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THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM AUGUST, 1919, TO THE 28th FEBRUARY, 1920.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

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CASES NOTED.

(Cases marked * are reported or to be reported in the Ontario Law Reports.)

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The
Ontario Weekly Notes

VOL. XVII. TORONTO, SEPTEMBER 26, 1919. No. 1

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 15TH, 1919.

HORROCKS v. SIGNAL MOTOR TRUCK CO. OF CANADA LIMITED.

Sale of Goods—Contract for Sale of Motor-truck—Fraud and Misrepresentation—Evidence—Findings of Trial Judge—Implied Warranty of Fitness—Sale by Description—Condition—Breach—Damages—Costs—Appeal.

An appeal by the defendants from the judgment of CLUTE, J., 16 O.W.N. 132.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, SUTHERLAND, and MIDDLETON, JJ.

A. A. Macdonald and F. W. Denton, for the appellants.

B. N. Davis, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 15TH, 1919.

HORNE v. HUSTON AND CANADIAN BANK OF COMMERCE.

Gift—Deposit of Money in Savings-bank Account to Credit of Depositor and Intended Donee—Terms of Deposit—"Payable to either but only on Production of Pass-book"—Retention of Pass-book by Depositor—Imperfect Gift.

Appeal by the defendants from the judgment of MULOCK, C.J. Ex., 16 O.W.N. 93.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, SUTHERLAND, and MIDDLETON, JJ.

A. St. G. Ellis, for the appellants.

J. H. Rodd, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 15TH, 1919.

HORNE v. HUSTON AND MERCHANTS BANK OF CANADA.

Gift—Deposit of Money in Savings-bank Account to Credit of Intended Donee—Instructions to Bank not to Notify Donee until after Death of Depositor—Evidence—Intention—Parting with Control of Fund—Present Irrevocable Gift, not Gift of Testamentary Nature.

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex., 16 O.W.N. 173.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, SUTHERLAND, and MIDDLETON, JJ.

J. H. Rodd, for the appellant.

A. St. G. Ellis, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

KELLY, J. AUGUST 5TH, 1919.

PETINATO v. SWIFT CANADIAN CO. LIMITED.

Insurance (Fire)—Stock of Goods Destroyed—Insurance Moneys Attached by Judgment Creditors of Assured—Claim of Chattel Mortgagee—Chattel Mortgage Registered without Affidavit of Execution—Invalidity as against Creditors—Bills of Sale and Chattel Mortgage Act, secs. 5, 7—Ownership of Goods—Covenant to Insure for Benefit of Mortgagee—Effect of—Issue Found in Favour of Creditors.

An issue directed to determine the right to certain insurance moneys.

Antonio Musalino had a stock of groceries upon his premises in Parry Sound. The stock was insured by him, and was destroyed by fire. The defendants, who had a judgment against Musalino, attached the moneys in the hands of the insurance company. Petinato, the plaintiff in the issue, claimed the moneys, and the issue was directed.

The issue was tried without a jury at North Bay.

G. A. McGaughey, for the plaintiff.

H. E. Stone, for the defendants.

KELLY, J., in a written judgment, said that on the 24th August, 1917, the plaintiff was the owner of the stock of groceries, and on that date sold them to Musalino, and gave him a bill of sale thereof. Musalino was neither a partner of nor financially interested in the business of the plaintiff before that date. The plaintiff was the sole owner, and, so far as he was concerned, the sale to Musalino was bona fide. As security for the unpaid portion of the purchase-money, it was agreed that Musalino should give the plaintiff a chattel mortgage. A chattel mortgage upon the stock in trade of groceries and other merchandise and the trade-fixtures, furniture, chattels, and effects contained in and used in connection with the store business carried on by the mortgagor and lately purchased from the mortgagee, together with any additions and accretions thereto and substitutes therefor, was accordingly prepared. It contained a covenant by the mortgagor to insure and keep insured the mortgaged goods and chattels to their full insurable value, for the benefit of the mortgagee, the plaintiff, with loss, if any, payable to him. The chattel mortgage bore date and was signed by the mortgagor on the 24th August, 1917, and on the 28th it was deposited for registry in the proper office. Upon the chattel mortgage, when produced from that office, there was no affidavit of the execution by the mortgagor, nor was there such an affidavit on the duplicate original in the possession of the mortgagee. This was fatal to the plaintiff's claim to priority over the other creditors of the mortgagor: Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, secs. 5, 7.

The plaintiff contended that, by virtue of the covenant for insurance contained in the chattel mortgage, his priority was preserved, on the theory that, there being an agreement therein in his favour for insurance, the loss upon which is to be payable to him, in equity he is entitled to have, as against other claimants, what the mortgagor bargained to give him. If that contention could be upheld, his right to security upon the insurance moneys would be superior to any right he could have asserted to the mortgaged goods if they had not been destroyed. That view was unreasonable, and as a legal proposition was not supported by authority.

The assignment of the insurance moneys by the mortgagor to the plaintiff after the fire did not strengthen his claim as against creditors of the mortgagor.

No insurance was effected by Musalino until many weeks after the chattel mortgage was signed. When the insurance was procured the insurance moneys were not, by any document or writing, made payable, in the event of loss by fire, to the plaintiff.

Judgment for the defendants in the issue with costs.

KELLY, J. AUGUST 6TH, 1919.

RE THOMPSON AND BEER.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Conveyance Made to Person as "Trustee"—Nature of Trust and Powers of Trustee not Indicated—Right of Person to Sell and Convey—Evidence—Affidavit of Solicitor—Insufficiency—Land Subject to Easement—Right to Place Poles and Wires thereon—Validity of Objections to Title.

Application by the vendor, under the Vendors and Purchasers Act, to determine two questions raised by the purchaser by way of objection to the vendor's title: first, as to the right of Lillian P. Quigley to sell and convey, her title having been acquired through a conveyance made to her as trustee, without stating or indicating the nature of the trust or the powers conferred upon her as such trustee; and, second, in respect of an easement, reserved to her vendor (Perry) in that conveyance, of placing poles and wires over and upon a part of the lands conveyed.

The motion was heard in the Weekly Court, Toronto.
E. D. Armour, K.C., for the vendor.
M. H. Ludwig, K.C., for the purchaser.

KELLY, J., in a written judgment, said that the vendor maintained that sufficient evidence had been submitted to establish Lillian P. Quigley's right to sell and convey, and that on that ground the purchaser could not reject the title. The only evidence to establish that fact was an affidavit of a solicitor, who said that he acted for Lillian P. Quigley in the purchase and then in the sale of the property, and that the purchase was made out of moneys which belonged to the estate of her father, of whose will she was one of the executors. The use of the word "trustee" after her name, in the conveyance to her, was notice to subsequent purchasers that she took in the capacity of trustee. A purchaser is entitled to proof of the nature and extent of the trusts on which she took, and who are the cestuis que trust or persons otherwise interested, and whether these trusts include a power to sell either by herself or with the consent of others or otherwise; and, if the terms of the trust confer a power of sale, he may insist on proof that it is properly exercised. The evidence here submitted, as to the nature of the trusts on which Lillian P. Quigley took, and that her conveyance was a due exercise of the powers which as such trustee she possessed, was not an answer to the objection.

The difficulty was, that, not only were the cestuis que trust not before the Court, but it was not satisfactorily estabblished who they were, or that the trustee had any power whatever to sell. If, upon the terms of the trust, she was precluded from selling or conveying, that was the end of the matter, If, by these terms, she was given that power but with the consent of any other person or persons or upon any other condition, then the purchaser, having notice of the trust, was entitled to proof that the conditions had been complied with. The solicitor's affidavit is not a sufficient declaration of trust. Such a declaration should be by the person creating the trust or by some other equally certain means of proving its terms.

Reference to Fry on Specific Performance, 5th ed., p. 431, para. 878; Rose v. Calland (1800), 5 Ves. 186; Sharp v. Adcock (1828), 4 Russ. 374; In re Nichols' and Von Joel's Contract, [1910] 1 Ch. 43, 46; Cumming v. Landed Banking and Loan Co. (1893), 22 Can. S.C.R. 246.

In respect to the other objection, the contract to purchase does not bind the purchaser to accept the title subject to the reservation in the conveyance from Perry to Lillian P. Quigley, in favour of the grantor, his heirs, executors, administrators, and assigns, of placing poles and stringing wires for telephone and electric light on a portion of the property, with a further right to enter on the lands for the purpose of erecting, inspecting, or repairing the poles and wires. The reservation is in its terms quite broad, and is not limited to the erection and maintenance of poles and wires merely to serve the purposes of the property now under contract between the parties, but may be extended to other purposes as well. The purchaser is not by his contract bound to take the property incumbered by a pole thereon carrying wires to serve other properties, nor to have his enjoyment of the property subjected to further interference from persons who may have already acquired or may hereafter acquire rights over the property by virtue of that reservation.

The two objections are valid and have not been satisfactorily answered, and the title should consequently not be forced upon the purchaser.

Order declaring accordingly; no order as to costs.

MASTEN, J. AUGUST 6TH, 1919.

YOUNG v. FORT FRANCES PULP AND PAPER CO.

Nuisance—Injury to Hotel Property by Operation of Pulp Mill in same Neighbourhood—Discharge of Vapours—Rumbling of Machinery and other Noise from Mill—Noise and Smoke from Shunting Trains—Depreciation in Value of Hotel Property—Cause of—Onus of Proof—Failure to Discharge—Deposit of Soot and Carbon from Mill on Hotel Property—Trespass—Invasion of Rights—Damages—Costs.

Action for an injunction or damages in respect of an alleged nuisance.

