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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 6TH, 1920.

RE SOLICITORS.

Solicitors—Bill of Costs—Retainer—Findings of Taxing Officer—Evidence—Taxation—Costs of Appeals.

An appeal by Brownlee and others from an order of LOGIE, J., 18 O.W.N. 163, upon appeal from the taxation of a bill of costs of the solicitors.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL and SUTHERLAND, JJ., and FERGUSON, J.A.

T. J. Agar, for the appellants.

Grayson Smith, for the solicitors, respondents.

THE COURT varied the order of LOGIE, J., by declaring that the solicitors were entitled against the appellants to costs of the proceeding in respect of which the bill was rendered down to and including a certain motion in that proceeding in April, 1918, but to no subsequent costs. Reference back to the Taxing Officer with this declaration. No costs of this appeal nor of the appeal to LOGIE, J.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

*ELLIS v. HAMILTON STREET R.W. CO.

Street Railway—Injury to Passenger Alighting in Highway—Street Car Stopped at Point between Stopping Places at Street Intersections at Request of Passenger—Injury to Passenger by Passing Motor Vehicle—Municipal By-Law—Motor Vehicles Act, sec. 15—Negligence—Findings of Jury—Absence of Evidence to Support.

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

An appeal by the defendant company from the judgment of KELLY, J., 47 O.L.R. 526, 18 O.W.N. 226.

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

G. Lynch-Staunton, K.C., and C. Gibson, for the appellant company.

M. J. O'Reilly, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, after setting out the facts, said that the verdict and judgment appeared to have been based upon the theory that there is more danger of a passenger alighting from a street car being injured by passing motor vehicles when the car is stopped at a place other than the regular stopping place; and, though there is no law to prevent the street car being stopped at such a place, that the street railway company owes the alighting passenger a greater duty to protect him or her against injury from passing vehicles than it owes where the stop is made at a regular stopping place.

This was not the case of a street car being stopped at a place selected by the motorman or conductor, coupled with an express or implied invitation to alight. The selection was made by the plaintiff—she was responsible for the making of the stop between two street intersections.

Neither the Motor Vehicles Act nor the municipal by-law made it unlawful to stop at any place other than the regular stopping place, and there is nothing in the Act that makes the obligation or duty of the driver of an automobile less when the street car is stopped at a point other than the regular stopping place.

Reference to Hay v. Canadian Pacific R.W. Co. (1919), 58 Can. S.C.R. 283; Wallace v. Employers' Liability Assurance Corporation (1912), 26 O.L.R. 10; Oddy v. West End Street R.W. Co. (1901), 178 Mass. 341.

There was no evidence to support the jury's finding of negligence.

The appeal should be allowed with costs and the action be dismissed with costs.

MEREDITH, C.J.O., in a short written judgment, said that he agreed entirely with Ferguson, J.A. It was the respondent who selected the place where the car was to be stopped; and, if she thought the place where it was stopped was the regular stopping place at the next street intersection, the motorman was not informed of and did not know what was in her mind. The learned Chief Justice said that he would be sorry to decide anything which

would deter a motorman who finds that a passenger has not got off the car at the stopping place at which he intended to alight, and is asked by the passenger, when the car has gone but a few feet beyond the stopping place, to let him get off, from complying with that request. To declare the law to be what the respondent contended it was, would have that effect.

MAGEE, J.A., agreed with FERGUSON, J.A.

HODGINS, J.A., also agreed with FERGUSON, J.A., upon the facts appearing in this case. He said that he regarded the stoppage of a street car, apart from statutory regulation or by-law, in the same way as the stoppage upon the highway of any other vehicle carrying passengers for the purpose of discharging them. There might be circumstances, however, arising out of the traffic, the dangers at a particular point of stoppage, the condition of the passenger, or other causes, which might cast a duty on the driver greater than that which arose in this case. In allowing the appeal the Court was not laying down any absolute rule which would exclude, in each case as it might arise, considerations such as those pointed out.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

McDONALD v. BROWN.

Land — Possession — Acts Amounting to — Enclosure — Fences — Evidence—Acquisition by Length of Adverse Possession of Right against True Owner—Right against Trespasser—Injunction—Damages.

An appeal by the plaintiffs from the judgment of the County Court of the County of Frontenac dismissing with costs an action for an injunction and damages in respect of the defendant's interference with traps set by the plaintiffs to catch muskrats, and in favour of the defendant on his counterclaim, restraining the plaintiffs from trespassing on the defendant's land and for $75 damages and costs.

