shall have the right to prosecute the action; allowing the defendants 10 days within which to deliver their statement of defence, after service of notice by the plaintiff company of proof of the grant of a license in the manner mentioned, and allowing the defendants, in addition to other defences, to set up any defence they may be advised founded upon or arising out of the statute. Costs of the motion and of the appeal to be costs to the defendants in any event. G. H. Sedgewick, for the defendants. H. S. White, for the plaintiff company.

WILKINSON V. HAYES—LENNOX, J., IN CHAMBERS—OCT. 28.

Trial—Action for Malpractice and Assault—Motion to Strike out Jury Notice—Rule 398—Discretion of Judge in Chambers—Motion Adjourned before Trial Judge.]—Application by the defendant, under Rule 398, to strike out the plaintiff's jury notice, in an action against a physician and surgeon for malpractice and assault. Upon the argument, counsel for the plaintiff offered to abandon such parts of the statement of claim as alleged malpractice and to confine the action to a claim for

damages for assault, if this would be accepted as entitling the plaintiff to retain the jury notice; but this was not accepted by the defendant; and the motion was disposed of upon the original pleadings. The learned Judge said that in a clear case the question whether an action should be tried with or without a jury should be determined at as early a stage as possible. An action for malpractice is usually to be tried without a jury: Town v. Archer (1902), 4 O.L.R. 383; Hodgins v. Banting (1906), 12 O.L.R. 117; Gerbracht v. Bingham (1912), 4 O.W.N. 117. Questions involving scientific investigation are not usually tried with a jury: Swyny v. North-Eastern R.W. Co. (1896), 100 L.T. Jour. 389, 390. But this action was not for malpractice alone; and it was a case in which the discretion as to the mode of trial should be exercised by the trial Judge. Application enlarged before the Judge at the trial. A. W. Langmuir, for the defendant. R. U. McPherson, for the plaintiff.

MILLS v. TIBBETTS—LENNOX, J., IN CHAMBERS—OCT. 28.

Parties—Mortgage Action—Addition of New Defendants—Proposed Parties not Notified.]—Motion by the defendants for an order adding one Beatty and two other persons as defendants to the action, which was brought upon a mortgage made by the defendants, described as trustees, to the plaintiff. The defendants contended that the provisions of the mortgage, including the covenants entered into by the defendants, should be enforced against the proposed new parties as well as against the original defendants. None of the proposed parties had been served with notice of the motion; but the motion was opposed by counsel for Beatty, who happened to be in Chambers when the application was made. No objection was offered by counsel for the plaintiff. The learned Judge said that he saw no justification for such an order. Motion dismissed, with costs, if demanded. H. A. Tibbetts, for the defendants. A. D. George, for the plaintiff, A. G. Murray, for Beatty.

AVERY & SON v. PARKS—CLUTE, J.—OCT. 29.

Damages—Chattel Mortgage—Seizure and Sale of Goods—Part Payment by Assignment of Securities—Acceptance—Find-

ing of Fact—Excessive Seizure—Assessment of Damages.]—Action for damages for wrongful and excessive seizure of the plaintiffs' goods under two chattel mortgages made by the plaintiffs in favour of the defendant Parks—the seizure having been made by the defendant MacIntyre as bailiff. The plaintiffs assigned a certain judgment and a certain promissory note to the defendant Parks, and set up that the latter accepted them in payment of part of the amount due under the chattel mortgages; but the defendant Parks said that the judgment and note were collateral. The action was tried without a jury at North Bay. The learned Judge finds that the judgment and note were received in part payment of the account, and that the seizure was excessive. Proceeding upon the view that a seizure was not altogether illegal, and estimating the value of the articles seized and sold as accurately as possible upon the contradictory evidence, after deducting the balance due to the defendant Parks, and not taking into account goods seized and not to be sold, to which the plaintiffs were entitled, the learned Judge assessed the damages at $1,250, making no allowance in respect of the claim for injury to the plaintiffs' business—having regard to business conditions in the locality, he was not satisfied that the plaintiffs suffered any loss in that regard. Judgment for the plaintiffs for $1,250 with costs. J. H. McCurry, for the plaintiffs. G. H. Kilmer, K.C., and G. A. McGaughey, for the defendants.

CORRECTION.

In Re Independent Order of Foresters and Town of Oakville, *ante* 98, on p. 99, line 18, before the word "indicate" insert the words "do not."