The action was tried without a jury at Fort Frances.

C. R. Fitch, for the plaintiff.

A. D. George, for the defendants.

MASTEN, J., in a written judgment, said that the plaintiff was the owner of an hotel in Fort Frances, situated near the defendants' mill. The hotel was built in 1905; the defendants' mill went into operation in 1914. The hotel appeared to have been profitable and successful until the Ontario Temperance Act came into force in 1916. The hotel was not occupied by the plaintiff personally. It was unoccupied in cold weather, and was partly rented for various purposes during the summer.

Reference to Appleby v. Erie Tobacco Co. (1910), 22 O.L.R. 533, 538; Humphries v. Cousins (1877), 2 C.P.D. 239, 243, 244; Chandler Electric Co. v. Fuller (1892), 21 Can. S.C.R. 337, 340.

The plaintiff sought to establish that a nuisance had been created: (a) by the discharge of vapours from the ventilators of the defendants' mill; (b) by the rumbling of machinery and a whistling sound arising from the operation of the mill; (c) noise of shunting trains and smoke; (d) deposit on the plaintiff's premises of soot and carbon from the defendants' smoke-stack.

It was clear upon the evidence that no permanent injury had been done either to the outside or the inside of the structure of the plaintiff's building through any of the acts complained of.

The plaintiff, however, asserted injury by being prevented by the defendants' acts from securing tenants; and he alleged that the operations of the defendants had resulted in the removal of the business centre of the town to another part of it.

Even if it were established—and it was not—that the operation of the defendants had resulted in a shifting of the business centre of the town, the plaintiff would not, upon the principles of

law as they had developed, be entitled to recover. In such a case that which depreciates the value of property is not the direct action of the person operating works but the result indirectly arising because people think that another part of the town will better suit their purposes.

For the noises from shunting and the smoke from engines, the defendants should not be held responsible—they arose from the operation of a railway by a railway company.

The condition arising from steam and vapour was manifest only in the winter season, when the hotel was unoccupied.

The onus was upon the plaintiff to prove beyond reasonable doubt that the defendants' act had injured and depreciated the value of his property. It was not a case of res ipsa loquitur. Upon the evidence, the plaintiff had failed to discharge the onus.

The rumbling of machinery and the whistling sound complained of did not constitute a nuisance.

The hotel property had undoubtedly decreased in value, but that appeared to be due to the coming into force of the Ontario Temperance Act. While the hotel was in active operation from 1914 until September, 1916, the matters complained of by the plaintiff did not appreciably affect the enjoyment of the property nor depreciate its value.

In respect of the soot and carbon coming from the defendants' chimney and settling on the plaintiff's property, the plaintiff had established at least a nominal cause of action in trespass—there had been an invasion of the rights of the plaintiff, for which he was entitled to damages. Having regard to the considerations adverted to in Black v. Canadian Copper Co. (1917), 12 O.W.N. 243, 244, an injunction should not be granted, but damages in lieu thereof should be awarded. This was a matter in the discretion of the trial Judge.

The damages must be such as had been actually suffered down to the present time from the deposit of soot and carbon: Halsbury's Laws of England, vol. 10, p. 341, para. 627; Battishill v. Reed (1856), 18 C.B. 696.

The damages were almost nominal, and should be fixed at $50.

Judgment for the plaintiff for $50 in respect of the deposit of soot and carbon. In other respects, action dismissed. No costs, success being divided.

FALCONBRIDGE, C.J.K.B. AUGUST 8TH, 1919.

RE SCAMAN AND WARD.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Covenant in Conveyance to Vendors—Building Restriction—Infringement—Rights of other Purchasers—No General Building Scheme.

Motion by Ward, the purchaser of land from Lelia A. Scaman and Gertrude Scaman, for an order, under the Vendors and Purchasers Act, declaring that an objection to the title had not been answered and was a valid objection.

The motion was heard in the Weekly Court, Toronto.

T. J. Agar, for the purchaser.

R. B. Beaumont, for the vendors.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the objection to the title arose out of the covenant by way of building restriction contained in the last paragraph of the deed from Louisa C. Loney to the vendors as follows:—

"And to the intent that the burden of this covenant shall run with the lands hereby conveyed for a period of 25 years from the 20th day of May, 1911, the grantees, for themselves, their and each of their heirs and assigns, jointly and severally covenant and agree with the grantor, her heirs, executors, administrators, and assigns, that not more than one dwelling-house of the prime cost of not less than $4,000 may be erected and standing at any one time on the said lands, but this shall not prohibit the erection of a suitable stable, coach-house, garage, or outbuilding on the said lands; and that any dwelling-house which shall be erected on the said lands shall not be nearer to the street-line in front thereof than 25 feet, and that the external walls of the said dwelling-house shall be constructed of stone or brick, or partly of stone and partly of brick; but this covenant shall not be held binding upon the grantees or their assigns except in respect of a breach committed or continued during their joint or sole seisin of or title to the said lands."

A house erected by the vendors complied with the restriction as regarded the main structure. But there was a verandah, on the Rosehill avenue side, which was less than 25 feet (viz., 20 ft. 1 in.) from the line of that street.

The vendors had procured from their vendor, Louisa C. Loney, a deed declaring that the said dwelling-house and verandah are in compliance with the covenants, and that she is satisfied with the

same, and has no cause of action in respect thereof, and she declares that those presents shall extend to the heirs, executors, administrators, and assigns of the present vendors.

Other purchasers from Louisa C. Loney have no rights in the matter. It is said and not denied that the plan shews no general design or building scheme, and the covenant does not purport to be for the benefit of any other purchaser.

In a deed from Louisa C. Loney to one McKenzie, made some months subsequent to the conveyance to these vendors, special mention is made of verandah steps and porch in the restriction against the erection nearer than 25 ft.

Reference to Reid v. Bickerstaff, [1909] 2 Ch. 305.

Declaration that the objection has been fully answered and that it does not constitute a valid objection to the title.

No costs.

KELLY, J. AUGUST 12TH, 1919.

BRYANS v. PETERSON.

Promissory Note—Accommodation Makers—Note Given as Collateral to Security by Chattel Mortgage from Creditor to Debtor—Action by Executors of Creditor—Release of Makers of Note—Evidence—Corroboration—Meaning of "Collateral"—Discharge of Chattel Mortgage—Dealings between Creditor and Principal Debtor—Sureties Giving up Benefit of another Security.

Action by the executors of William Bryans, deceased, upon a promissory note made by John Knight, F. W. Rickaby, and N. H. Peterson. The action was brought against Peterson and Rickaby and the executors of Knight.

The note was in these words and figures:—

"$1,000.00 Bruce Mines, Ont., February 20th, 1914.

"One year after date we jointly promise to pay Mr. William Bryans, or order at his place of residence in the town of Bruce Mines, Ont., the sum of one thousand dollars for value received with interest at 6% per annum till paid. This promissory note is given as collateral security to a chattel mortgage bearing even date herewith and given by David B. Tees to William Bryans to secure payment of $2,700 and interest as therein provided, and this note is given as an accommodation note on behalf of the said David B. Tees."

The action was tried without a jury at Sault Ste. Marie.

Grayson Smith, for the plaintiffs.

J. E. Irving, for the defendants.

KELLY, J., in a written judgment, after stating the facts, said that the defendants set up that they were released by reason of the manner in which the mortgagee and the plaintiffs dealt with the debtor, Tees, and the security of the chattel mortgage, and also because of the conditions upon which the note was given. The plaintiffs said that the makers of the note did not become mere sureties for Tees or his indebtedness to William Bryans, but that they became primarily liable to the extent of the note as collateral and additional security for the chattel mortgage and the debt it represented. Even on that hypothesis, the creditor owed a duty to the makers of the note so to deal with the chattel mortgage as not to prejudice them if he desired to hold them liable. The note on its face was collateral security to the chattel mortgage. Not only did Bryans neglect to renew that mortgage within the statutory time, thus rendering it null and void as against creditors and subsequent purchasers and mortgagees in good faith for valuable consideration, but he deliberately destroyed it and put it out of existence for the debt it represented. The new mortgage taken was to secure a sum different from the amount unpaid on the earlier mortgage at the time of its expiry and on different terms of payment. By the terms of the earlier mortgage, $2,000 of the principal became due on the 20th February, 1915. Had the mortgagee insisted on prompt payment, and had payment been refused, resort to proceedings on the mortgage would, no doubt, have realised the amount of the mortgage-debt—the evidence shewed that the mortgaged goods were ample to meet the total then unpaid. Taking the new mortgage operated as payment of the prior mortgage, and the mortgagee's remedy was therefore upon the latter mortgage, to which the note was not collateral.

All the evidence being considered, the note was not merely collateral.

"Collateral" literally means "situate at the side of," hence "parallel or additional," and not—unless the nature of of the transaction so requires—"secondary:" In re Athill (1880), 16 Ch.D. 211.

It was not the intention that the chattel mortgage and the note should contribute ratably—the chattel mortgage was to be resorted to in priority to the note; the note was auxiliary and to be resorted to only in aid of the principal security.

There was another and more positive reason why the defendants should be held discharged. Even if they were not released by the discharge of the chattel mortgage and by the manner of Bryan's dealing with Tees, the principal debtor, they, undoubtedly, were released when they gave up the benefit of another security upon land in Sudbury. There was an oral agreement between Bryans and defendants that on Bryans taking over the Sudbury

mortgage the note would be delivered up. This was a separate and distinct agreement from that expressed in a memorandum in writing signed by Bryans when the original mortgage was given, and was not affected by it.