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

T. S. Elmore and A. Shea, for the appellants.

W. F. Nickle, K.C., for the defendant, respondent.

FERGUSON, J.A., in a written judgment, said that the question for the Court was: "Had the defendant possession of the disputed lands at the time the plaintiffs entered and set their traps?"

Reference to Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 288; Davis v. Henderson (1869), 29 U.C.R. 344, 353, 354, 355; Jackson v. Cumming (1917), 12 O.W.N. 278; M. J. O'Brien Limited v. LaRose Mines Limited (1920), 18 O.W.N. 337; McCannel v. Hill (1920), 18 O.W.N. 343.

Applying the law laid down in these cases, the answer to the question must be given by determining whether there was evidence to support the findings of fact of the trial Judge. After a careful consideration of each of the findings, with the evidence, the learned Justice of Appeal was of opinion that all were justified and in accordance with the evidence.

The argument of the appellants' counsel was not directed so much to an attack upon the findings as to the question whether they were sufficient to support the conclusion that the defendant was in possession. The contention was that the finding as to the fence dividing the east half from the disputed land did not establish an enclosure of the disputed land, and was insufficient to support a finding of possession. According to the authorities, enclosure is not necessary to establish possession. The fence was sufficient to enclose that part of the land which was dry and fit for pasture, and it was some evidence of an intention to possess and of possession of the part not enclosed thereby, and that piece of evidence must be considered in the light of the other evidence. Taking all the acts of the defendant together, they seemed to afford ample evidence to establish that the defendant, being in actual occupation of part of the lot, used the part not actually enclosed in the same manner as it would have been used and enjoyed had he been, as he thought he was, the actual owner; that these acts of user were done in the assertion of a right of ownership and possession, in the bona fide belief that he had acquired title to the lands, and were not mere acts of trespass.

The appeal should be dismissed with costs.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A., read a dissenting judgment. He was of opinion that the acts of the defendant did not amount to adverse possession of the land in question so as to give him title as against the true owner.

Appeal dismissed (MAGEE, J.A., *dissenting*).

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

MORLEY v. LEWIS.

Husband and Wife—Alienation of Wife's Affections—Action for—Evidence—Verdict of Jury—Damages—Judge's Charge.

An appeal by the defendant from the judgment of LATCHFORD, J., in favour of the plaintiff, upon the verdict of the jury at the trial, for the recovery of $800 damages and taxed costs, in an action for alienation of the affections of the plaintiff's wife.

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

P.H. Bartlett, for the appellant.

G. H. Weekes, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the defendant appealed on the ground that there was no evidence to go to the jury or that the evidence did not support the finding.

That the defendant did pay unusual attentions to the plaintiff's wife was beyound controversy. Whether such attentions were prompted by proper or improper motives was a question for the jury. The weight of evidence was that the affections of the plaintiff's wife had been alienated from her husband. Whether such alienation was the result of the defendant's attentions or the result of the husband's neglect and improper conduct was also a question for the jury.

The trial Judge directed the jury as follows:—

"It is said that the defendant was of a generous disposition, supposed to be assisting this family out of the goodness of his heart. On the other hand, it is said that he was doing it because he wanted to win the affection of the plaintiff's wife, to which the plaintiff as a matter of law is entitled. Did the defendant do that? That is the point for you to determine, first and last, except as to the matter of damages. Did this defendant alienate from the plaintiff the affection of the plaintiff's wife? If the defendant did not, then you should find in favour of the defendant. If he did, then you should find a verdict for the plaintiff—and ask yourselves then, how much should we award to the plaintiff? Those are the only two questions for you to determine. The damages will be what you, in your judgment as men sworn to find a verdict upon this evidence, think are proper and reasonable in the circumstances. If you think the plaintiff is entitled to succeed, I cannot assist you in fixing any amount as damages; that is a matter which lies in your discretion and judgment."

The charge was not objected to.

Not only was there evidence to go to the jury, but there was also evidence to support their finding.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

VETERANS MANUFACTURING AND SUPPLY CO. v. HARRIS.

Landlord and Tenant—Tenant's Fixtures—Wiring Affixed to Freehold—Tenanacy Expiring on Fixed Date—Wiring Remaining on Premises after Expiry—Property of Landlord.

Appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiffs in an action to recover $461.02 for wiring installed by the plaintiffs on the premises of the defendant and for damages for the wrongful use thereof by the defendant. The action was tried by WARD, Co. C.J., who gave judgment for the plaintiffs for $150 with interest and costs.

