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# Ontario Weekly Notes

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## APPELLATE DIVISION.

MARCH 9TH, 1915.

### RE HISLOP.

*Will—Construction—Division of Estate among Named Brothers and Sisters by one Brother "according to his Best Judgment"—Trust — Imperative Direction — Discretion — Limited Power—Division Based upon Equality—Tenancy in Common—Predecease of one Sister—Intestacy as to her Share—Ascertainment of Next of Kin of Testator at his Death—Sister Surviving Testator but Dying before Division—Vested Share Passing to Representatives.*

Appeal by the executor of the will of Philip Hislop, deceased, from the judgment of MIDDLETON, J., 7 O.W.N. 614.

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

L. Harstone and R. S. Robertson, for the appellant.

W. Davidson, K.C., for the representatives of Euphemia Moody.

N. W. Rowell, K.C., for the executors of Janet Glover.

R. S. Hays, for David Hislop.

J. W. Graham, for Margaret Hislop.

KELLY, J.:— . . . The part of the will out of which the questions arise is the following devise: "To my brother John Hislop I leave the disposition of all my real and personal estate of which I may die possessed to be divided by him the said John Hislop according to his best judgment amongst my two brothers the said John Hislop and my brother David Hislop . . . and my three sisters, namely Margaret Hislop . . . Janet Glover . . . and Euphemia Moody . . ."

The will was made on the 23rd March, 1910, and the testator died on the 30th June, 1913. Euphemia Moody died intestate in November, 1912, and Janet Glover died on the 22nd January, 1914, leaving a will.

Mr. Justice Middleton states the first of these questions thus: "Has John Hislop an absolute and uncontrollable discretion which enables him to divide the testator's property among those entitled, in such shares and proportions as he may see fit, or is the testator's intention that the property shall be divided equally, and is John Hislop's function limited to apportioning so as to bring about that which, in his judgment, would constitute equality? " The appellant's contention is, that the testator's direction that the division be "according to his (the executor's) best judgment" confers upon him power to make the division amongst the five named persons in such proportions as to him seem best. I can find no such meaning in that language, particularly when read in connection with the other words used by the testator in making the devise. That to which his best judgment was to be applied was not the proportion in which the named persons should take, but the mode of making the division, as, for instance, what assets should each get as his or her share of an equal division. Had the testator said in express language that the executor should make the division in such proportions as in his best judgment he thought proper, or words to that effect, the result might have been otherwise.

Authority is not wanting that the language employed imports an equal division. A testamentary gift "to be divided" between two or more, means an equal division and creates a tenancy in common: Stroud's Judicial Dictionary, p. 559, citing Peat v. Chapman (1750), 1 Ves. Sr. 542, referred to in the judgment appealed from.

In Liddard v. Liddard (1860), 28 Beav. 266, where leaseholds were conveyed to trustees, and it was declared that when the settlor's eldest son attained 21 years, they should be in trust for him, and that they should be assigned accordingly, but so that the settlor's wish that his other children "might be allowed by the eldest son to participate with him in the same," should be observed by him, it was held that the younger children were entitled to equal shares with the eldest, as tenants in common. The Master of the Rolls (Sir John Romilly) said (p. 271): "It is true the settlement says that the children are to be *allowed* by their brother to participate with him, but that does not invest him with the right of determining whether they shall partici-

pate with him at all, or only to such extent as he may think fit to allow. . . . The question then is, whether, in the absence of any direction as to the mode of participation, the participation is not to be in equal shares and proportions. I am of opinion that it is.''

Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint-tenancy, and to create a tenancy in common: Jarman on Wills, 6th ed., p. 1791; Robertson v. Fraser (1871), L.R. 6 Ch. 696. A different intention does not follow from the use of the additional words ''according to his best judgment.''

So strongly is the word ''divided'' when used in this connection held to mean equally, that where a direction was to pay, assign, and divide a sum to certain legatees as joint tenants, a tenancy in common was held to be created: Booth v. Allington (1857), 27 L.J. Ch. 117.

And so in earlier cases, a devise to A. and B. between them (Lashbrook v. Cock (1816), 2 Mer. 70), and a bequest unto and among certain persons (Richardson v. Richardson (1845), 14 Sim. 526), were each held to create a tenancy in common.

There is good ground for holding that the division contemplated by the testator was to be based on an equality, and that a tenancy in common was created. That being so, the answers given by the judgment appealed from to the other questions submitted must be held to be correct.

The appeal should, therefore, be dismissed with costs.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., concurred.

LATCHFORD, J.:—John Hislop, his brother David, his sister Margaret, and the personal representatives of his deceased sister Euphemia, are under the decision appealed from entitled respectively to an equal one-fourth share in the estate of the testator.

By appealing John Hislop obviously manifests an intention of not dividing the estate in equal shares.

Upon the argument his counsel admitted that the words of the devise imported that he would be obliged to give some part of the estate to each of the brothers and sisters who survived the testator, but contended that, while such part should not be illusory (how little would be illusory he declined to say), the amount of it was in the discretion of the executor—who, being one of those entitled, might apportion to himself more than he

thought proper to allot to the others entitled. Considered apart altogether from the facts and circumstances attending the making of the will, the very words of it import, in my opinion, an intention on the part of its maker to benefit equally his brothers and sisters—all of whom he named. His whole estate was given to the executor to be divided among the only five persons who stood in equal relation to him. Upon the authority cited in the judgment appealed from, a division between two must be an equal division; and, in the absence of anything to indicate an intention to the contrary, a division among a number of persons standing in the same relation to the testator must also be equal.

*Appeal dismissed with costs.*

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MARCH 9TH, 1915.

## *REX v. WRIGHT.

*Liquor License Act—Sale of Beer by Brewer under Provincial License to Unlicensed Person in Municipality in which Local Option By-law in Force — Meaning of "Sell" and "Sale"—R.S.O.* 1914 *ch.* 115, *sec.* 155.

Appeal by the Crown from an order of the Senior Judge of the County Court of the County of Simcoe quashing a summary conviction of the defendant.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

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

A. E. H. Creswicke, K.C., for the defendant.

KELLY, J.:—Albert Wright was charged before the Police Magistrate for the Town of Orillia upon an information that, being the holder of a brewer's provincial license at the town of Orillia, it being a municipality in which a by-law passed under sub-sec. 1 of sec. 41 of the Liquor License Act is in force, he did "sell illegally a quantity of liquor, to wit, beer or ale, and did deliver the same at the township of Orillia, it being a municipality in which a by-law passed under sub-sec. 1 of sec. 141 of the Liquor License Act is in force." On the 13th January, 1914, he was thereon convicted.

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

He appealed to the Senior Judge of the County Court of the County of Simcoe, who quashed the conviction. The present appeal is from that judgment.

The learned Judge found that on the 21st November, 1913, one Fahsa gave $2 to one William Anderson, who went to the defendant's brewery in the town of Orillia and ordered one dozen of beer and one dozen of porter for Fahsa, to be delivered by the defendant at Fahsa's residence in the township of Orillia; that there was nothing done at the time about appropriating the beer or porter; but that the defendant sent his man and delivered the two dozen bottles the next day at Fahsa's place in the township of Orillia.

The learned Judge disposed of the matter on the question of what constituted a sale.