As against the plaintiffs, the executors of Bryans, there was ample corroboration of the testimony of Peterson and Rickaby, in the documents themselves and in the testimony of Tees.

Action dismissed with costs.

KELLY, J., IN CHAMBERS. AUGUST 14TH, 1919.

RE IMPERIAL STEEL AND WIRE CO. LIMITED.

Company—Petition by Shareholders for Winding-up Order—Opposition by Company—Question whether Company Insolvent—Inquiry by Accountant—Winding-up Act, R.S.C. 1906 ch. 144, sec. 15—Adjournment of Hearing of Petition.

Petition by 14 holders of preferred shares of the capital stock of the company, each to an amount exceeding $500 par value, for an order under the Dominion Winding-up Act for the winding-up of the company, on the ground of the insolvency of the company, the act constituting the insolvency being that an execution against the company, placed in the hands of the Sheriff of Simcoe on the 25th July, 1918, on which a seizure was made, remained in the Sheriff's hands unsatisfied for more than 15 days after the seizure, and that at the date of the petition, the 14th July, 1919, it was still in his hands unsatisfied, to an amount exceeding $17,000.

The petition was made returnable on the 21st July, 1919, and was adjourned until the 31st July, when it was heard in Chambers, together with another petition for winding-up, by the same petitioners and others, under the Ontario Companies Act.

R. S. Robertson, for the petitioners.

I. F. Hellmuth, K.C., and M. L. Gordon, for the company.

M. L. Gordon, for Easton and Broadbent, execution creditors.

Gideon Grant, for certain judgment creditors.

KELLY, J., in a written judgment, said, after stating the facts, that there was no doubt, and it was not disputed, that prior to the filing of the petition the company had committed an act of insolvency, within the meaning of the Dominion Winding-up Act, and that that condition of things continued until the 30th July,

1919, the day preceding the argument of the petition, when, according to an affidavit then filed, the writ of fi. fa. was withdrawn from the Sheriff's hands, "as arrangements had been made by the company to pay the same."

A meeting of the company's shareholders was held on the 26th July, 1919, at which a majority of the shareholders, preferred and ordinary, favoured the company continuing in business. Notwithstanding that, the petition should not now be dismissed. It was asserted that, owing to the shareholders being scattered over the country at very considerable distances from the head office of the company at Collingwood, where the meeting was held, many of them were unable to be present or to be represented.

The learned Judge said that he had not lost sight of the control which the majority of the shareholders of a company, acting within their legal rights, possess in the administration of its affairs. In his judgment, the situation was such that the proper course was to adjourn the motion until the 11th September next to enable an accountant to inquire into the affairs of the company and report thereon, under sec. 15 of the Winding-up Act, R.S.C. 1906 ch. 144. He appointed Mr. G. T. Clarkson accountant for that purpose. The motion under the Ontario Act should be adjourned until the same date.

MEREDITH, C.J.C.P. AUGUST 16TH, 1919.

RE McCALLUM.

Will—Construction—Bequest to Children who Shall Attain Majority—Provision for Widow—Death of Children in Infancy—Vested Estates—Intestacy—Costs.

Motion by the executors of the will of Andrew Bell McCallum, deceased, upon originating notice, for an order determining a question as to the true meaning and effect of the will.

The motion was heard in the Weekly Court at London.

A. B. Carscallen, for the executors.

O. L. Lewis, K.C., for the widow of the testator.

Fraser, K.C., for remoter next of kin.

F. P. Betts, K.C., for the Official Guardian, representing an infant next of kin.

MEREDITH, C.J.C.P., in a written judgment, said that the testator bequeathed a fund to his children who should attain the

age of 21, or, being daughters, should attain that age or marry before attaining it, in equal shares; and, in case of there being only one child so entitled, he bequeathed three-quarters of it to that child and the other quarter to his own wife.

He had two children—sons—each of whom died soon after his death, and they died in early infancy; but his wife survived him and was living at the time of the application.

He gave the income of the fund, until the time when his bequest of the corpus should come into effect, to his wife for the maintenance and education of his children without liability to account for the application of it, and, after her death, to the children directly, or to their guardian without liability to see to the application of it; and in one part of the will he described the bequests to the children as "his or her presumptive or expectant share."

Much was said upon the hearing as to the character of the bequest to the children, whether they took or did not take vested interests, though any such question should be easily answered, as the gift was only to such as should attain the age or status prescribed by him; and he afterwards described the gifts as presumptive—possible—or expectant—hoped for.

But, so far as the comprehensive question, who takes the fund? goes, it makes no difference whether vested or not.

If not vested, there is an intestacy as to this fund. The will contains no other gift of it. The widow and next of kin under the statute therefore took it. The next of kin—the two sons—died intestate, leaving the widow, their mother, their next of kin, and as such she took all that had gone to them.

If vested, on the death of each of the children the mother, as his next of kin, took all that he had taken, whether from his father or his brother.

Only if the next of kin of the father or of the children were those who should be such when the sons attained the age of 21, could any difficulty arise. It may well be that under some wills such persons only take, though the Courts have seemed ill-disposed towards such a result, describing sometimes such persons as an artificial class. But are they not just as real and human as any other class, and sometimes much more easily ascertained and dealt with than next of kin at the time of the testator's death, which may have been very many years before, and it may be that none of them can benefit by the gift, all being dead? And why should not a testator mean the living and not the dead? The subject is to some extent dealt with in the recent case of In re Hutchinson, [1919] 2 Ch. 17.

But this case is not one of testacy, but is one of intestacy; and so on his death all that remained undisposed of by the will of the father passed at once to those who became entitled to it,

under the provisions of the Devolution of Estates Act; and the same applies to his sons.

The widow is beneficially entitled to the whole fund.

By speaking of the persons beneficially entitled, it is not intended to interfere with any rights of any legal representatives or with the proper method of dealing with the estates of deceased persons.

The case is not one in which costs should be awarded to any party to be paid by any other; it is a case in which there should be no order made, on this application, as to costs.

MEREDITH, C.J.C.P., IN CHAMBERS. AUGUST 16TH, 1919.

*REX v. McKAY.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale—Motion to Quash—Sec. 102—Evidence—Proof of Guilt—Sec. 84—Benefit of Doubt.

Motion to quash a conviction of the defendant by a Police Magistrate, for an infraction of the provisions of the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40, by keeping intoxicating liquor for sale without a license.

W. R. Meredith, for the defendant.
J. B. McKillop, for the prosecutor.

MEREDITH, C.J.C.P., in a written judgment, referred to sec. 102 of the Act as defining the power of the Court or Judge upon such an application as this, and said that the one question raised was, whether there was evidence to support the conviction complained of.

The defendant's son, Basil McKay, was suspected by some of the persons employed to enforce the provisions of the Act, and a trap was set by them to catch him in the offence of selling liquor without a license.

Two informers were brought from Toronto, and the assistance of the witness Bannon, who lived near London and was apparently well acquainted with Basil, was procured. The three men went to a barber shop, of which Basil was in temporary charge; at the time, as it happened, Basil was away from the shop and at his father's house; and the men then sought him there. The two informers remained in the background; and Bannon, to whom

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

they had given money to buy liquor, if Basil would sell it, alone went to the defendant's house and rang the door-bell. Basil opened the door, and Bannon asked him for some liquor; Basil "said he did not have any on hand, but would get it for me in a few minutes," and it was then arranged that Bannon should go into a lane near the house and wait there. Bannon went, and, after about 10 minutes, Basil came and sold to Bannon in the lane, for $1.40, a bottle, which, it was said, contained very bad whisky. The other two men noticed that Bannon was away for about 15 minutes before he returned with the bottle.

The defendant, as a witness in his own behalf, proved that he had no right of any kind in or over the lane; that he had never used it; that his house was Basil's home, but that Basil stayed there only occasionally. The defendant also testified unequivocally to his innocence of the charge made against him.

No one could reasonably contend that, upon such evidence alone, the defendant could be convicted of the offence charged. The offence of selling without a license was proved against Basil; it was extraordinary that Basil was not prosecuted and that his father was; and, the father being prosecuted, that it was not for selling but for keeping.

The provisions of sec. 84 of the Act were invoked to support the conviction. The question whether that section would be of avail if the charge had been one of selling did not arise; and the section could not be applied to the charge actually made. There was no sale in the defendant's house. The sale took place in the lane, where the accused had no right or authority. There was no evidence of keeping by the father or in his house. There was no evidence of keeping by the son anywhere; in the 10 or 15 minutes he might have obtained the whisky from a keeper anywhere within a 10 or 15 minutes' time radius. The whole testimony shewed that he had none on hand, and all the circumstances corroborated it—he had to go elsewhere to get it. No reasonable man could say that, upon the evidence adduced at the trial, there was no reasonable doubt that the whisky was kept for sale in the defendant's house. A sale may be made without keeping for sale—a sale of that which is kept for a lawful purpose. As to what is a sale the case of Titmus v. Littlewood, [1916] 1 K.B. 732, affords light.

Guilt must be proved just as much under this enactment as under any other. Although the legislation aids the accuser much, in some respects, in his proof, it has not taken away from the accused and given to the accuser "the benefit of the doubt;" and that no Court and no judicial officer has any power to do.

An order should go quashing the conviction.

FALCONBRIDGE, C.J.K.B. AUGUST 18TH, 1919.

*GARBER v. UNION BANK OF CANADA.

Bailment—Breach of Duty by Bailee—Agent of Bank—Authority or Ostensible Authority—Liability of Bank—Sale of Business—Keys of Business Premises to be Delivered upon Payment of Part of Purchase-money—Demand for Keys by Landlord of Premises—Jus Tertii—Damages—Intervention of Third Person—Effective Cause of Ultimate Damage.