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

G. H. Gilday, for the appellant.

G. R. Forneret, for the plaintiffs, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiffs had been awarded the value of electric wiring which they, while tenants of the defendant's premises, had erected and strung thereon. The lease expired on the 31st July, 1919. At that time the rent was in arrear, and the landlady refused to permit the tenants to remove their machinery until the rent was paid. The plaintiffs vacated the premises and delivered up possession, it being arranged that the machinery should be moved into a room on the demised premises and there stored for a short period, so that the tenants might have an opportunity of raising and paying the rent. It was further agreed that the tenants should pay a storage-charge of $10. On the 3rd September, the tenants paid the rent and the storage-charge; and, according to the finding of the trial Judge, then sought to remove not only the machinery but the electric wiring. The landlady had, on the 1st September, demised the premises to a new tenant, and refused to allow the removal of the wiring. The learned trial Judge found that, in these circumstances, the tenants were entitled to remove the wiring, that the refusal to permit them to do so was wrongful, and that the plaintiffs were entitled to damages.

It was contended on behalf of the appellant: (1) that the wiring was so affixed to the freehold that it could not be removed without serious damage, and was a landlord's fixture and not a

tenant's fixture; (2) that, even if the wiring was a tenant's fixture, it could be severed from the freehold only during the term and not after the term had expired.

This was not the case of a tenancy at will, under which the tenants would have a reasonable time after the expiry of the term to remove their fixtures: Woodfall on Landlord and Tenant, 19th ed., p. 761; it was a tenancy for a definite term. The tenants allowed that term to expire without having exercised their right to reconvert this fixture into a chattel; and the tenants' fixture vested in the landlord immediately on the termination of the tenancy, especially so as the termination was followed by a taking of possession: Woodfall, p. 760.

The lease was made pursuant to the Short Forms of Leases Act, and provided that the tenant might remove his fixtures at or prior to the expiration of the term. The trial Judge did not find any other or new agreement in reference to the wiring, and the evidence would not justify such a finding.

The appeal should be allowed with costs and the action be dismissed with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

FISHER v. FISHER.

Deed—Action for Recovery of Land—Defence that Son in Possession under Conveyance from Father (Plaintiff)—Evidence of Father—Conveyance to Wife of Son—Delivery—Subsequent Destruction—Absence of Registration—Addition at Trial of Son's Wife as Defendant — Counterclaim — Judgment Declaring Added Defendant True Owner—Appeal—Application for New Trial—Surprise—Evidence as to Contents of Destroyed Deed—Right of Son's Wife to Appear and Defend without being Made a Party—Rule 53—Duty of Court to Determine all Matters in Controversy—Rule 134—Direction for Taking Further Evidence—Costs.

An appeal by the plaintiffs from the judgment of LOGIE, J., in an action to recover possession of land. At the trial Xenia Fisher was added as a defendant, and by the judgment it was declared that she was the owner of the land in question and entitled to possession; the conveyance by the plaintiff Carl E. Fisher to his co-plaintiff Emilie Fisher was set aside; the action was dismissed with costs; and the counterclaim of Xenia Fisher allowed without costs.

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

W. N. Tilley, K.C., and A. Courtney Kingstone, for the appellants.

G. Lynch-Staunton, K.C., and T. F. Battle, for the defendants, respondents.

MEREDITH, C.J.O., read a judgment in which he said that the action as launched was for possession of land, and the only defendant was H. St. Leger Fisher, the husband of the added defendant Xenia Fisher. The defence was that H. St. Leger Fisher was the owner of the land, claiming title by conveyance from the plaintiff Carl E. Fisher (his father), and an oral agreement with the latter was set up, the effect of which, it was alleged, was to entitle H. St. Leger Fisher in equity to the land, and title by length of possession was also set up. This defendant counterclaimed for a declaration that he was the owner of the land and to have a conveyance made by Carl E. Fisher to his co-plaintiff set aside and ordered to be delivered up to be cancelled and the registration of it vacated.

At the trial the defendant failed to establish his defence and his counterclaim. The plaintiff Carl E. Fisher, however, testified that he made a conveyance to Xenia Fisher, the wife of H. St. Leger, and the trial Judge directed that she be added as a defendant; nothing was said about adding her as a plaintiff by counterclaim, and no amendment of the pleadings was then made. The trial Judge apparently understood that Xenia was added as a plaintiff by counterclaim, for he "allowed her counterclaim."