The defendant, at the time it is charged the offence was committed, was the holder of a brewer's provincial license and carried on the business of a brewer in the town of Orillia, where what is known as a local option by-law was then in force. His right to sell liquor was at the time governed by the provisions of 62 Vict. ch. 31, sec. 4, as amended by 9 Edw. VII. ch. 82, sec. 47, and further amended by 1 Geo. V. ch. 64, sec. 16, which declares that "a brewer's provincial license shall be an authority for the holder thereof to sell to persons who are holders of licenses under the Liquor License Act ale and beer on the premises in or on which they are manufactured in the quantities hereinafter mentioned, and shall authorise him to sell by sample in such quantities to such persons in any municipality in the Province for future delivery; said license shall be an authority for the holder thereof to sell ale and beer in quantities as heretofore in the building and license district aforesaid to others than licensees; provided, however, that no such last mentioned sale shall be made either directly or indirectly within any municipality in which a by-law passed under sub-sec. 1 of sec. 141 of the Liquor License Act is in force." (See the Liquor License Act, R.S.O. 1914 ch. 215, sec. 155). Fahsa was not the holder of a license under the Liquor License Act. There was also a finding that a local option by-law was in force in the township of Orillia. I do not think there was any evidence, or any admission, on which to base that finding. But, in the view which I take of the matter, that finding is immaterial.

The quantity of liquor ordered and delivered to Fahsa was such as the defendant, as a licensed brewer, had the right to sell to persons to whom his license was an authority to sell.

The statute prohibited a sale to any person within the town of Orillia except on the premises on or in which the ale or beer was manufactured, and on such premises a sale could legally be made only to holders of a license under the License Act. Fahsa not being so qualified, it became necessary to determine whether what took place at the defendant's premises or within the town of Orillia, when the liquor was ordered for Fahsa, was a sale within the meaning of the Act.

The position taken by the defendant is, that a sale was not made in the town of Orillia; and, if what happened constituted a sale in the township of Orillia, where the goods were delivered, a conviction could not be had, the information not charging that a sale was made in the township but only that there was delivery there. The argument for the accused proceeded on the line that there was in Orillia only a contract for sale at most, if, indeed, there was even such a contract; that there was no transmutation of the property to the purchaser; that there could not be a completed sale until there was an appropriation of the goods and a delivery of them to the purchaser; and, the delivery not being in the town, no sale was made therein. All this is based on the assumption that the test is, whether there was a sale in the strict legal meaning of that word as used in reference to contracts of sale and purchase. That, however, is too strict a rule to be applied here. It seems to me that the Legislature, in imposing the prohibition which was in force in this town, intended to put restrictions not only on sales actually in all respects completed, but upon the contracting for sale or the doing of the very acts in furtherance of a sale which in the present case are found to have been done in the town, unless to the limited class authorised by the Act.

The case should not be disposed of by so interpreting the word "sell" as to mark a rigid distinction between an agreement to sell and a completed sale where the property has actually passed to the purchaser. That is the view taken in a number of English cases, a recent one being Lambert v. Rowe, [1914] 1 K.B. 38. . . . It was held that the word "sell" in sec. 13 of the Market and Fair Clauses Act was to be understood in a popular and not in its strict legal sense. . . . A like conclusion was reached in earlier cases, notably Stretch v. White (1861), 25 J.P. 485, cited with approval in Lambert v. Rowe.

Pletts v. Campbell, [1895] 2 Q.B. 229, was cited on the argument as opposed to that decision; but, even in that case, which is distinguishable from the present, Wright, J., said that he

thought "it is going too far to say that the word 'sell' must necessarily mean a sale in the legal sense; it may be satisfied by an agreement to sell, of which Stretch v. White is an illustration."

In my view, the transaction complained of constituted a sale in the town of Orillia, within the meaning of what is prohibited by the Act. The appeal should be allowed with costs and the conviction sustained.

SUTHERLAND, J., agreed.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., agreed in the result.

LATCHFORD, J., also agreed in the result, for reasons stated in writing.

*Appeal allowed.*

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MARCH 9TH, 1915.

## *RE MAJOR HILL TAXICAB AND TRANSFER CO. LIMITED AND CITY OF OTTAWA.

*Municipal Corporation — By-law of Police Commissioners — Motion to Quash—Jurisdiction.*

Appeal by the company from the order of LENNOX, J., 7 O.W.N. 747, dismissing a motion by the company to quash a by-law of the Board of Commissioners of Police of the City of Ottawa.

The appeal came on for hearing before FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. C. McCarthy, for the appellant company.

F. B. Proctor, for the respondent city corporation, objected that the Court had no power to quash a commissioners' by-law.

After counsel had been heard upon the objection, the judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:— We are all of opinion that the objection taken by Mr. Proctor is well-founded. The jurisdiction to quash a municipal by-law is not an inherent one, but is expressly conferred. We cannot as-

sume jurisdiction by inference or otherwise to quash a by-law of Police Commissioners.

Therefore, without passing upon the reasons for judgment given by the learned Judge in the Court below, we dismiss this appeal with costs.

[See secs. 282 et seq. of the Municipal Act, R.S.O. 1914 ch. 192; McGill v. License Commissioners of the City of Brantford (1892), 21 O.R. 665, where a doubt was expressed; and Biggar's Municipal Manual, pp. 375, 376.]

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MARCH 9TH, 1915.

## *REX v. CANADIAN PACIFIC R.W. CO.

*Municipal Corporation—Smoke Prevention By-law of Urban Municipality—Municipal Act, R.S.O. 1914 ch. 192, sec. 400, sub-sec. 45—Application to Railway Locomotive Engine—Opening to Atmosphere from Smoke-stack—"Flue, Stack, or Chimney."*

Appeal by the prosecutor from the order of MIDDLETON, J., 7 O.W.N. 568, quashing two convictions of the defendant company for offences against a municipal by-law of the City of Ottawa, providing for the prevention of a nuisance by smoke emission.

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

F. B. Proctor, for the appellant.

I. F. Hellmuth, K.C., for the defendants, respondents.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—Without expressing any opinion as to the reasons given by the learned Judge for his order in this case, so elaborately argued before us, we all think that the case falls to be disposed of on the construction of sec. 400, sub-sec. 45, of the Municipal Act, R.S.O. 1914 ch. 192, under which the council assumed to pass the by-law in question. Section 400 provides that "by-laws may be passed by the councils of urban municipalities . . . 45. For requiring the owner, lessee, tenant, agent, manager or occupant of any premises in, or of a steam boiler in connection with, which a fire is burning, and every person who oper-

ates, uses or causes or permits to be used any furnace or fire, to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney."

We think that this sub-section does not apply to a locomotive engine: the opening to the atmosphere is from the top of the smoke-stack of the engine, which is not, in our opinion, a flue, stack or chimney, within the meaning of the section.

The appeal will, therefore, be dismissed with costs.

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MARCH 10TH, 1915.

## *DOWDY v. GENERAL ANIMALS INSURANCE CO.

*Insurance—Animal Insurance—Misstatement of Facts in Application Filled in by Agent of Insurance Company—Absence of Knowledge by Assured—Untrue Statements by Assured—Construction of Policy—Fraud of Agent—Authority of Company's Agent as Agent of Assured—Mistake in Proofs of Loss.*

Appeal by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiff, upon the findings of a jury, in an action upon a policy issued by the defendants insuring the plaintiff's horse.