Action against the bank and Gordon B. Clark, manager of a branch of the bank at Dundalk, to recover damages for a breach of duty by the defendant Clark, as agent of the bank or personally, to the plaintiff, a customer of the bank, whereby the plaintiff sustained loss.

The action was tried without a jury at Hamilton.

S. F. Washington, K.C., and F. F. Treleaven, for the plaintiff.

W. B. Raymond, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff was the owner of a creamery business at Dundalk and had entered into an agreement for the sale of the businses to Weinert and Stevens. The share of the purchase-money to be paid by Stevens, $1,787.50, was secured to the plaintiff by the note of Stevens. Weinert paid $500 in cash when the agreement was signed, and was to pay $1,287.50 on taking possession of the premises on the 4th February, 1918. The plaintiff, who kept a banking account with the defendant bank at Dundalk, delivered the keys of his business premises to the defendants by sending them to Clark in a post-letter, dated the 1st February, 1918, and registered, in which he said that the keys were to be given to Weinert on the day mentioned, "and before you hand him the keys he has to give you a cheque made out in my favour for $1,287.50." There was a conversation by long distance telephone between the plaintiff and Clark on the 4th February, in which, as the plaintiff testified, he confirmed the instructions given in the letter of the 1st February. Clark testified that in that conversation he told the plaintiff that if Sinclair, the landlord of the plaintiff's business premises, demanded the keys, he (Clark) would have to give them over, and that the plaintiff said he was going to write to Sinclair, but that the plaintiff did not say not to hand the keys over without the money or cheque. This was denied by the plaintiff. The learned Chief Justice finds in favour of the plaintiff as to this conversation.

Sinclair came into the bank afterwards and demanded the keys. Clark gave them up, and Sinclair handed them to Weinert.

Weinert, going into possession, found, as he asserted, that many articles covered by the agreement were missing from the premises, and also alleged that the premises were not kept open until the day when the keys were delivered over, and refused to pay the whole amount—he offered $500 in full.

The plaintiff alleged that the defendants did not safely keep or take care of the keys, but disregarded their instructions and delivered up the keys to the purchasers or to some other person for them, whereby the purchasers were enabled to get possession without payment of the sum due.

The learned Chief Justice said that, in his opinion, Clark failed to carry out the terms of his instructions and was liable to the plaintiff unless Clark was entitled to set up the jus tertii. "A bailee who has actually delivered the subject-matter of the bailment to persons having paramount title may set up such delivery in defence to the claim of the bailor for the return of the property; but the bailee acts at his peril and is liable if he fails to prove the title of the adverse claimant:" Corpus Juris, vol. 6, p. 110. See also Bowstead on Agency, 6th ed., art. 47, p. 130 et seq.; Rogers v. Lambert, [1891] 1 Q.B. 318. The onus of proof of the title of the third person was, therefore, upon the defendant Clark; and, on the evidence, he had not discharged that onus.

The defendant bank was entitled to set up the additional defence that it was not liable because Clark was not acting in the transaction as agent of the bank, and that, if he was apparently so acting, he had no authority to bind the bank.

The bank was agent for the collection and remission of the money. If there had been a bill of exchange attached to the keys there would have been no question about the matter; and the fact that there was a mere letter, instead of a bill of exchange, did not alter the situation. It was open to the bank or Clark either to refuse to take the keys on the terms stated in the plaintiff's letter, or, on demand being made for the keys, to interplead. They chose to do neither.

The next question was, whether the plaintiff had proved any damage, the onus being on him.

The learned Chief Justice was of opinion, not without doubt, that the case fell within the general rule laid down in Hadley v. Baxendale (1854), 9 Ex. 341, that the spontaneous intervention of an independent volition, either on the part of the plaintiff or his servants or of a third party, may suffice to break the chain of causation between the defendant's original wrongful act and the damage suffered by the plaintiff—it is a question of fact to be

decided in each case whether the original wrongful act was the effective cause of the ultimate damage.

Weinert could have got possession independently of the keys handed over, whether Clark delivered up the keys or not, by breaking into the premises.

On the question of damages the plaintiff failed.

Action dismissed without costs.

KELLY, J., IN CHAMBERS. AUGUST 13TH, 1919.

LOGIE, J., IN CHAMBERS. AUGUST 20TH, 1919.

MARTENS v. STEWART.

Summary Judgment—Motion for—Affidavit in Answer Setting up Arguable Defence—Leave to Defend—Motion for Leave to Appeal—Plaintiff Deprived of Security of Execution—Rule 507 (b).

Appeal by the defendant from an order of the Master in Chambers permitting the plaintiff to enter judgment, upon summary application, after appearance, in an action, commenced by a specially endorsed writ of summons, to recover the amount of a money claim.

E. G. Long, for the defendant.
F. Arnoldi, K.C., for the plaintiff.

KELLY, J., in a written judgment, said that the affidavit of the defendant set up an arguable defence, and cross-examination thereon had not established anything to the contrary. The defendant should not be deprived of the right to have his defence tested in the regular manner at a trial.

The appeal should therefore be allowed: costs in the cause.

The plaintiff moved for leave to appeal from the order of KELLY, J., in Chambers.

The motion was heard by LOGIE, J., in Chambers.
Arnoldi, K.C., for the plaintiff.
H. S. White, for the defendant.

LOGIE, J., in a written judgment, said that the motion was made under Rule 507, and he agreed with Kelly, J., that the

affidavit set up an arguable defence and that cross-examination thereon had not shewn that the defendant should be deprived of his right to have his defence tested in the regular manner at the trial.

Whether it was necessary for the defendant, in order to succeed, to amend his defence, and, if so, whether he could, in the circumstances, do so, were questions to be now determined elsewhere; should counsel for the defendant decide that such amendment was necessary in his client's interest, he would, no doubt, apply.

Upon the present application, the learned Judge said, he had only to do with the question whether the plaintiff had brought himself within the Rule.

It was argued that, if the order from which leave to appeal was desired should stand, the plaintiff would lose the security of his execution, and that this was a matter of such importance that leave to appeal should be given. With this the learned Judge did not agree. The execution necessarily fell with the judgment upon which it was founded; and, in a strenuously contested matter such as this, the practice of allowing a default judgment to stand as security, upon the Court permitting, as an indulgence, a defendant, who had suffered judgment by default, to be let in to defend, had no application.

No authority was cited for the contention as to the execution.

Leave to appeal should not be given because there did not appear to be good reason to doubt the correctness of the order from which the plaintiff sought leave to appeal, and because it did not appear that the appeal would involve matters of such importance that leave to appeal should be given: both of which must exist under clause (*b*) of Rule 507 before such leave should be given: Robinson v. Mills (1909), 19 O.L.R. 162; Gage v. Reid (1917), 39 O.L.R. 52.

Motion dismissed with costs.

The plaintiff launched an appeal without leave. The appeal came on for hearing before MEREDITH, C.J.C.P., HODGINS, J.A., LATCHFORD and MIDDLETON, J.J., on the 18th September, 1919. The same counsel appeared. On the objection of the plaintiff's counsel that the order was not a final one and that leave was necessary, the appeal was dismissed with costs.

LOGIE, J. AUGUST 22ND, 1919.

PING LEE v. CRAWFORD.

Landlord and Tenant—Lease—Breach of Covenant—Nonpayment of Rent—Forfeiture—Notice—Rights of Partner of Lessee—Tender of Overdue Rent—Absence of Privity—Relief against Forfeiture—Parties—Injunction—Interim Order.

Motion by the plaintiff to continue an interim injunction restraining the defendant Agnes Crawford from leasing, selling, or dealing with certain restaurant premises in the city of Windsor, except subject to two leases to one Tom H. Lee, and from taking any action to cancel or declare these leases or either of them forfeited.

The motion was heard in the Vacation Court, Toronto.
George Wilkie, for the plaintiff.
W. Lawr, for the defendants.

LOGIE, J., in a written judgment, said that on the 28th July, 1915, the defendant Agnes Crawford leased to Tom H. Lee the restaurant premises in Windsor for 5 years from the 1st September, 1915; and on the 1st June, 1916, she leased to him the rooms above the restaurant for 4 years and 3 months, both leases expiring at the same time.

Neither the lessor nor any one on her behalf had any dealings with the plaintiff or knew him in either of these transactions, nor subsequently till the 16th July, 1919. The plaintiff was not a party to the leases, nor were they expressed to be on behalf of a partnership.

The lessor resided in California, and, arriving in Windsor in June last, found that $550 rent was overdue.

On the 4th July, 1919, the Sheriff of Essex had made a seizure of the goods of Tom H. Lee for the costs of an action between the plaintiff and Tom H. Lee.

The defendant Agnes Crawford, hearing of this, on the 11th July, 1919, gave into the Sheriff's hands a warrant of distress for the rent then in arrear, $660, and, on the 17th July, instructed him to enter into possession of the premises for her. On the same day she notified Tom H. Lee that he had broken the covenants in the leases, that she thereby declared the terms forfeited, and that she intended to enter upon and take possession of the premises. Upon the Sheriff entering the premises and advising Tom H. Lee that the goods were under seizure, the latter said: "All right go ahead," and he and his men left, giving the key to the Sheriff.

Nothing had been heard of Tom H. Lee since that time.

By the judgment in the action of Ping Lee against Tom Lee, dated the 11th April, 1919, the Court declared that the plaintiff was a partner of the defendant and entitled to a partnership interest in the business of restaurant-keepers carried on in the premises, and that he had been such since the 15th July, 1915, and declared the partnership dissolved with a reference to the Master in Ordinary to take the accounts. No specific mention was made in the judgment of the leases above referred to.