The plaintiffs, upon their appeal, asked for a new trial, and in support of the application filed an affidavit of Carl E. Fisher in which he said that he had refreshed his memory and was positive that the defendant and his wife never saw the deed which he had made to the latter; this deed, he said, had never been delivered; and he was positive that he had no conversation with the defendants, as they swore, in which he said that he would hold the property in trust for H. St. Leger. The finding of the trial Judge was that the conveyance to Xenia was an effectual conveyance to her—that there had been what in law constituted a delivery of it to her by Carl, her father-in-law.

It was now argued for the appellants that the case made by the amendment was a different one from that which the parties came down to try; that the amendment should not have been allowed, and that no application to add Xenia as a plaintiff by counterclaim was made; and a new trial was asked for on the ground of surprise; and Carl now alleged that the conveyance was subject to a life-estate in himself and to certain burdens and charges, which he set out—the deed itself having, as he swore, been destroyed.

The learned Chief Justice could not understand why the trial was allowed to proceed and judgment to be given on the assumption that the conveyance which had been executed was an absolute conveyance in fee simple, if, as now alleged, it contained the other provisions.

There was no ground for questioning the proprierty of allowing the amendment. Xenia Fisher was a proper party defendant to the action. If the conveyance to her which Carl had executed was effectual to convey the land to her—assuming it to have been an absolute conveyance—she was entitled to the possession of it. And, although not named as a defendant, she was entitled to appear and defend an action for the recovery of land: Rule 53. Under Rule 134, it was proper not only to add her as a defendant but also to permit her to counterclaim for the relief which her husband had sought—on proper terms, if the appellants sought to have terms imposed.

The issue raised by the defence was that Xenia, and not the appellants, was the owner and entitled to possession of the land; and, if that issue be decided in her favour, the relief claimed by the counterclaim would be unnecessary, because the appellants would be concluded by the judgment from denying the wife's title to the land—the rights of the parties would be finally determined by the judgment in the action. No declaration such as asked by the counterclaim was necessary.

Xenia Fisher having been properly added, she was entitled to invoke the provisions of sec. 16 (*h*) of the Judicature Act, and it was the duty of the Court to determine all matters in controversy and avoid all multiplicity of proceedings.

The matter in controversy in the action, after Xenia was made a defendant, was the right to possession as between the appellants and her, she claiming to be the absolute owner of it.

If, as had been found, the conveyance to the wife was delivered, and by it she became the absolute owner of the land, no advantage would be gained by sending the case down to be tried again. The application for a new trial to enable Carl to correct or supplement the evidence which he gave at the trial with regard to the delivery of the conveyance should be refused. His testimony fully supported the finding of the trial Judge, and the judgment was based upon his testimony.

But the application for a new trial in order to shew the nature of the conveyance to Xenia should be granted. There was the uncontradicted evidence of Carl as to the form which the conveyance took, and there was the admission by H. St. Leger Fisher that it was arranged that Carl was to retain a life-estate; and counsel for the respondents conceded that the land was to be taken

subject to the incumbrances on it. According to the judgment at the trial, Carl loses his life-estate, and the incumbrances must be discharged by him, instead of being borne by the grantee.

In these circumstances, it would be unjust that the judgment should stand in its present form. Further evidence should be taken by Logie, J., upon the simple question, "What were the provisions of the conveyance to Xenia?" After that evidence had been taken, the case might be spoken to.

The appellants should pay the costs of the hearing of the appeal and of the taking of the further evidence, forthwith after taxation.

A contention was put forward, by a memorandum submitted by the appellants' counsel, since the hearing of the appeal, that the conveyance to the appellant Emilie Fisher, having been registered, had priority over the conveyance to Xenia; that Emilie had no notice of the latter conveyance, and that that conveyance was a voluntary one, and registration was necessary to make it binding. This was not raised in the pleadings nor in the argument of the appeal, and the appellants should not be permitted now to raise it. If, as no doubt was the fact, Xenia, by the conveyance to her, assumed the burden of the incumbrances, she was not a volunteer but a purchaser for value.

MAGEE and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A., was of opinion, for reasons stated in writing, that the appellants should be allowed to raise any and all defences they could have raised and give such further evidence as they could have submitted at the former trial had the amendment been made at a reasonable time before the trial and not after the conclusion of the evidence.

Order as stated by the Chief Justice.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

CHARTERED TRUST AND EXECUTOR CO. v. MILBURN.

County Courts—Jurisdiction—Claim for $1,000—County Courts Act, sec. 22 (2)—Objection not Taken until after Judgment——Agent's Commission on Sale of Land—Commission Agreement—Revocation—Finding of Trial Judge—Appeal.