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

George Wilkie, for the appellants.

C. W. Bell, for the plaintiff, respondent.

The judgment of the Court was delivered by RIDDELL, J.:—

. . . Hall, who was the agent of the defendants . . . urged the plaintiff more than once to insure a horse which he owned. After some demur, the plaintiff agreed, and Hall, producing an application, filled it in without asking the plaintiff for information (except in a very few matters). The plaintiff believed that Hall knew his business, and that what he was writing was true, and

signed, at Hall's request, without knowledge of the falsity of some of the statements.

On the application is printed in plain letters the words: "Any false statement in this application annuls the policy." The application also contains the following question: "29. Do you accept to be alone responsible for the correctness of the description and other particulars set forth in this application, and if the whole or any portion of the same be written by a canvasser, agent, or employee of the company, or by any other person whatsoever, do you accept to consider same as your agent writing for and on your behalf? And Hall, without the plaintiff's knowledge, inserted an answer "Yes."

A policy issued, having on its face the statement that the application "is . . . made a part of this policy and a warranty on the part of the assured," and condition 1 reads: "This policy shall be void if any fact or circumstance relating to this risk has not been fully and truly stated to this company by the assured."

Certain of the facts were undoubtedly misstated, but not to the knowledge of the assured.

The horse died, and claim-papers were put in containing similar misstatements. The papers had been drawn up by a solicitor from the policy, and the plaintiff was not aware of the inaccuracies.

The defendants refused to pay; the plaintiff sued, and, at the trial before His Honour Judge Snider and a jury, the jury found in favour of the plaintiff, and judgment went for the full amount, $200, and costs. The defendants now appeal.

Notwithstanding the clause in the application apparently making the insurance agent agent for the applicant, the Supreme Court of Canada seem to have decided that the insurance company cannot take advantage of this where the applicant is misled by the agent's fraud: Hastings Mutual Fire Insurance Co. v. Shannon (1878), 2 S.C.R. 394, at p. 408; and, if Biggar v. Rock Life Assurance Co., [1902] 1 K.B. 516, is opposed to this view, we should follow our own Court. I think, however, we need not pass upon this point, but decide the case on another ground.

In the application (as we have seen) it is specifically stated that "any false statement . . . annuls the policy," the application is made a warranty, and it is provided that the policy is to be void if any circumstances shall not have been truly stated

*by the assured.* All these provisions are, I think, to be read together; they are all *in pari materiâ;* there is no possible need for or use in the last if it is not to modify the two former. Remembering that the language of a policy must be read most strongly against the insurance company, whose language it is, I think the policy is to be void only on the untrue statement of the assured, and not of one who is in fact the agent of the company, but technically perhaps and for a special purpose acting for the assured. If this be not the meaning, the words "by the assured" are wholly unnecessary and useless.

The assured made full and true disclosure of everything upon which he was asked, and I do not think the fraud of Hall can be imputed to him; and there was no fraud, but only mistake, in the proofs of loss.

I would dismiss the appeal with costs.

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MARCH 11TH, 1915.

## *BUFF PRESSED BRICK CO. v. FORD.

*Company — Liability for Calls of Original Shareholder and Petitioner for Incorporation—Fraud of Promoter.*

Appeal by the plaintiff company from the judgment of MULOCK, C.J.Ex., who tried the action without a jury, dismissing it with costs.

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

S. H. Slater, for the appellant company.

E. E. Gallagher, for the defendant, respondent

RIDDELL, J.:—One Brinker, engaged in promoting a brick company, is said by the defendant to have committed a fraud upon him by concealing his interest in the matter, and thereby induced the defendant to take a share in the proposed enterprise. The defendant with others signed a petition to the Lieutenant-Governor asking for a charter, the defendant being a subscriber for 10 shares. The charter was granted in January, 1914, and names the defendant as one of the corporators.

Calls were properly made upon the stock; the defendant re-

fused to pay; and this action was brought. He defended on the ground that he had been induced to subscribe by the fraud of the promoter; and the case came down for trial before the Chief Justice of the Exchequer, at Hamilton, without a jury.

The learned Chief Justice found the facts in favour of the defendant, and dismissed the action. The plaintiff company now appeals.

There is no doubt that if shares be subscribed for on the faith of a prospectus, shares issued on such a subscription, if it is fraudulent and the fraud induced the subscription, are not to be forced upon the subscriber, "for the prospectus is the basis of the contract for shares," and the company by issuing stock thereon ratifies and adopts the prospectus: Pulsford v. Richards (1853), 17 Beav. 87; Jennings v. Boughton (1853), 17 Beav. 234; and it makes no difference if the prospectus be issued before incorporation: Karberg's Case, [1892] 3 Ch. 1. See also Henderson v. Lacon (1867), L.R. 5 Eq. 249; Ross v. Estates Investment Co. (1868), L.R. 3 Ch. 682; Lynde v. Anglo-Italian Hemp Spinning Co., [1896] 1 Ch. 178; Roussell v. Burnham, [1909] 1 Ch. 127; In re Pacaya Rubber Co., [1914] 1 Ch. 542.

But where a person petitions for a charter and becomes an original shareholder named as such in the charter, the same rule does not apply. Any misrepresentation made is the act of a promoter, not the company; the company, not being in existence, cannot make any misrepresentation, and there is no ratification (if there could under the circumstances be ratification) by the company: In re Northumberland Avenue Hotel Co. (1886), 33 Ch. D. 16; In re Rotherham Alum and Chemical Co. (1883), 25 Ch. D. 103; Clinton's Claim, [1908] 2 Ch. 515.

The matter came up squarely in In re Metal Constituents Limited, [1902] 1 Ch. 707, where the decision is rested both on the ground I have stated and on the ground that by signing the memorandum the applicant became bound not only as between himself and the company but as between himself and the other persons who should become members.

The distinction between the case of a shareholder who is allotted stock by the company and one who is a petitioner and a charter member was not present to the mind of the learned Chief Justice, but it is thoroughly established and is unassailable on principle or authority.

In this view it is unnecessary to consider whether the alleged misrepresentations were in fact made or if made whether they were such as would give the defendant the right to repudiate.

I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff company for the amount sued for with costs.

FALCONBRIDGE, C.J.K.B., and LATCHFORD and KELLY, JJ., agreed in the result.

*Appeal allowed.*

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## HIGH COURT DIVISION.

MIDDLETON, J. MARCH 4TH, 1915.

## KENNEDY v. SUYDAM.

*Discovery—Examination of a Defendant as a Party and as an Officer of Defendant Companies—Disclaimer of Interest—Scope of Examination—Personal Knowledge Obtained in any Capacity—Single Examination.*

Motion by the plaintiff for the issue of a writ of attachment against the defendant Suydam for refusal to be sworn before a special examiner, upon the return of an appointment for his examination for discovery; or, in the alternative, for an order directing him to attend again at his own expense to be examined, pursuant to the ruling made by the special examiner upon the return of the appointment.

Upon the return of the appointment before the special examiner, counsel for the plaintiff proposed to examine the defendant Suydam as an individual defendant and as an officer of each of the defendant companies. Counsel for the defendant Suydam took the objection that, before the witness could be sworn, counsel for the plaintiff should decide in what capacity the plaintiff wished first to examine the defendant, whether as an individual defendant or as an officer of one of the companies, and, if so, of which company, demanding that there be three separate examinations.