The first intimation that the present plaintiff claimed any interest in the premises was in the tender of the overdue rent on his behalf to the defendants on or about the 16th July, 1919. Whether this tender was made before or after the notice of forfeiture was not material—acceptance of a tender of rent overdue prior to forfeiture would not operate as a waiver of the right of re-entry: Re Bagshaw and O'Connor (1918), 42 O.L.R. 466.

The defendant Agnes Crawford disclaimed all knowledge of the plaintiff, and proceeded under her notice to take possession until restrained by the injunction.

Two objections were raised by the defendants, either of which was fatal to the continuance of the injunction:—

(1) There was no privity between the plaintiff and the defendant Agnes Crawford. Reference to Alder v. Fouracre (1818), 3 Swanst. 489.

(2) The defendant Agnes Crawford was not a party to the action of Lee v. Lee; and, if the plaintiff had any rights under the leases, they must be determined in this action.

The only right which the plaintiff could claim against the said defendant was relief against forfeiture of the leases.

As the action was at present constituted, he had no standing.

The original lessee (except under extraordinary circumstances) must be a party—and relief should not be given in his absence. Hare v. Elms, [1893] 1 Q.B. 604.

The original lessee was not a party to this action, and on this ground also the extraordinary remedy by injunction should be withheld till the questions in issue had been tested at the trial.

The plaintiff's counsel stated that he was in no sense an underlessee, so that relief could not be afforded him under sec. 21 of the Landlord and Tenant Act, R.S.O. 1914 ch. 155.

The defendant Agnes Crawford was a woman of substance: and, if the plaintiff, by reason of the dissolving of the injunction, suffered any damage, she was amply able to pay.

The injunction should be dissolved; costs in the cause unless otherwise ordered by the trial Judge; the plaintiff should have leave to amend as advised.

KELLY, J. AUGUST 23RD, 1919.

RE MCPHERSON.

Will—Construction—Residuary Bequest—"Religious Benevolent and Charitable Purposes and Uses"—Discretion of Executors—Vagueness or Uncertainty—"And"—"Or"—Prior Definite Bequests for Religious Purposes—Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103.

Motion by the executors of Mary McPherson, deceased, under Rule 600, for the advice of the Court on the proper construction of the residuary bequest contained in the will of the deceased.

The motion was heard at a sittings in Cornwall.

G. A. Stiles, for the executors.

R. Smith, K.C., for the next of kin.

KELLY, J., in a written judgment, said that the residuary bequest was in these words:—

"All the residue of my estate I give and bequeath to my said executors upon trust to be disposed of and given by them to such religious benevolent and charitable purposes and uses as may seem meet and proper to them my said executors."

The contention of the next of kin was that the residuary bequest was void for uncertainty, and that the residue was undisposed of. They relied on Williams v. Kershaw (1835), 5 Cl. & F. 111 (note). The distinction between that case and several of the decisions relied upon to support the bequest now in question was chiefly in the conjunction used between the words designating the objects to be benefited.

Reference (among other cases) to Re Huyck (1905), 10 O.L.R. 480; In re Sutton (1885), 28 Ch. D. 464; In re Macduff, [1896] 2 Ch. 451; In re Best, [1904] 2 Ch. 354.

The decision in Williams v. Kershaw had been criticised both here and in England, and was said in Re Huyck not to be of present authority. If it was not to be recognised as an authority binding the Court to construe "and" as "or" and to that extent change the testator's meaning, there was no sufficient reason for declaring the residuary bequest now in question void, and thus defeating what, from the whole language of the will, must have been intended by the testator as a definite gift. A decision upholding the bequest as valid might well be supported upon the authorities cited.

There was, however, another reason for holding the bequest valid on the construction of the language of the will, unaided by decisions. The scheme of the will was this. The testatrix, after

directing payment of her debts, funeral and testamentary expenses, and devising all her real and personal property (except personal property specifically bequeathed) to her executors in trust to sell, gave, by para. 3, to the Presbyterian Church in Canada specific sums, for home missions, foreign missions, widows and orphans' fund, etc., and, by paras. 4 and 5, made a large number of specific bequests to relatives and others. Then followed para. 6, containing the residuary bequest above quoted. The meaning which the testatrix intended should attach to the descriptive words of para. 6 was well indicated by para. 8, which directed that "all the charitable bequests mentioned in the 3rd and 6th paragraphs hereof are to be paid without interest as soon as the accounts of my estate are passed and as soon as possible after the sale of my said lands."

Reading the whole will, the dominating idea in the mind of the testatrix in disposing of the residue by para. 6, was to make a bequest which would be applied to charitable purposes. The words "charitable uses," as defined by the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, have a very extended meaning. On the proper construction of para. 6, read with the other parts of the will, the residuary bequest was valid, and its purposes were sufficiently definite to enable the executors or the Court to make a selection.

Order declaring accordingly; costs of all parties to be paid out of the residuary estate—those of the executors as between solicitor and client.

MIDDLETON, J. AUGUST 26TH, 1919.

RE CAMPBELL TRUSTS.

Trusts and Trustees—Settlement—Trust-deed—Rights of Settlor—Power of Appointment—Will.

Motion by the Royal Trust Company, trustee under a settlement, for an order determining the rights of the settlor in respect of the property conveyed to the company in trust.

The motion was heard in the Weekly Court, Toronto.
J. A. Worrell, K.C., for the Royal Trust Company.
W. D. Gregory, for Mrs. Campbell, the settlor.
R. L. Defries, for the trustees of the MacPherson estate.

MIDDLETON, J., in a written judgment, said that under the trust instrument of the 17th October, 1916, Mrs. Campbell, then

Miss MacPherson, conveyed certain property to the Royal Trust Company in trust. By the terms of the instrument the company was to receive the income for her; at the end of 20 years she had the right to demand half the capital; and the balance in the hands of the trustee was to be subject to her will or the operation of the law as to intestate succession. Mrs. Campbell now asked that the trustee should hand her over the whole property. It was admitted that she might have half, but it was argued that as to the rest she had only a life-estate and a power of appointment exercisable by will only, and so was not entitled. It was said that in Re Hooper (1915), 7 O.W.N. 104, the distinction between a general power of appointment exercisable by deed or will and a general power exercisable by will only was ignored. No cases were cited to shew that there is any such distinction, and the cases of Page v. Soper (1853), 11 Hare 321, and In re Onslow (1888), 39 Ch. D. 622, shew that no such distinction exists.

The law on the question seems now too clearly settled to admit of discussion. No one has any claim to this property save Mrs. Campbell and those who must claim through her, either under her appointment or as her representatives; and so she may demand it. Had there been a gift over to a third person in default of appointment in the manner pointed out, the case would be very different, for an appointment by will cannot be made by an instrument to take effect in the testator's lifetime: Reid v. Shergold (1805), 10 Ves. 370. Nor can a will be made which is irrevocable: Robinson v. Ommanney (1883), 23 Ch. D. 285; Vynior's Case (1610), 8 Coke 82a.

The order will declare that it is the duty of the trustee to hand over the estate.

Costs out of the estate.

LOGIE, J. AUGUST 29TH, 1919.

BELL v. CHARTERED TRUST CO.

CHARTERED TRUST CO. v. BELL AND BUISSEY.

Landlord and Tenant—Oral Agreement for Lease—Lease Prepared but not Executed—Part Performance—Possession—Payment of Rent—Assignment by Lessee for Benefit of Creditors—Attempted Surrender of Lease—Invalidity as against Creditors—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5—Right of Assignee to Enforce Performance of Agreement for Lease—Equitable Right—Discretion—Terms—Personal Covenants to be Entered into by Assignee—Notice under sec. 38 (2) of Landlord and Tenant Act, R.S.O. 1914 ch. 155.

Motion by the plaintiff in the first action to continue an interim injunction.

Upon the return of the motion, it was agreed by all parties that the two actions should be consolidated, the motion turned into a motion for judgment in the consolidated actions, and the motion disposed of upon the material filed upon the original motion.

The motion for judgment was heard accordingly in the Weekly Court, Toronto.

J. P. Walsh, for Bell and Buissey.

S. King and W. Lawr, for the Chartered Trust Company.

LOGIE, J., in a written judgment, said that the first action was brought to recover possession of the premises No. 1196 St. Clair avenue, Toronto, from the trust company, assignee for the benefit of creditors of Buissey, and for an injunction restraining the company from trespassing upon or carrying on any business in the said premises, and for damages. The second action was brought to have it declared that a lease of the said premises by Bell to Buissey was a valid and subsisting lease, notwithstanding an alleged surrender thereof by Buissey to Bell, and that the lease was surrendered improvidently and by reason of the fraudulent act of Bell, and for an injunction restraining Bell from taking possession of the premises, and for specific performance by Bell of an alleged agreement to execute a lease to Buissey of the said premises for 5 years from the 28th October, 1918.

It appeared from the affidavits and papers filed that on the 28th October, 1918, an oral agreement was entered into between Bell and Buissey to lease the premises to Buissey for 5 years from the 28th October, 1918, at $1,080 per annum. A lease in duplicate was prepared in accordance with this agreement, and one of the documents was handed by Bell to Buissey; but it was never signed by either party. Buissey went into possession, expended $12 in fixtures, and paid rent at $90 per month until July, 1919, when he found himself financially in deep water. He then made an assignment to the trust company for the benefit of his creditors, and signed a surrender of his supposed lease. The trust company entered upon the demised premises; and these two actions were brought.