Appeal by the defendant from the judgment of the County Court of the County of York (WARD, Co. C.J.) in favour of the plaintiff company for the recovery of $1,250 in an action for a broker's commission upon the sale of land for the defendant.

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

C. B. Henderson, for the appellant.

F. J. Hughes, for the plaintiff company, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the appellant contended that the amount awarded was beyond the jurisdiction of the County Court. The plaintiff, by the endorsement of the writ of summons, claimed $1,000, and the defendant did not dispute the jurisdiction: County Courts Act, R.S.O. 1914 ch. 59, sec. 22 (2). On the hearing of the appeal the Court held that sec. 22 (2) prohibited the raising of the objection at this stage of the proceedings.

The appellant also contended that the commission agreement had been terminated before the sale on which commission was claimed. The result of the appeal turned on the answer to the question: "Was the agreement to pay commission, embodied in exhibit 1, abandoned, revoked, or otherwise terminated prior to the exchange stipulated for in exhibit 2?"

The trial Judge said: "I find upon the evidence that there was no revocation of the agreement, and that the plaintiff continued to act for the defendant under this agreement until the exchange was carried out, as shewn in exhibit 2."

Upon the evidence, this finding could not be disturbed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1920.

*PETERSON v. BITZER.

Contract—Agreement for Sale of Land (House Property)—Formation of Contract—Completed Bargain—Finding of Trial Judge—Appeal—Receipt—Cheque—Statute of Frauds—Description of Property by Street and Number—Purchase-price—Statement of—Terms of Payment—Mortgage for Part of Price—Implication as to Property upon which Mortgage to be Given—Interest—Rate of—Silence of Documents—Specific Performance Refused.

An appeal by the defendant from the judgment of MASTEN, J., 18 O.W.N. 251.

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

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

V. H. Hattin, for the plaintiff, respondent.

MAGEE, J.A., in a written judgment, said that the defendant appealed from a judgment directing specific performance by her of an alleged agreement by her to sell a house and lot in Kitchener to the plaintiff. Two grounds of defence were set up: (1) that there was not in fact a complete and certain bargain; and (2) that there was no writing sufficient to bind the defendant under the Statute of Frauds.

The parties had in December, 1919, orally agreed upon $3,800 as the price for the land, if sold; the sale, if made, would be closed and possession given on the 1st May, 1920. The price was not to be paid in cash, but part of it was to be paid at some time not later than 5 years, but in how many payments and when was not discussed; and, although the parties contemplated that interest would be payable at some rate, the rate of interest was not arrived at or mentioned between them.

The property adjoined other land of the defendant, and a roadway over the adjoining property led to it, and was in fact used with it, but was not a way of necessity, and by reason of the common ownership it had not the character of an easement. The way was dealt with in the oral arrangement, but the defendant had by the judgment been ordered to convey a right to it.

The defendant asserted that, even apart from these questions, no final oral agreement was arrived at, but only a provisional basis of sale if she finally decided to sell. This, however, had been found against her by the trial Judge, on the disputed evidence, and his finding must be accepted.

The property was at the time subject to a mortgage for about $2,000.

Under the Statute of Frauds the action does not lie against the defendant unless the agreement or some memorandum or note thereof be in writing and signed by her. The only writing of any sort signed by her was a receipt, reading: "Kitchener, Ont., December 29th, 1919. Received from Clayton Peterson the sum of $100 on deposit for house No. 62 St. George Street—$1,400 payable 1st May, 1920, and balance of $2,300 on five year mortgage. Adeline Bitzer."

At the time she gave this receipt, and as payment of the sum thereby acknowledged to be received, the plaintiff's cheque of the same date was given to her, reading: "Pay to the order of Mrs. Adeline Bitzer ($100) one hundred dollars, deposit on 62 St. George Street at purchase-price of $3,800—$1,400 payable on May 1st, 1920, and assume a 5 yr. mtg. of $2,300. C. Peterson."

This cheque was not cashed, used, or endorsed by the defendant, and was subsequently sent back to the plaintiff with a letter from her son declining to make a sale. The letter was written with her authority, but of course not by an agent authorised to contract, as it was a refusal to sell.

The question was, whether these writings were sufficient to bind the defendant under the statute.

It is well recognised in cases under the statute that if in a writing signed by the party to be charged reference is made to another, or to a subject-matter, parol evidence to identify what is referred to, so as to connect the two, is admissible. Here the receipt was for $100. The receipt and cheque could be read together.