The examiner ruled that the defendant Suydam should be examined in the whole three capacities at once, making a single examination; and thereupon counsel for the defendant Suydam refused to allow the witness to be sworn. The plaintiff then made this motion.

The motion was heard by MIDDLETON, J., in the Weekly Court.

J. H. Fraser, for the plaintiff, contended that there was but one set of facts, and that the witness must tell all the facts in his personal knowledge as an individual and as an officer of the defendant companies. The statement of claim alleged a series of transactions tainted with fraud and collusion participated in by each of the defendants and asked substantial relief against each of them.

W. M. Douglas, K.C., and W. H. Clipsham, for the defendants, contended that, as the defendant Suydam had disclaimed any interest in the transactions in question, the plaintiff was not entitled to examine him, and further took the same objections that had been raised before the special examiner.

MIDDLETON, J., held that merely by disclaiming interest the defendant Suydam could not escape liability; that the plaintiff was entitled to examine the said defendant; and that he must tell all the facts in his personal knowledge, without regard to the capacity in which those facts came to his personal knowledge; and directed that he should attend to be examined at his own expense, pursuant to the ruling made by the special examiner.

Costs in the cause.

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LENNOX, J., IN CHAMBERS. MARCH 8TH, 1915.

## VOLCANIC OIL AND GAS CO. v. CHAPLIN.

*Costs—Taxation between Party and Party—Appeal — Counsel Fees—Discretion—Application of Tariff of* 1913 *to Costs Previously Incurred.*

Appeal by the plaintiffs from the taxation by the Senior Taxing Officer of the defendants' costs of the action and appeals therein, as against the plaintiffs.

H. S. White, for the plaintiffs.

Forgie (Bain, Bicknell, & Co.), for the defendants.

LENNOX, J.:—I am not satisfied that good reason has been shewn to support the 2nd, 3rd, and 4th objections to the taxation of the Senior Taxing Officer of this Court. The circumstance that he taxed $300 for counsel fees to the plaintiffs, when they appeared to be successful, does not shew that a subsequent

allowance of $500 as counsel fees to the defendants for the same Court was wrong. The inference is just as strong that too little was allowed upon the first taxation as that too much was allowed on the second. The same is true as to the costs in the Divisional Court; and as to both it is argued and not strenuously questioned that more effort was made to shew the Taxing Officer the actual conditions upon the later than the earlier taxation. As to the $1,000 allowed for counsel fees before the Appellate Division, it is alleged that, under the direction of the Court, several days of two counsel were spent in preparing a statement to aid the Court. With this explanation, the sum allowed does not appear to be extravagant. Aside from all this, the long experience and judgment of the Senior Taxing Officer should count for a good deal, in matters peculiarly within his province.

The first objection taken, however, rests upon entirely different considerations. Here the question is the tariff applicable to the taxed bill—a question of principle. The officer was bound to tax it according to law. He had no discretionary power. He was at least bound by the decisions of Judges of this Court as I am bound by the judgment of a Judge of co-ordinate jurisdiction. It was held by the Chief Justice of the Common Pleas in Re Solicitors (1914), 6 O.W.N. 625, that all taxation after the 1st September, 1913, are governed by the tariff of costs which came into force on that day. With very great respect, I am of opinion that the Senior Taxing Officer was bound to follow this judgment, and erred in taxing under the former tariff.

There will be a reference back to the Taxing Officer with a direction to tax the bills of costs in question under the present tariff of costs; and upon the other objections taken the taxation is confirmed. I make no order as to costs.

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LENNOX, J. MARCH 8TH, 1915.

## CRICHTON v. TOWNSHIP OF CHAPLEAU.

*Municipal Corporation — Carrying on "Show" Business in Municipal Building—By-law—Lease — Illegality — Action by Ratepayer for Injunction—By-law not Quashed—Contract—Parties—Employment of Manager.*

Action by a ratepayer of the township against the township corporation and J. B. Dexter to restrain the defendant corporation from carrying on the business of exhibiting moving pictures

in the township hall, and for a declaration that providing funds therefor is ultra vires and illegal, and that a contract made by the defendant corporation with the defendant Dexter is illegal.

G. E. Buchanan, for the plaintiff.
H. E. Rose, K.C., for the defendants.

LENNOX, J.:—The defendant corporation is engaged in a business in which it has no right to engage. The defendant Dexter is the agent of the corporation for the purpose of enabling it to carry on a show business, and as a cloak to cover up the real nature of the corporate operations. The by-law and so-called lease, purporting to be made under it, are palpable shams for the purpose of evading the law. A perusal of these documents is sufficient to convince me of this, and it is put beyond argument by the evidence at the trial.

The plaintiff is a ratepayer of the municipality, and sues upon behalf of all other ratepayers as well as upon his own behalf. Loss to the municipality is quite a probable result of the business the defendant corporation is carrying on. The taxes and the revenue from the town hall are being imperilled, and the defendant Dexter and his daughter and others are engaged at wages, so far as they relate to the picture show, to the payment of which the defendant corporation cannot lawfully apply the revenues of the municipality. If the municipality emerges from the transaction without a scandal and serious loss, it will be attributable to good luck, if there is such a thing, or the honesty of Dexter, not to the good management or the proper discharge of its duties by the municipal council. In a sense the council may have acted in good faith, but with a manifest intention of evading the law. This is one side of the case—the starting-point.

The plaintiff is not only a ratepayer, interested in preventing an improper diversion of the municipal revenues, or the taking on of unlawful obligations, but he has a special and peculiar individual interest in this matter as well. He is engaged in the moving picture business, for which he has to pay taxes and license fees. He must submit to rivalry and lawful competition of course, but he is not bound, I think, to submit to the special handicap of a People's Theatre unlawfully carried on by the defendants, and special and captivating appeals such as: "*Citizens of Chapleau*, Patronise the *Town Hall Show*, and in doing this *Look* after *Your Own Interests.*" This is *unlawful* and therefore unfair competition. In the circumstances of this case, I

think that the plaintiff can maintain this action, without quashing the by-law, and without joining the Attorney-General: Hope v. Hamilton Park Commissioners (1901), 1 O.L.R. 477; Standly v. Perry (1876-9), 23 Gr. 507, 2 A.R. 195, 3 S.C.R. 356; McDonald v. Lancaster Separate School Trustees (1914), 31 O.L.R. 360; Alexander v. Township of Howard (1887), 14 O.R. 22, at p. 44; Ottawa Electric Light Co. v. City of Ottawa (1906), 12 O.L.R. 290; Township of Kinloss v. Stauffer (1858), 15 U.C.R. 414; Rose v. Township of West Wawanosh (1890), 19 O.R. 294; Holt v. Township of Medonte (1892), 22 O.R. 302; Biggar's Municipal Manual, pp. 379, 511. And it does not matter that the transaction may be beneficial to the municipality: Jones v. Town of Port Arthur (1888), 16 O.R. 474.

It is not so clear that the plaintiff has the right to join Dexter, but authority is rather in favour of it: Halsbury's Laws of England, vol. 8, p. 356, para. 812; Holt v. Township of Medonte, supra; and some other cases referred to.