For Bell, the landlord, it was contended that the tenancy of Buissey was a tenancy at will, duly determined by notice and demand for possession; or, if not, that the surrender was effective.

For the trust company, assignee of Buissey, it was argued that the agreement for the lease, evidenced by the unexecuted instrument, should be specifically performed by the lessor; that the

surrender was fraudulent against creditors; and that, in any event, the assignee was a tenant from year to year, and not a tenant at will—if Buissey was a tenant at will, admittedly the assignee was out of Court.

The learned Judge was of opinion that the agreement for a lease should be enforced, upon the assignee entering into personal covenants with the lessor to observe the conditions and perform the stipulations and provisoes contained in the unexecuted instrument.

Although the agreement was not in writing and the lease was not executed, there had been a sufficient part performance, unequivocally referable to the agreement, and equities had arisen from the acts of part performance which rendered it unjust not to decree specific performance.

The unexecuted instrument contained a provision that if the lessee should make any assignment for the benefit of creditors the term should at the option of the lessor forthwith become forfeited; but the lessor had taken no proceedings looking towards forfeiture; and, by sec. 38 (2) of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, the assignee has the right, notwithstanding any provision in the lease, to retain possession for the remainder of the term upon giving notice to the landlord to that effect—the giving of this notice should be a condition precedent to the granting of the relief.

Apart from the statute, the assignee in bankruptcy of the lessee is entitled to a grant of the lease upon entering into personal covenants: Powell v. Lloyd (1827), 1 Y. & J. 427.

If the surrender was signed before the assignment for the benefit of creditors, the surrender was void against creditors under sec. 5 of the Assignments and Preferences Act, R.S.O. 1914 ch. 134; if afterwards, it was a nullity.

No hardship would be occasioned and no injustice done by ordering specific performance of the agreement for the lease, with the safeguards provided above.

The first action should be dismissed with costs, upon the plaintiff in the second action carrying out the terms imposed upon it.

In the second action there should be judgment for specific performance of the agreement for the lease, in the terms of the unexecuted instrument, with costs, upon the plaintiff in that action entering into personal covenants as above with the defendant Bell and giving the notice required by sec. 38 (2) above.

Should the plaintiff in the second action fail to enter into the covenants and give the notice forthwith, the second action should be dismissed with costs, and there should be judgment for the plaintiff in the first action, as prayed, with costs.

LOGIE, J. AUGUST 30TH, 1919.

CARR v. PUBLIC SCHOOL BOARD OF SCHOOL SECTION 2 TOWNSHIP OF CASEY.

Public Schools—Erection of Second School-house in Rural School Section—First School-house Built by Government—Agreement of Trustees with Government—Action to Restrain Trustees from Proceeding with Work—Money in Hands of Trustees from Sale of Township Debentures under Valid and Subsisting By-law—Remedy of Ratepayer—Objections Raised—Regularity of Proceedings of Trustees—Public Schools Act, R.S.O. 1914 ch. 266, secs. 11, 31, 44.

Motion by the plaintiff, a ratepayer of school section 2, to continue an injunction granted by a Local Judge, restraining the defendants from proceeding with the erection of a second school-house in school section 2, Casey, and from purchasing any material therefor.

The motion was, by consent, turned into a motion for judgment, and was heard in the Weekly Court, Toronto.

M. F. Pumaville, for the plaintiff.

J. P. Walsh, for the defendants.

LOGIE, J., in a written judgment, said that before the 22nd August, 1916, the school section had one school-house, situated near the centre of lot 7 in the 1st concession. This school-house was destroyed by fire on that date. On the 30th October, 1917, the defendant school board entered into a written agreement with the Ontario Government, in consideration of the erection at the Government's expense of a new school-house in the eastern portion of the section, to erect and complete a school-house of the same type in the western portion. The Government erected a school-house at the north-east corner of lot 6 in the 1st concession.

The trustees of the section, with the consent of the ratepayers, as provided by sec. 11 of the Public Schools Act, R.S.O. 1914 ch. 266, selected a site for another school at the south-east corner of lot 2 in the 2nd concession; and no objection was taken to this.

Subsequently, on the 16th December, 1918, the township council, at the request of the trustees, passed a by-law providing for the issue of debentures to the amount of $2,000 in order to raise the sum required for building the school. This appeared to be a valid and subsisting by-law. Under it debentures were issued and sold, and $2,000 paid over to the trustees.

It was admitted that the Government was pressing for the erection of the new school by the trustees, and that the Government, through the Minister of Education, had power, under sec. 31 of the Act, to require the school board to provide a second school, and further that the trustees might of their own motion do what the Minister of Education had power to compel them to do under sec. 31: Re Medora School Section No. 4 (1911), 23 O.L.R. 523.

The by-law standing, the plaintiff, in proceeding by this action, had misconceived his remedy; but, even if he had a cause of action, he failed upon all the objections urged by him, which were as follows:—

(1) That the proposal for the loan had not been submitted to and sanctioned at a special meeting of the ratepayers called for the purpose.

(2) That the ratepayers subsequently rescinded the original motion alleged to have been passed sanctioning the proposal for the loan and also the requisition or application for the debentures.

(3) That the building of a school in the western part of the school section was a hardship on the ratepayers and an impossibility to maintain.

(4) That the requisition of the trustees was for debentures bearing interest at 7 per cent., whereas the by-law provided for interest at 8 per cent.

The learned Judge examined the evidence bearing on each of these objections with particularity. He referred to sec. 44 of the Act; to the maxim "omnia præsumuntur rite esse acta;" In re McCormick and Township of Colchester South (1881), 46 U.C.R. 65; Wallace v. Lobo Public School Trustees (1886), 11 O.R. 648; and said that no substantial injustice had been done and no irregularities proved.

The injunction should be dissolved and the action dismissed with costs.

LOGIE, J. SEPTEMBER 3RD, 1919.

BUSCH v. KEIGHLEY.

Partnership—Receiver—Injunction—Dissolution not Sought—Misconduct not Proved—Interim Order Vacated without Prejudice to Fresh Litigation.

Motion by the plaintiff to continue a receiver appointed and an injunction granted by order of FALCONBRIDGE, C.J.K.B., on the 25th August, 1919.

The motion was heard in the Weekly Court, Toronto.

D. Inglis Grant, for the plaintiff.

A. C. McMaster, for the defendant.

LOGIE, J., in a written judgment, said that by the order of the Chief Justice a trust company was appointed receiver to take over the property of a partnership composed of the plaintiff and defendant, under the name of "The Frolic Company," the property consisting of a machine known as "The Frolic," a riding device, at the time being operated for gain at the Toronto Exhibition and to receive all returns and profits of the partnership business arising from the operation of the machine. The order also restrained the defendant from alienating, incumbering, or disposing of the property, or any receipts or profits arising from the partnership business.

The partnership was admitted. The plaintiff did not claim a dissolution nor did he allege any misconduct of the defendant other than the giving of information to the Dominion immigration authorities that the plaintiff was an unnaturalised German subject, which caused the said authorities to send the plaintiff out of Canada. The defendant denied giving the information.

Up to the 30th July, 1919, and subsequent to the plaintiff's exclusion from Canada, the machine had been operated in the Western Provinces until it was brought to Toronto. From Toronto it was to be sent to London, Ontario, on the 6th September, and was to be taken from Ontario to Tennessee on the 13th September.

It was admitted that the plaintiff, when he left Canada on the 30th June, took with him the books of the partnership, and still had them.

The plaintiff alleged that the defendant had refused to give an account. This was denied by the defendant, who alleged his willingness to account on having access to the books. It was admitted that the partnership was under contract to give entertainments at various "fall fairs" until November next, and that the stoppage of the business, assuming honesty on both sides, would result in loss to both partners. The plaintiff was willing to face this loss if allowed to hold the takings at the Toronto exhibition; the defendant was not willing, and alleged that the working capital now in dispute was necessary for the successful conduct of the business.

The Court, in appointing a receiver of partnership property, takes the affairs of the partnership out of the hands of all the partners and entrusts them to a receiver or manager of its own appointment, and excludes all alike from taking part in the management of the concern: Hall v. Hall (1850), 3 Macn. & G. 79, 86.

Where a dissolution is neither sought nor absolutely necessary, a receiver pendente lite will not in general be appointed unless there is danger of the business being destroyed or the assets misapplied.

The exclusion of the plaintiff from the management was the act of the Dominion authorities. It was not proved that the defendant improperly supplied the evidence upon which the authorities acted.

The practical inconvenience—if not impossibility—of the receiver appointed managing the amusement business in the United States was manifest.

In all the circumstances, the Court would be justified in allowing the partnership to continue as a going concern in its own way, as provided by the agreement of the parties.

The order appointing the receiver and enjoining the defendant should be vacated; but the order now made is not to prejudice the plaintiff in any action which may be brought in the United States nor be taken as determining the rights of the parties or pleaded as res judicata.

Costs in the cause to the successful party.

LENNOX, J. SEPTEMBER 4TH, 1919.

RE FARRELL.

Deed — Construction of Trust-deed — Ascertainment of Persons Entitled to Trust-fund after Death of Life-tenant.

Motion by the National Trust Company of Ontario Limited for an order determining questions as to the meaning and effect of a will and also of a trust-deed.

The construction of the will was declared in an earlier judgment: Re Farrell (1919), 15 O.W.N. 447.

Argument as to the trust-deed was heard in the Weekly Court, Toronto.

Glyn Osler, for the applicants.