But without the cheque the receipt itself would be a sufficient memorandum—apart from the question of its correct representation of the true understanding of the parties. And the cheque only threw difficulties in the plaintiff's way.

The receipt shewed that something was to be paid for a house at No. 62 St. George Street: $100 is a "deposit;" $1,400 is "payable" on the 1st May, 1920; and how much the total is, is indicated by the "balance" being $2,300—and that balance is to be on a 5-year mortgage. If the parties had agreed and the receipt had stated that it was to be on a mortgage payable in 5 years or in 5 yearly instalments with interest yearly at 6 per cent. per annum—that would be not a complete contract but a sufficient memorandum of the complete contract—sufficiently indicating its terms to enable the Court to enforce it. No ordinary person would dream and the Court should not assume that the $1,400 "on mortgage" could mean "by a mortgage" on other property. The memorandum then would imply that a mortgage was to be given, which implies a conveyance, which the purchaser would be entitled to when the purchase-money other than the mortgage is given along with the mortgage, that is to say, the purchaser would be entitled to give both on the 1st May, 1920, and the conveyance implies possession at the same time. No mention is made of the existing mortgage for $2,000, but that the vendor would be bound to remove.

The cheque would not in this view add anything to the value of the receipt except the words "purchase-price" of $3,800. It gives no more indication than the receipt that C. Peterson is the purchaser, and it renders the whole written transaction of less value, by adding the untrue words "assume a 5-year mortgage of $2,300." The existing mortgage, even if to be assumed, was only $2,000—and thus the cheque makes no provision for the other $300, and only adds confusion by shewing that the existing mortgage is to be assumed, instead of being removed by the vendor, as would be called for by the receipt. The two documents, therefore, on which the plaintiff relied were contradictory.

But these parties never really made a definite bargain. They had not decided how the mortgage-money would be payable, nor what rate of interest would be called for—though both intended

interest. It would be a gross fraud upon the defendant to say she should get no interest. It would be only less unfair to say she should only get the legal rate of 5 per cent., when neither she nor the other side contemplated leaving it to the law or doing otherwise than make their own bargain if they could, or part if they could not. It was simply an uncompleted bargain in respect of two very important matters which the parties on both sides intended at the time to settle for themselves, but did not. Specific performance should not be granted so as to force upon either party a bargain which was not contemplated by either.

The appeal should be allowed.

HODGINS and FERGUSON, JJ.A., agreed that the appeal should be allowed, each giving written reasons.

MEREDITH, C.J.O., read a dissenting judgment.

Appeal allowed (MEREDITH, C.J.O., *dissenting*).

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. DECEMBER 6TH, 1920.

RE TUTTLE.

Infant—Custody—Right of Father—Adoption Agreement—Discretion—Welfare of Infant.

Motion by the father of the infant Ruth Tuttle for an order awarding the applicant the custody of the infant.

T. F. Slattery, for the applicant.
T. N. Phelan, for Edith Stoops, the respondent.

LENNOX, J., in a written judgment, said that the affidavits were conflicting. The applicant was prima facie entitled to the custody of his child. He entered into an agreement committing her to the custody and guardianship of Edith Stoops. That was not an insuperable objection to his regaining the custody of the child if her welfare demanded it.

The learned Judge was, however, of opinion that he could not make an order, on this application, for the removal of the child, not because he regarded her present surroundings as fitting, but

because the evil that had been done could not be undone, and he was not satisfied that the alternative offered would work an improvement.

The application should be dismissed. The father, although he could not place the child in his own home, while conditions remained as they were, might not be without remedy. A father is not deprived of the right to say something as to where his child shall live merely because he cannot house and care for her in his own home.

Motion dismissed without costs.

KELLY, J. DECEMBER 7TH, 1920.

RE RYDING AND GLOVER.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Covenant—Building Restriction—Change in Character of Locality—Conveyances to Uses—Grantee's Right to Convey Free from Dower—Description of Land—Sufficiency—Immaterial Mistake.

Application by a vendor of land, under the Vendors and Purchasers Act, for an order determining the validity of objections made by the purchaser to the title.

The application was heard in the Weekly Court, Toronto.

W. A. McMaster, for the vendor.

H. F. Parkinson, for the purchaser.

KELLY, J., in a written judgment, said that the first objection was based on the existence of a covenant in a conveyance in 1911 of part of the lands, restricting the buildings thereon for a limited number of years to a dwelling house to cost not less than $800. The uncontradicted evidence was that already a store had been erected on this land; that to both east and west of it were other stores; that considerably more than one-half of all the property within 200 feet on each side was already built upon; that every building within the 200 feet area was store property; that St. Clair avenue (on which this property was situated) was, in the vicinity of this property, a business street. The character of the locality had changed, and it was now suited for business purposes. In these conditions Sobey v. Sainsbury, [1913] 2 Ch. 513, applied; and this objection by the purchaser could not be upheld.