I do not think that the purchase of the piano was illegal or improper. If the town hall is to be made available for entertainments from time to time, and revenue-producing, it may be part of necessary equipment, just as seating and lighting is necessary. Whether the picture machine is of this class was not shewn, and I cannot judge. It was not purchased with this object; but, beyond this, I make no finding as to it.

There will be an injunction restraining the defendant the corporation from carrying on a moving picture business in the town hall or elsewhere, and from employing the defendant Dexter as its manager for this purpose, and from investing or applying the revenues of the municipality in any enterprise of this character, and restraining the defendant Dexter from carrying on any business or enterprise of this character, with full costs against the municipality, including the examination of Dexter for discovery, and without costs to or against Dexter.

BOYD, C. MARCH 9TH, 1915.

## *STEARNS v. AVERY.

*Contract—Illegality—Sale of Goods—Conditions Unreasonably Enhancing Prices Charged to Public—Element of Crime—Impairing Freedom of Contract—Refusal to Enforce Agreement.*

Motion by the plaintiffs for an interim injunction restraining the defendant from selling the goods manufactured by the plaintiffs except at prices mentioned in an agreement between the plaintiffs and defendant.

The motion was heard by BOYD, C., in the Weekly Court at Toronto.

S. H. Bradford, K.C., for the plaintiffs.

A. C. McMaster, for the defendant.

BOYD, C.:—The 5th paragraph of the defendant's affidavit would shew that the profits exacted by the plaintiffs to be made by the defendant are greatly in excess of what would be fair and reasonable. The case was not argued on the facts, but rather put upon the law as to whether the English case of Elliman Sons & Co. v. Carrington & Son Limited, [1901] 2 Ch. 275, was to be regarded as applicable, or the Canadian case of Wampole & Co. v. F. E. Karn Co. Limited (1906), 11 O.L.R. 619. If the right view is, as I think it is, that the stipulations imposed by the vendor-plaintiffs were such as unreasonably to enhance the price to the purchasing public, then the element of crime comes in and affects the freedom of contract which might otherwise exist. That being so, I think it is my duty to follow the Wampole case. I would call attention to the fact that this case was followed by Mathers, C.J., in a Manitoba case, Shragge v. Weidman (1910), 20 Man. R. 178. He was reversed on appeal in that Province; but his decision was restored by the Supreme Court of Canada: Weidman v. Shragge (1912), 46 S.C.R. 1.

The English decision was also not followed by the Supreme Court of the United States in Miles Medical Co. v. Park & Sons Co. (1911), 220 U.S. 373, 413, for reasons generally in accord with the lines adopted by my brother Clute in the Wampole case.

I refuse the motion for injunction with costs; and I suppose that means the dismissal of the action also.

BOYD, C. MARCH 9TH, 1915.

## *RE FASHION SHOP CO.

*Company—Winding-up—Landlord's Preferential Lien for Rent —Landlord and Tenant Act, R.S.O.* 1914 *ch.* 155, *sec.* 38— *Existence of Statutory Lien Irrespective of Distress or Possession—Voluntary Assignment for Benefit of Creditors before Winding-up Order—Winding-up Act, R.S.C.* 1906 *ch.* 144, *secs.* 5, 23, 133.

Appeal by the liquidator of the company, in process of winding-up under the Winding-up Act, R.S.C. 1906 ch. 144, from the finding of the Master in Ordinary, in the course of the reference, that the company's landlord was entitled in the distribution of the assets to priority in respect of his claim for rent.

The appeal was heard in the Weekly Court at Toronto.

A. C. McMaster, for the liquidator, the appellant.

L. F. Heyd, K.C., for the landlord.

BOYD, C.:—"In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment:" Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38.

The phrase "the preferential lien of the landlord for rent" means, as construed by decisions binding on me, that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section: Lazier v. Henderson (1898), 29 O.R. 673, at p. 679; Tew v. Toronto Savings and Loan Co. (1898), 30 O.R. 76.

This was the condition of the assets in the hands of the voluntary assignee under the debtor's general assignment of the 28th December, 1914, and such was the plight of affairs when the notice was served on the 31st December of a petition to wind up the company. At that date the winding-up proceedings "shall be deemed to commence:" R.S.C. 1906 ch. 144, sec. 5.

After the winding-up order is made (in this case on the 8th January, 1915), every attachment . . . distress or execution put in force against the effects of the company shall be void:

sec. 23. And, by sec. 133, all remedies sought for enforcing a privilege, mortgage, lien or right of property upon, in or to any effects in the hands of the liquidator, may be obtained by an order of the Court on summary petition.

Here no distress was needed to create the statutory preferential lien which arose by virtue of the Landlord and Tenant Act upon the execution by the tenant of the assignment for creditors. That preferential lien existed, I think, quoad the particular goods which afterwards became vested in the liquidator (who happens to be the same person as the voluntary assignee.) The goods became subject to the winding-up order, charged with the preferential lien as to the limited amount of rent; and, if any order of the Court is required to make that lien available, it should be granted nunc pro tunc.

Substantially the same state of affairs arose in Re Clinton Thresher Co. (1910), 1 O.W.N. 445, under mechanics' liens created before the winding-up, and I held that the efficacy of the lien was not disturbed, as the estate came into the hands of the liquidator subject thereto.

The great distinction between the present case and Fuches v. Hamilton Tribune Co. (1884), 10 P.R. 509, is, that there the claim was by a landlord who had not distrained before the winding-up proceedings; but here the fact of the voluntary assignment intervened, which operated as a statutory lien in favour of the landlord, despite the absence of a distress.

The Master's report should be affirmed with costs.

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BOYD, C. MARCH 9TH, 1915.

## *UNION BANK OF CANADA v. TAYLOR.

*Mortgage—Executions—Distribution of Moneys Realised from Sale of Land for Satisfaction of Creditors and Incumbrancers — Rights of Mortgagees and Execution Creditors — Settlement of Priorities in Master's Office—Application and Effect of Creditors' Relief Act.*

Appeal by the defendant J. R. Douglas and other defendants from the report of the Local Master at Ottawa upon the distribution of the proceeds of the sale of land under the judgment of the Court.

The appeal was heard in the Weekly Court at Ottawa.

T. A. Beament, for the appellants.

J. F. Smellie, for the plaintiffs.

J. F. Orde, K.C., for the defendants Kirby & Co. and others.

W. D. Hogg, K.C., for the defendants Hughes and Owen.

BOYD, C.:—The moneys to be distributed in this case were made available for the satisfaction of creditors and incumbrancers by the intervention of the Court in a suit to have a transfer of the property (land) declared void as to creditors. The land was sold subject to the claims of prior mortgagees—prior, that is, to the date of the first execution. The proceeds of the sale are to be distributed among those entitled according to their priorities. Those entitled may be classified thus: first in time, execution creditors having charges on the land; second, the claim of La Banque Nationale under a subsequent mortgage; thirdly, a group of creditors whose executions are later in date than this mortgage; fourthly, another later mortgage to one Douglas and another to one Bickell; fifthly, another group, still later in date, of execution creditors; then, a fourth subsequent mortgage to the Traders Bank; and, lastly, another group of creditors whose executions are in the hands of the Sheriff. The amount realised by the sale is enough to pay in full the first group of executions, also the bank mortgage, and probably the next group of execution creditors. The Master has in this way settled the priorities and the manner of payment. It is objected on the appeal that the Master should have followed the directions given to Sheriffs in the Creditors' Relief Act, R.S.O. 1914 ch. 81, sec. 33, sub-secs. 11 and 12. The meaning imputed to that statute is that the groups of execution creditors should be gathered in one scheme of distribution (irrespective of the different mortgages) and the proceeds of the sale divided ratably among all as on an equal footing. The result would thus probably be that the bank mortgage would be paid in full and the execution creditors prior to this mortgage would receive a fraction of their charges. One obvious answer to this is, that the first execution creditors are prior to that mortgage, and the second execution creditors are subsequent to that mortgage, and so have their charge on a different estate in the land, lessened in value by the amount of the mortgage.