LENNOX, J., in a written judgment, said that he was asked to determine who were entitled to certain property in the city of Halifax conveyed by Letitia Farrell and Teresa Farrell, on the 28th August, 1905, to the National Trust Company of Ontario Limited, in trust for Minnie Agnes Farrell and the heirs of the body of her husband, Vincent F. Farrell, by the said Minnie

Agnes Farrell, during the ifetime of Minnie Agnes Farrell, and after her death on certain other trusts to be executed after the death of Minnie Agnes Farrell, until the youngest of the said heirs should attain the age of 21 years, and to convey upon this event occurring, or, in case of complete failure of such heirs to reconvey to the grantors. Eva Farrell, one of the heirs referred to, died in the lifetime of Minnie Agnes Farrell, and Minnie Agnes Farrell was also dead.

Heirs of the the body of Vincent F. Farrell begotten by a previous wife were also provided for by the deed; but from a memorandum made by counsel and a declaration of Vincent F. Farrell, made on the 3rd July, 1914, it appeared that Eva Farrell, Dorothy Farrell, and Cyril Farrell, named in the last will and testament of Dominick Farrell as legatees under that will, were the children of Vincent F. Farrell and were resident in Halifax. The learned Judge concluded that these were the only heirs of the body of Vincent F. Farrell covered by the deed, and that the three children above mentioned were those whose rights had to be dealt with.

Eva Farrell was born on the 19th July, 1883, and was therefore in her 23rd year when the deed was made. It was clear by the deed that the income was to be divided according to numbers alive, during the lifetime of Minnie Agnes Farrell, and the minority of the youngest child, with all to Minnie Agnes Farrell for her lifetime upon the death of all the children, and all the income to the children who survived their mother until the youngest came of age, and all to the survivor until that time, if one only survived, or one only continued to live until the time for final adjustment arrived. There was a presumption, of course, in favour of the early vesting of property; but the fact that Eva was of age when the deed was executed, and that the deed made it clear that Eva's heirs were not to get any share of the income during the lifetime of her mother or the minority of her brother or sister, coupled with the fact that the property—i.e., the whole property, not a share of it—was to revert to the grantors if no child lived to attain 21, and was not to revert if any child attained 21, led the learned Judge to conclude that the proper construction of the deed was that the land covered by the deed (or the proceeds of it if it had been sold) belongs to Cyril Farrell and Dorothy Farrell, both now over 21 years of age, in equal shares; and there should be a declaration accordingly.

The trust company should have their costs in respect of the will out of the estate of Dominick Farrell and their costs in respect of the trust-deed out of the trust-property, both on the basis of solicitor and client.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 6TH, 1919.

*MONTREUIL v. ONTARIO ASPHALT BLOCK CO.

Improvements—Company in Possession of Land under Agreement with Life-tenant—Judgment for Specific Performance of Agreement—Mistake as to Nature of Estate—Bona Fides—Death of Life-tenant—Action of Ejectment Brought by Remaindermen—Company Allowed to Retain Possession upon Making Compensation—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 37.

An action to recover possession of land, tried without a jury at Sandwich.

E. D. Armour, K.C., and A. R. Bartlet, for the plaintiffs.

J. H. Rodd, for the defendant the Ontario Asphalt Block Company.

A. H. S. Foster, for the defendant the Cadwell Sand and Gravel Company.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that this case was like a serial story. The preceding chapters were to be found in Ontario Asphalt Block Co. v. Montreuil (1913), 29 O.L.R. 534, and in the printed case on appeal to the Supreme Court of Canada, to which tribunal the Ontario Asphalt Block Company unsuccessfully appealed. The final judgment declared the asphalt company (accepting the life-estate) to be entitled to specific performance of the agreement with an abatement in the purchase-price of the difference in value between an estate in fee simple and an estate for life of Luc Montreuil, with a reference to the Master.

It was said that no proceedings had been taken in the Master's office. The life-tenant, Luc Montreuil, having died in January, 1918, these plaintiffs, the remaindermen, brought ejectment.

The defendants invoked the provisions of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 37, especially the latter part of the section.

No case cited went so far as to declare that a person having merely an option to purchase, which he might or might not exercise, could be under the belief that the land was his own; but in Young v. Denike (1901), 2 O.L.R. 723, relief was given under the statute to a person who had a contract to purchase. If that case was properly decided, it would seem to follow that it is not necessary to entitle a person to relief under the statute that he should believe or have reasonable grounds for believing that he has the

legal estate; apparently all that is required is that he should believe in good faith that he is in a position to make himself the owner. The defendants dealt with the life-tenant under the bona fide but mistaken belief that he was the owner in fee.

Having regard to the unswerving intention of the defendants to exercise their option and to their entire good faith as shewn by their large expenditure of money on the property, the learned Chief Justice felt justified in holding that they had made lasting improvements on the land under the belief that it was their own, and in declaring them entitled to retain the land, making compensation for the same, to be ascertained by the Master at Sandwich.

Further directions and costs as between the plaintiffs and the Ontario Asphalt Block Company reserved until after the Master's report. As against the other company, action dismissed with costs.

Regarding the case as one of great hardship, the Chief Justice gave the defendants leave (if he had power to do so) to amend by making the three executors parties qua executors as well as personally; and also gave them leave to expand their plea of estoppel as they might be advised.

LOGIE, J., IN CHAMBERS. SEPTEMBER 12TH, 1919.

*JARVIS v. LONDON STREET R.W. CO.

Costs—Scale of Costs—Action Brought in Supreme Court—Rule 649—Recovery at Second Trial of Amount within Competence of County Court—Costs of First Trial Made "Costs in the Cause to the Plaintiff"—Scale of Costs Applicable to First Trial.

Appeal by the plaintiff from the certificate of the Taxing Officer at Toronto of his ruling that the plaintiff's costs of the first trial of the action should be taxed upon the County Court scale.

The action was brought in the Supreme Court of Ontario to recover damages for negligence, and was dismissed at the first trial. Upon the plaintiff's appeal, a Divisional Court of the Appellate Division ordered a new trial, directing that the costs of the first trial and of the appeal "be costs in the cause to the plaintiff:" Jarvis v. London Street R.W. Co. (1919), 15 O.W.N. 421, 45 O.L.R. 167.

At the second trial there was a verdict for the plaintiff for $400—a sum admittedly within the jurisdiction of a County Court.

The only question raised on the appeal from the Taxing Officer's certificate was, whether the costs of the first trial should be on the County Court scale or that of the Supreme Court of Ontario.

H. F. Parkinson, for the plaintiff.
H. S. White, for the defendants.

LOGIE, J., in a written judgment, said that the trial Judge's entry of the verdict at the second trial was, "$400 and costs to be taxed." Rule 649 (formerly 1132) provides that where an action is brought in the Supreme Court which is of the proper competence of a County Court and the Judge makes no order to the contrary the plaintiff shall recover only County Court costs. An order for payment of costs simpliciter does not preclude an inquiry as to the scale properly applicable: Re Forster (1898), 18 P.R. 65.

The plaintiff contended that the effect of the order of the appellate Court was to give him these costs on the Supreme Court scale, and that they should be paid without reference to Rule 649; but in this the learned Judge did not agree.

Reference to Dickerson v. Radcliffe (1900), 19 P.R. 223; Murr v. Squire (1900), 19 P.R. 237; Brotherton v. Metropolitan District Railway Joint Committee, [1894] 1 Q.B. 666.

Avery & Son v. Parks (1917), 38 O.L.R. 535, 39 O.L.R. 74, distinguished.

The reasoning in the Brotherton case applies, particularly as it has been held that Rule 649 applies only to costs up to judgment: McIlhargey v. Queen (1911), 2 O.W.N. 916.

In effect, by the decision of the appellate Court the costs of the first trial were ordered to abide the result of the cause—they were made payable to the plaintiff in the cause, but still to abide the result. The result of the cause was a verdict for the plaintiff within the competence of a County Court, and the words "in the cause" imply not only the party who is to pay them if he is not mentioned, but also the scale upon which they are payable; and, no order to the contrary having been made, this scale is the County Court scale.

Appeal dismissed with costs.

MULOCK, C.J. EX. SEPTEMBER 15TH, 1919.

MELOCHE v. TRUAX.

Vendor and Purchaser—Agreement for Sale of Land—Fraud of Agent of Purchasers—Commission Paid by Vendors to Agent—Knowledge of Vendors of Relation between Agent and Purchasers—Rescission of Contract—Repayment of Moneys Paid on Account of Purchase-price.

Action by three brothers, the owners of 24 acres of land in the township of Sandwich West, against three defendants—Truax, Sullivan, and Boucher—for a declaration that a contract for the sale of the land to the defendants was rescinded and determined and the plaintiffs entitled to repossess the land, because of default of payment of an overdue instalment of the purchase-money.

The agreement was in writing, dated the 3rd July, 1917. The price was $50,000, payable in instalments. The plaintiffs alleged default in payment of the second instalment, $10,000 and interest.

In their original statement of defence and counterclaim the defendants admitted the making of the agreement and alleged that the plaintiffs had extended the time for the payment of the second instalment, and claimed specific performance.

At the trial, the defendants Truax and Sullivan obtained leave to amend their statement of defence and counterclaim by pleading that the plaintiffs had, fraudulently and without the knowledge of these defendants, agreed to pay to the defendant Boucher, who was the agent of Truax and Sullivan, a commission of $2,500 for his services in inducing them to enter into the agreement; that the agreement was thus procured by the plaintiffs' fraud, and the defendants Truax and Sullivan were entitled to have it cancelled and to repayment of the moneys paid by them on account of the purchase-price, with interest.

At the trial the contest was confined to the issue raised by the amendment.

The action was tried without a jury at Sandwich.