The second objection was that in 4 conveyances to one George E. Davies the grant was to him upon certain uses. The purchaser contended that the form of these grants did not enable the grantee to convey free from dower without the consent of his wife. Each of these conveyances was in such form as to enable the grantee, by a proper document to that end, to appoint in favour of another or others. It was stated that he already had made a conveyance or appointment, but the document itself was not produced; and the learned Judge was not in a position and was not required to pass upon its sufficiency. The objection raised by the purchaser to the form of these conveyances to uses was not well taken.

The third objection arose from a mistake in the description in an earlier conveyance. On perusing this description, the mistake was obvious; the rest of the description sufficiently identified the land intended to be conveyed; and, in that view, the description, even with the obvious mistake, was sufficient.

Costs were not mentioned on the application, and the learned Judge assumed that they were not asked.

LATCHFORD, J. DECEMBER 9TH, 1920.

TORONTO GENERAL TRUSTS CORPORATION v. ARENA GARDENS LIMITED.

Receiver—Order Appointing Receiver on Behalf of Bondholders of Company—Application by Judgment Creditors of Company to Set aside—Applicants not Prejudiced as Creditors—Insolvency—Payment of Interest on Bonds—Intention to Cease Carrying on Business.

Motion on behalf of the Toronto Hockey Club, judgment creditors of the defendants, for an order setting aside the order made in this action on the 20th November, 1920, whereby Charles E. Robin, an officer of the plaintiff corporation, was appointed receiver on behalf of the bondholders of the defendants entitled to the benefits of a certain indenture made between the defendants and the plaintiffs, dated the 2nd March, 1912, and an amending indenture dated the 19th July, 1917, of all the undertaking and all the assets, real and personal, of the defendants comprised in or subject to the security or charge collated by such indentures.

The motion was heard in the Weekly Court, Toronto.

W. R. Smyth, K.C., and W. J. Boland, for the applicants.
E. G. Long, for the plaintiffs.
A. C. McMaster, for the bondholders.

LATCHFORD, J., in a written judgment, said that, assuming that the applicants were parties affected by the order—a point upon which he expressed no definite opinion—the application must fail.

The grounds of the application were:—

(a) That the indenture of the 2nd March, 1912, as amended, did not cover the chattel property of the defendants.

(b) That no copy of the indenture was filed pursuant to the Bills of Sale and Chattel Mortgage Act.

(c) That the defendants were not in arrears in payment of any instalment of interest to the plaintiffs.

(d) That the defendants were solvent and had not done or permitted to be done any act constituting a failure on their part to carry on business.

With reference to (a) and (b) it might become a question to be determined by an interpleader issue between the judgment creditors and the defendants whether the chattel property of the defendants passed to the plaintiffs under the indentures mentioned and whether the indentures were required to be filed by the Act respecting Bills of Sale and Chattel Mortgages. The applicants were creditors of the defendants to the amount of about $24,000 under one judgment, and to an unstated amount, as to which a reference had been directed, under another judgment—the claim under the latter was stated to be $100,000. It was obvious, however, from the evidence, that the motion was made, not in the applicants' interest as judgment creditors, but in their interest as lessees of the arena during the hockey season of 1920-21, under an agreement alleged to have been made with the managing director of the defendants.

From the financial statement in evidence it was plain that the defendants were not in a position to pay their debts in full, though they could probably pay or arrange to pay the applicants the amount due under the judgment so far as ascertained.

The defendants were in arrears for the interest due on the bonds for $300,000 held by the trusts corporation in 4 half-yearly gales, the last falling due in March, 1919, but by arrangement with the bondholders certificates were accepted by them in lieu of the cash which the defendants were unable to pay.

The trusts corporation were notified by Mr. Lyell, one of the bondholders and a director in the defendant company, that the company intended to cease to carry on business as a going concern, "owing to its financial position," and for other reasons not stated.

It might be that Mr. Lyell did not mean that the arena should not be utilised during the present winter. However that might be, the trusts corporation were justified in applying for the appointment of a receiver.

If the applicants held a valid contract for the use of the arena during the approaching season, it would, no doubt, subsist as against the receiver just as it would if a receiver had not been appointed. As creditors, the applicants were in no way prejudiced.