The Act does not appear to contemplate such a state of things as here exists: a succession of mortgages registered at different dates with groups of executions in the intervals between the different mortgages. The effect of the Act appears to be to pay

a subsequent mortgage in full by reducing the amount of a prior execution, and this gives to a subsequent mortgage a better status as against a prior execution charged on the lands than existed when the mortgage transaction was effected between the owner and the mortgagee.

If this is the meaning and result of the Act, I do not feel disposed to extend its methods to the distribution of assets in this Court.

I do not think the analogy of the statute should be imported into these equitable proceedings. If the bank mortgage had been enforced by suit, the subsequent executions would have been wiped out if the creditors had not redeemed, and if foreclosure ensued that would leave the prior executions in full force. When the mortgage was made, it was subject to the existing executions, and there was no equity to have that mortgage paid out of the land in priority to the prior charges. The course of the Court is well settled and is carefully expounded in the cases cited and followed by the Master of Roach v. McLachlan (1892), 19 A.R. 496, and Breithaupt v. Marr (1893), 20 A.R. 689.

The appeal is dismissed with costs.

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SUTHERLAND, J., IN CHAMBERS. MARCH 9TH, 1915.

## RE MACK.

*Infant—Undivided Interest in Land—Motion for Authorisation by Court of Conveyance—Security for Purchase-money—Official Guardian—Refusal of Motion.*

Motion by John H. Mack, the father of the infant Noel Calvin Mack, for an order authorising the disposion by the infant of all his interest in the Brisco House premises, in the town of Napanee, to W. J. Foster, the purchaser thereof, and authorising the execution of a conveyance by or on behalf of the infant so as to be binding on him.

The motion was heard at the sittings at Napanee.
U. M. Wilson, for the applicant.
D. H. Preston, K.C., for the Official Guardian.
G. F. Ruttan, K.C., for W. J. Foster.

SUTHERLAND, J.:— . . . The Brisco House property was bought by John H. Mack for $6,000, and it is said that, at the re-

quest of his wife, Josephine Mack, the conveyance, dated the 20th December, 1912, was made to him and her and their three sons, two of whom are of age, and one, Noel Calvin Mack, is still an infant of 16 years of age. It is also said that the sons did not contribute anything to the purchase.

On the 20th April, 1914, the Brisco House premises were sold, and conveyed by John H. Mack, Josephine Mack, and the two adult sons, to W. J. Foster, for $6,000, and the latter conveyed to them a certain property known as the Roblin property . . . valued at $3,000, in part payment of the purchase-money. As the interest of the infant in the Brisco House premises had not been conveyed to Foster, an arrangement was come to whereby a mortgage on the Roblin property for $1,500 was executed in Foster's favour for a named consideration of $1,500, with a proviso therein for a release thereof upon the execution by the infant of a quit-claim deed of his undivided one-fifth interest in the Brisco House premises when he became of age.

It was, I think, suggested in argument that the remaining $3,000 had been paid by Foster to the grantors, and that part of the same, to the extent of $1,000 or $1,500, had been used in improvements upon the Roblin property. It is said that there is an outstanding execution against John H. Mack for upwards of $400, and that he requires funds to pay it and for the purpose of going to the North-West with the other members of the family, inclusive of the infant, for the purpose "of homesteading land for not only" himself but his "said three sons."

The arrangement that is sought to be carried out is the following: that the Court shall direct or ratify a conveyance of the infant's interest in the Brisco House premises to Foster; that the mortgage on the Roblin property to Foster for $1,500 shall be discharged; that a new mortgage thereon for $1,500 shall be given, the proceeds to be applied by John H. Mack in part in payment of the said execution, and, as to the remainder, to cover the expenses of removing to the North-West and taking up land there; that a second mortgage shall be given on the Roblin property for the purpose of securing to the infant the sum of $1,200 to represent his one-fifth share in the sale-price of the Brisco House premises; and that John H. Mack will, in addition, and as collateral thereto, assign a certain life insurance policy. . . .

It is also said that the annual rental value of the Roblin property and of 20 acres of pasture land owned by Josephine Mack is in the neighbourhood of $200 a year, and that she is ready and willing to execute a second mortgage on the 20 acres, in addition, to secure the infant.

While it is said, and may well be the fact, that the proposed arrangement is in the interest of the infant, it involves care and attention on the part of some one to see that the rents are collected, the interest on the first mortgage for $1,500 on the Roblin property paid, and the premiums on the policy of insurance also paid as they fall due. I do not think that the Official Guardian should be called upon to undertake this burden. He is not disposed to think he should. It would seem that some one in the locality might well advance the $1,200 on the security suggested if it is considered a safe and satisfactory one. If this could be done, the money might be paid into Court in the usual way.

In these circumstances, I do not think I should be justified in making the order asked. The motion is, therefore, refused, and I think the purchaser, Foster, and the Official Guardian should have their costs paid by the applicant.

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BOYD, C. MARCH 10TH, 1915.

## *RE WARD.

*Will—Construction — Direction to Divide Proceeds of Sale of Property among Wife and Children — Postponement of Realisation—Discretion of Trustees—"Best for my Estate" —Death of Wife before Realisation — Interest Vested, though Enjoyment Postponed.*

Motion by the National Trust Company Limited, executors and trustees under the will of William Ward, deceased, for an order determining two questions arising upon the will.

William Ward died on the 24th Janary, 1912, leaving a widow (his second wife), a son by his first marriage, Frank Ward, seven sons and daughters by his second wife, and one grandchild, the daughter of a daughter by the second wife. The grandchild and one child were infants.

The question to be determined arose upon this clause of the will: "All the rest and residue of my property real and personal I give . . . to my trustees . . . to be held on the trusts hereafter mentioned, namely—firstly, to sell and convert into cash all my property . . . such property to be sold at such time and in such manner as may seem to my trustees best for my estate, it being left to their absolute discretion at what time and on what terms they should sell any of my said property, and on realising same or any portion thereof to divide the

proceeds among my wife and my aforesaid children and my said grandchild, each of them taking one equal share thereof, the share of any child or grandchild under age to be retained by my said trustees until he or she reaches that age."

The widow died on the 8th May, 1913, before any of the rest and residue of the property had been sold.

The questions propounded were: (1) whether the widow took any interest at the time of her death in the residue of the property not then sold or realised; and (2), if she had any interest in such residue, whether on her death the same was redivisible among the children of William Ward mentioned in the will and the grandchild, or whether the same belonged to the personal estate of the widow and should be divided among her children only, she having died intestate.

The motion was heard in the Weekly Court at Toronto.