F. C. Kerby, for the plaintiffs.

F. D. Davis, for the defendants Truax and Sullivan.

MULOCK, C.J. Ex., in a written judgment, after setting out the facts, found that, in bringing about the sale of the land to Truax, Sullivan, and himself, Boucher was acting as agent for Truax and Sullivan and 14 other persons who were contributing to the purchase-money. Boucher had shewn Truax and Sullivan and the other contributors the written option entitling him to purchase

the property for $50,000, and had made them believe that that sum was the actual price without any deductions—fraudulently concealing from them the fact that he was the plaintiffs' agent to sell the property, and was to be paid by them for such services.

Boucher, having an interest adverse to that of his co-defendants and the contributors whom they represented, occupied a fiduciary relation towards them, and was bound to disclose to them his relation to the plaintiffs. The plaintiffs were chargeable with knowledge of Boucher's relation to the contributors, and were also bound to disclose to the contributors or to their trustees, Truax and Sullivan, Boucher's relation to the plaintiffs. This duty the plaintiffs failed to discharge, and their concealment was a fraud on the defendants Truax and Sullivan and the others. Boucher owed to them undivided loyalty, but was unable to render it because of his secret and adverse interest with the plaintiffs.

It is a fraud if, in connection with the bringing about of a contract, one principal maintains underhand dealings with the agent of the other principal, and such a fraud entitles that other to a rescission of the contract: Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co. (1875), L.R. 10 Ch. 515; Grant v. Gold Exploration and Development Syndicate, [1900] 1 Q.B. 233; Hitchcock v. Sykes (1914), 49 Can. S.C.R. 403.

The defendants Truax and Sullivan were therefore entitled to a rescission of the contract and to repayment of $8,250 and interest. The plaintiffs must pay the costs of these defendants. As between the plaintiffs and Boucher, the plaintiffs were entitled to rescission because of default in payment of the second instalment.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 19TH, 1919.

ROXBOROUGH GARDENS OF HAMILTON LIMITED v. DAVIS.

Company—Agreement by—Resolution Authorising—Dispute as to Passing of Resolution—Evidence—Minutes of Meeting—Action to Set aside Agreement—Damages—Reference—Costs.

Action to set aside an agreement entered into in the name of the plaintiffs, an incorporated company.

The action was tried without a jury at Hamilton.

C. S. Cameron, for the plaintiffs.

G. Lynch-Staunton, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the principal question of fact to be decided was whether resolution No. 2 appearing on p. 40 of the minute-book of the company was in fact carried at the meeting held on the 16th October, 1917. It appeared in the minutes signed by the defendant Petrie as secretary pro tem.

If it was not carried, the defendant Petrie was guilty of both forgery and perjury, and it would require the cogent testimony which would have to be adduced to secure his conviction, if he were on his trial on those charges, to justify that conclusion. Several witnesses for the plaintiffs, men of apparent respectability, vehemently denied that any such resolution was carried or even put to the meeting. But great reliance was to be placed on the evidence of Mr. Fisher, manager of the Molsons Bank at Owen Sound, who appeared as the seconder of the motion. The learned Chief Justice found as a fact that the resolution was passed. Giving the plaintiffs' witnesses credit for honesty in giving their testimony, it must be concluded that in the confusion and excitement of a very heated meeting they failed to realise that the motion was being put and carried.

In any event it would be impossible to rescind this agreement. The parties could not be restored to their original position. Many of the lots had been sold, purchasers had received deeds, and other changes had taken place.

Nor could it be found that any damage had been sustained. The purchase appeared to be a liability, and not an asset, and the defendants at the trial invited the shareholders who were supporting this action to come into the new company on the same footing as they were in, even offering to forgo their commission, but that invitation had not been accepted.

The plaintiffs should have, at their own risk and expense, a reference to the Master at Hamilton as to the matters set up in the 10th and 11th paragraphs of the statement of claim. Save as to this, the action should be dismissed. Some of the defendants' proceedings seemed to invite attack, and there should be no costs. If the plaintiffs go into the Master's office, further directions and subsequent costs reserved until after report.

RE MINTY AND BLACKBURN—KELLY, J.—AUG. 6.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Mistake in Deed of Conveyance—Grantee, Party of Second Part, Described in Grant as Party of First Part and in Habendum as Party of Third Part—Application under Vendors and Purchasers Act.]—Application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring invalid an objection to the title made by the purchaser. The motion was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the objection was as to the form of a deed of conveyance of the 27th June, 1888, between Thorne and Nelson, of the one part, and Strathy, of the other part. It was plain from the deed itself, unassisted by evidence aliunde, that the intention of the parties to it was to effect a conveyance of the lands by Thorne and Nelson to Strathy, and that using the words "first part" as descriptive of the grantee in the grant itself, and the words "third part" in the habendum, was clearly an error for the words "second part." The objection could not therefore be sustained. Order declaring accordingly; no costs. H. W. A. Foster, for the vendor. D. B. Goodman, for the purchaser.

RE LYNETT—FALCONBRIDGE, C.J.K.B.—AUG. 7.

Quieting Titles Act—Title by Possession—Appeal.]—Appeal by W. Lynett and others from the finding of the Inspector of Titles in a matter under the Quieting Titles Act. The motion was heard in the Weekly Court, Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the matter was quite arguable, and he was by no means free from doubt; but he thought that the view taken by the Inspector of Titles was the correct one. Reference to Re Murray Canal (1884), 6 O.R. 685; Fry and Moore v. Speare (1916), 36 O.L.R. 301. Appeal dismissed; no costs. H. S. White, for the appellants. E. C. Cattanach, for the Official Guardian, representing certain absentees with a possible interest.

WEDDELL v. LARKIN & SANGSTER—MASTEN, J.—AUG. 7.

Contract—Work Done under Sub-contract for Contractors with Crown—Dispute as to Amounts Due to Sub-contractor under Various Heads—Report of Master—Variation on Appeal.]—An appeal by the defendants from a report of the Local Master at Belleville. The appeal was heard in the Weekly Court, Toronto. MASTEN, J., in a written judgment, said that the plaintiff was a sub-contractor under the defendants for work on the Trent Valley Canal, for which the defendants had a contract with the Crown. Disputes having arisen between the parties as to the amount payable by the defendants to the plaintiff, the plaintiff brought this action to recover the amount which he asserted to be due. The action was tried by CLUTE, J., and a judgmentwas pronounced by which many of the questions raised were finally determined. By para. 2 of the judgment, it was adjudged that the claim of the plaintiff be allowed to the extent of the sum required to reimburse him at cost for work done by him subsequent to the 25th July, 1913, between stations 66 and 67.75, by way of additional drilling and blasting necessary to complete and facilitate the work there in question, and that it be referred to the Master to inquire and state such sum. By para. 5, the Master was also to inquire and state the sum due to the defendants upon their counterclaim. By his report the Master, in addition to an allowance for drilling and blasting, had allowed $1,924 for "dredging" and a like sum for "sweeping, diving, and finishing." These items were beyond the scope of the reference and must be disallowed. The defendants also attacked the allowance by the Master of $3,376 for drilling and blasting. Upon the evidence, this item should be reduced by $818.24, leaving a balance of $2,557.76. The Master allowed $1,500 in respect of the counterclaim, and this, the defendants contended, was inadequate Upon the evidence, the learned Judge was of opinion that it should be increased to $2,500. Having regard to these conclusions, the balance due to the plaintiff should be reduced to $3,518.59, and the defendants should have the costs of the appeal. A. M. Stewart, for the defendants. E. G. Porter, K.C., for the plaintiff.

LOUBRIE v. GRAHAM—KELLY, J.—AUG. 8.

Principal and Agent—Agent's Commission on Sale of Goods—Action for—Evidence—Failure to Establish Claim.]—The plaintiff, carrying on business in Bordeaux, France, under the name and style of "Bureau de Courtage International," sued to recover commission at the rate of 3 per cent. on the sale by the defendants, manufacturers of food products in Belleville, Ontario, to the French Government or its representative of a large quantity of food supplies; or, in the alternative, a fair and reasonable remuneration for services alleged to have been rendered by the plaintiff as agent for the defendants. The action was tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, said, after reviewing the evidence, that he could not find that the sale made by the defendants was to a purchaser introduced by the agent, or that the defendants had improperly taken the benefit of the labour of the plaintiff, or that any wrongful act of theirs so interfered with his negotiations as to entitle him to remuneration. The plaintiff had not established his claim. Action dismissed with costs. E. G. Long, for the plaintiff. M. Wright, for the defendants.

POTOCHUKE v. FRIEDMAN—KELLY, J.—AUG. 13.

Contract — Rectification — Evidence — Onus — Specific Performance—Trust—Account.]—Action for rectification of an agreement, a declaration that the defendant Minnie Friedman held her interest in a certain property in trust for the plaintiff, for specific performance, an account, and other relief. The action was tried without a jury at Sault Ste. Marie. KELLY, J., in a written judgment, said that the dispute between the parties was on matters of fact only. One question was: Did the defendant A. Friedman agree with the plaintiff to purchase for him the property referred to in the pleadings, and did the plaintiff, therefore, become entitled to the property as Friedman purchased it? and the other was, whether the plaintiff bound himself to the defendants, or either of them, not to carry on certain lines of business on that property for 10 years, or for any other time. The evidence was conflicting. The onus was upon the plaintiff. The learned Judge found that the defendant A. Friedman agreed to purchase the property for the plaintiff, and that he agreed with the plaintiff that all that he, Friedman, was receiving out of the transaction was $200, which was intended to represent commission or remuneration for his services in making the purchase for the plaintiff. The plaintiff was entitled to an accounting on the basis of a purchase at $3,000