W. H. Lockhart Gordon, for the executors and the adult children of the second marriage.

H. C. Fowler, for Frank Ward and (by appointment of the Court) for the infant Reginald Ward.

F. W. Harcourt, K.C., Official Guardian, for the infant grandchild, Gladys Serge.

BOYD, C.:—The clause in doubt in this will reads thus: "The residue . . . to be sold at such time and in such manner as may seem to my trustees best for my estate, it being left to their absolute discretion at what time and on what terms they shall sell any of my said property, and on realising same or any portion thereof to divide the proceeds among my wife and . . . children." True it is the enjoyment is to be only after the sale, and the widow was then dead, and so could not take personally; but, if the whole tenor of the will shews that the postponement was intended to serve the best interests of the estate, the prospective benefit will be construed as vested in the beneficiary, though death may come before the actual enjoyment. In this will the testator delegates to the trustees the trust of selling the estate when it shall seem to them "best for the estate," and that is the testator's reason for not having the residue sold and divided at once.

This language is sufficient under the authority of Packham v. Gregory (1845), 4 Hare 396, 397, as I read it, and this will, to warrant the declaration that the share of the deceased widow in the residue was vested and would pass to her next of kin as part of her estate, she having died intestate, as I understand.

Wigram, V.-C., said in the case in Hare: "If there is a gift to a person . . . on the happening of any event . . . or a direction to pay and divide when a person attains 21 . . . there is no gift . . . except in the direction to pay, and the person to take must come within the particular description. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed."

Costs from estate.

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MULOCK, C.J.Ex. MARCH 11TH, 1915.

## MITCHELL v. GRAND TRUNK R.W. CO.

*Railway—Level Highway Crossing—Injury to and Death of Person Crossing Track in Sleigh—Train Moving Reversely—Negligence of Servants of Railway Company—Contributory Negligence of Driver of Sleigh—Findings of Jury—Dominion Railway Act, sec. 276—Appliances for Warning Persons about to Cross Track—Incompetent Flagman.*

Action under the Fatal Accidents Act, brought by Charles E. Mitchell, father of Leo Curran Mitchell, who was killed by a train of the defendants, to recover damages for his death.

The action was tried with a jury at Simcoe.

T. J. Agar, for the plaintiff.

S. F. Washington, K.C., for the defendants.

MULOCK, C.J.Ex.:—On the morning of the 25th December, 1914, the deceased was proceeding westerly along Union street, in the town of Simcoe, in a cutter drawn by one horse. There were two other occupants of the cutter, namely, one Glenn, the driver (who had hired the horse and cutter), and one Snelgrove, who was sitting at the left side of the cutter with Glenn on his lap, the deceased being at his right. The defendant company's line of railway crosses Union street at rail level at right angles. A few hundred feet south of the intersection of the railway track and Union street is the company's station, and the train in question was standing there. It consisted of the engine, tender, baggage car, and passenger car, and backed northerly across

Union street, the passenger car being in front. The horse and cutter with the occupants, Glenn and Snelgrove, crossed the track in safety at a distance of about from 4 to 7 feet in front of the backing train. The deceased, however, jumped from the cutter, falling on the track, where he was fatally injured.

The plaintiff alleges that the accident was caused by the defendant company's negligence and by their failure to comply with the requirements of sec. 276 of the Railway Act.

The case was tried by a jury, and their findings are as follows:—

1. Were the defendants guilty of any negligence which caused the accident? A. Guilty of contributory negligence.

2. If so, in what did such negligence consist? A. In not equipping train running transversely with a properly equipped flagman.

3. Was Glenn guilty of any negligence which caused or contributed to the accident? A. Yes.

4. If so, in what did such negligence consist? A. In driving too fast in approaching what he knew as a dangerous crossing.

5. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

6. If so, in what did such negligence consist? (No answer).

7. What damages, if any, do you award the plaintiff? A. $1,000.

When the jury brought in their answers, the following took place, as reported by the Court stenographer.

The Chief Justice:—What do you mean by saying that the defendants were guilty of contributory negligence?

The Foreman: I think, my Lord, the feeling of the jury was that they hadn't equipped the train with the proper signalling appliances in order to avoid collision with teams passing on that crossing. They neglect to do that. They neglect to supply the proper flagman in his proper position on the fore end of that car. We considered it in that light.

The Chief Justice: That is not the meaning of contributory negligence. Contributory negligence is one negligence plus another negligence.

The Foreman: I think the meaning of the jury, as far as the contributory negligence was concerned, was that neglect in not having had this contributed towards the accident.

The Chief Justice: That is not enough. You must find out what was the cause of the accident.

The Foreman: In our finding we coupled the negligence of the company with the negligence of the driver in driving too fast.

The Chief Justice: Well, driving too fast, unless he got on the track, would not play any part.

The Foreman: Approaching the crossing, knowing it to be a dangerous crossing.

The Chief Justice: This is your verdict, is it?

The Foreman: That is the verdict as the jury have found it.

The Chief Justice: You all adhere to this, do you?

The Foreman: We do.

The Chief Justice: I speak to all the rest of the jury. You have heard the discussion which has taken place between the foreman and myself; you have heard my questions and you have heard his answers; are his answers your answers? Do you all agree with that? (Jury agree). Because his answers given verbally here will form part of the general finding of the jury, and save you the trouble of retiring.

The meaning of the jury's answers is somewhat obscure, but I think it is to the effect that the accident was caused by the negligence of the company and of the driver, and that the company's negligence consisted in not giving the warning required by the statute, and that such failure to warn arose (a) by reason of no competent man being stationed on what was for the moment the foremost end of the backing car, and (b) by reason of the car not being equipped with signalling appliances sufficiently powerful to be heard at such a distance from the car as to serve as an effective warning to persons about to cross the track; the jury in effect finding that, if it had been so equipped, the occupants of the cutter would have heard the earlier warning given by Price when about 250 feet from the crossing in ample time to avoid the accident.

Section 276 of the Railway Act is as follows: "Whenever in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the fender, if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway."

The car at its "foremost" end was equipped with an air whistle appliance, and by moving a valve this appliance, if in working order, would serve as an emergency brake. For some reason not shewn, the emergency brake had been rendered non-effective, and in lieu thereof the train was equipped with a cord, whereby the man stationed at the "foremost" end of the moving train could signal to the engineer, who, according to his evid-

ence, would be able to stop the train more quickly by the engine than would be possible by the emergency brake. It seems to me, however, that the jury in speaking of signalling appliances meant appliances for warning persons about to cross the railway, and not appliances for communicating with the engineer, for in this case the evidence of Price, the brakesman, who was the person stationed at the foremost end of the car, is to the effect that he did not attempt to stop the train until after the deceased had been run over, but he did, by means of the air whistle, endeavour to warn the occupants of the cutter. . . .

There was a conflict of evidence as to whether the engine whistle was sounded and the bell rung; but, even if both of these things were done, the company would not thereby be relieved from their statutory duty to give the warning contemplated by sec. 276. The language of that section is mandatory. The person standing on the foremost platform of a train not headed by an engine, etc., "shall warn persons standing on or crossing or about to cross the track," etc.; and the question here is whether such statutory warning was given. Glenn, according to his evidence, did not hear the first air whistle, but only the one sounded when he was within 29 feet of the east rail of the track, and at the same moment he saw the approaching train, the north end being at a point which he fixes as about 60 or 70 feet south of the place of the accident. He was then travelling at the rate of from 8 to 10 miles an hour, and was within a couple of lengths of the horse and cutter from the track. He had but an instant in which to determine upon his course of action. The thought came to him that if he were to continue he would run into the train and he pulled on the reins; at the same moment the deceased grabbed them in front of Glenn's hands, bringing the horse almost on its haunches on the track. Glenn then recovered and loosened the reins, and the horse jumped forward clearing the track, and about at the same time the deceased jumped out of the cutter, alighting upon the track, when in a moment he was fatally injured.

Each occupant of the cutter was entitled to the benefit of the statutory provision in question. The only evidence of the deceased having heard the warning of the air whistle is that furnished by his act of seizing the reins. This was at some point at most not 30 feet from the track.

The jury's finding in effect is, that the statutory warning contemplated by the section was not given, and there is evidence to support that view. Apparently they accept Glenn's

evidence that he did not hear any earlier whistle, and conclude that a warning given when a collision was imminent and practically unavoidable was not a warning within the meaning of the statute.

With regard to the finding as to the brakesman's incompetence; it seems that this was only the second occasion that Price had been with this train in Simcoe, and it does not appear that he had any definite idea where the crossing was, or that there were buildings on the south side of the highway which would interfere with persons on the highway seeing the approaching train or his seeing persons about to cross the track. The company should not, I think, have placed in the responsible position where Price was on that day a person quite unacquainted with the conditions existing near the crossing. He acted according to the best of his judgment, and the moral as well as the legal blame for the accident rests with the company for having required Price to perform duties with the nature of which he was not familiar.

There is no dispute that after Price blew the air whistle at a point about 250 feet from the crossing, he did not again blow it until too late, namely, when the accident was unavoidable. Whether the signalling appliances referred to by the jury were, or were not, adequate, the evidence shews that Price did not give such warning as is contemplated by the statute, and, if it were open to me as trial Judge, I would so find; but sec. 27 of the Judicature Act does not empower the trial Judge but only the Court of Appeal so to deal with the case.

The jury exonerated the deceased from negligence. He was a passenger only; and, therefore, the plaintiff's rights are not affected by Glenn's negligence.

Judgment will be entered for the plaintiff for $1,000, with costs of action.

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McConnell v. Township of Toronto—Lennox, J., in Chambers—March 8.

*Jury Notice—Motion to Strike out — Discretion—Place of Trial.*]—Motion by the plaintiffs to strike out the defendants' jury notice. The learned Judge said that if the defendants had consented to have the trial in the city of Toronto, he would have left it to the trial Judge to say whether there should be a jury or not. It would not be advisable to have the action tried by a jury of the county of Peel; but, if it was an action which

probably or even possibly ought to be tried by a jury, the motion should be dealt with at the trial. This would probably lead to a motion for change of venue. The learned Judge was quite satisfied that this was a case which could be better tried by a Judge alone. Order striking out the jury notice with costs. R. U. McPherson, for the plaintiffs. W. D. McPherson, K.C., for the defendants. R. C. H. Cassels, for the third parties.

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RE SOLICITOR—LENNOX, J.—MARCH 8.

*Solicitor—Costs—Taxation—Appeal.*]—Appeal by the client from the certificate of the Local Registrar at Stratford upon the taxation of a bill of costs rendered by the solicitor. The learned Judge considered the bill, and was of opinion that the total amount taxed should be reduced by $145. No costs. H. S. White, for the appellant. The solicitor in person.

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LEITCH BROTHERS FLOUR MILLS LIMITED v. DOMINION BAKERY CO.—MASTER IN CHAMBERS—MARCH 10.

*Summary Judgment—Motion for—Action for the Price of Goods Sold and Delivered — Disputed Facts — Refusal of Motion.*]—Motion by the plaintiffs for summary judgment in an action to recover $1,323.15, the balance of an account for goods sold and delivered. In the affidavit of the manager of the defendants filed with the appearance, it was said that the defendants made a contract with the plaintiffs on the 27th August, 1914, for the supplying of certain goods at prices mentioned in the contract. The plaintiffs asserted that the order for the goods was taken by their agent subject to confirmation, and that they never confirmed it. The defendants, on the other hand, produced an invoice dated the 4th November, 1914, for goods which they said were ordered and delivered in accordance with the terms of this contract. On the 22nd January, 1915, the plaintiffs demanded payment of the balance due them, which, the defendants admitted, amounted at that time to $1,323.15. The plaintiffs contended that the correct amount due was $1,556.90. The defendants' manager in his affidavit swore that it was arranged between the plaintiffs and the defendants that, in consideration of the cancellation by the defendants of the contract of the 26th August, 1914, the plaintiffs would accept $25 every two weeks in full settlement of their claim against the defendants until the

full amount was paid. This agreement was carried out by the defendants by the payment of $25 on the 22nd January and $25 on the 8th February. Before the next payment became due, the plaintiffs brought this action to recover the whole amount. The defendants also alleged that the goods covered by the contract of the 26th August, 1914, were to be delivered at a price now much below the present market-price. The Master said that he could not decide the disputed questions of fact involved in this case on an interlocutory motion. That was the function of the trial Judge. See judgment of Middleton, J., in Canada Steamship Lines Limited v. Steel Co. of Canada Limited (1915), 7 O.W.N. 832. Motion dismissed; costs to the defendants in the cause. Grayson Smith, for the plaintiffs. E. F. Singer, for the defendants.

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PEPPIATT v. REEDER—LENNOX, J.—MARCH 13.

*Fraud and Misrepresentation—Sale of Theatre—Findings of Fact of Trial Judge—Rescission of Contract of Sale and Return of Money Paid—Deduction of Rent—Account—Reference.*]—This action arose out of a sale by the defendant to the plaintiff of a moving picture theatre, in July, 1914, carried out by a bill of sale from the defendant to the plaintiff, a chattel mortgage for $2,600 from the plaintiff to the defendant, and a lease from the defendant to the plaintiff. The plaintiff paid $900 in cash and an additional $1,000 in cash in consideration of the making of the lease or as security for the carrying out of its terms. The plaintiff alleged that the defendant was guilty of fraudulent misrepresentations in connection with the sale, and sought to have it rescinded. See the note of the decision of SUTHERLAND, J., upon an interlocutory motion: Peppiatt v. Reeder (1915), 7 O.W.N. 753. The action was tried by LENNOX, J., without a jury. He reserved judgment, and now delivered a written opinion in which he set forth his findings upon the evidence, which are all favourable to the plaintiff. Judgment declaring that the execution of the lease, bill of sale, and chattel mortgage, and the $1,900 paid by the plaintiff were obtained by false and fraudulent representations made to the plaintiff by the defendant, and that the plaintiff is entitled to recover the $900 he paid, with interest at 5 per cent., and the $1,000, with interest at 3 per cent., from the 28th July, 1914, less any sum found to be owing for rent when the accounts are taken; setting aside the three instruments referred to and directing that they

be delivered up to be cancelled; and directing a reference to the Master in Ordinary to take an account upon the footing of the findings and to certify the amount owing to the plaintiff, whereupon judgment is to be entered for the plaintiff for the amount so found with subsequent interest and the costs of the action and reference. Edward Meek, K.C., for the plaintiff. J. J. Gray, for the defendant.