The motion should be dismissed with costs.

LATCHFORD, J. DECEMBER 10TH, 1920.

RE MURRAY.

Church—Legacy for Benefit of—Amalgamation of Congregation with that of another Church—Transfer of Security Representing Legacy to Trustees of Amalgamated Bodies.

Application by the National Trust Company, as executors and trustees under the will of James Murray, deceased, for an order determining whether the company would be justified in assigning a certain mortgage for $4,000, held in trust by the deceased for Erskine Church, to P.M. Macdonald, or to the managing board of St. Paul's Presbyterian Church, of which he was pastor.

The motion was heard in the Weekly Court, Toronto.
J. A. Paterson, K.C., for the executors.
W. G. Thurston, K.C., for the executors of Ann Jane McBurney.
R. B. Beaumont, for the McBurneys.
George Wilkie, for St. Paul's and Erskine Churches.

LATCHFORD, J., in a written judgment, said that the late Ann Jane McBurney bequeathed part of the residue of her estate, amounting to $2,687.07, to the pastor for the time being of Erskine Presbyterian Church in Toronto, to be applied by him for the general purposes of the church, as to him might seem best for advancing the principles and work of the said church.

The legacy was paid to Dr. Murray, and, with other funds, including another legacy of $1,000 given to the church, was invested by Dr. Murray in the mortgage referred to.

In April, 1915, before the mortgage investment was made, the congregation of Erskine Church united with that of St. Paul's, and thereafter ceased to exist as a separate entity, but the church

edifice remained undisposed of until June, 1918. In the meantime many expenditures, such as heating, caretaking, etc., were made by Dr. Murray out of the funds in his hands.

After the amalgamation, the name "Erskine Church," as applied to the congregation, was dropped, and the united churches became known as St. Paul's.

It was urged on behalf of certain of the heirs or residuary devisees of Ann Jane McBurney that, as Erskine Church ceased to exist after the merger of 1915 or the sale of 1918, so much of the legacy as was unexpended by Dr. Murray for the church as a worshipping body or as a building reverted to the estate.

It was said that a personal trust was created by the will and that that trust had failed.

Such a contention might prevail if the legacy had not been paid; but, in the circumstances of this case, it had no value.

The two legacies received by Dr. Murray were applied by him during his lifetime strictly for the purposes designated. Even if he had not so used them, it would not be open to the heirs or devisees to question his administration of the funds. That was a matter affecting his *cestuis que trust*. The worshipping body of Erskine Church existed in St. Paul's, and the mortgage might be transferred to the pastor or managing board of that church.

No order as to costs.

LATCHFORD, J. DECEMBER 10TH, 1920.

BRENNER v. AMERICAN METAL CO.

Bankruptcy and Insolvency—Assignment to Authorised Trustee under Bankruptcy Act, 1919—Effect of—Sec. 10—"Property" —Sec. 2 (dd)—Causes of Action—Action for Breach of Contract —Leave to Assignee to Proceed with Action Begun before Assignment—Con. Rule 300.

Application by the plaintiff for an order that Osler Wade, an authorised trustee under the Bankruptcy Act, be permitted to proceed with this action, which was begun on the 6th November, 1920.

The application was heard in the Weekly Court, Toronto.

H. H. Shaver, for the plaintiff.

G. R. Munnoch, for the defendants.

LATCHFORD, J., in a written judgment, said that, when the plaintiff assigned on the 10th November, 1920, the action became defective. It was not a personal action, but one founded on an alleged breach of contract.

By sec. 10 of the Bankruptcy Act, 1919, the assignment, being in proper form, vested in the trustee all the property of the assignor.

By sec. 2 (*dd*), "property" includes "things in action . . . and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property as above defined."

Under a similar provision and definition in the English Bankruptcy Act, it has been held that as a rule all the bankrupt's causes of action vest in the trustee. The exceptions are claims in respect of personal torts to the bankrupt and claims in respect of injuries to his reputation: Yearly Practice, 1920, p. 221.

The present action does not fall within the exceptions stated, and the order authorising Mr. Wade to proceed should be made: Rule 300 (Supreme Court of Ontario, 1913).

The time for appearance, or such other course as the defendants may be advised to take, should be extended from the 13th to the 20th December.

Costs in the cause.

LENNOX, J. DECEMBER 11TH, 1920.

CHARTERED TRUST AND EXECUTOR CO. v. WYCOTT.

Deed—Voluntary Conveyance of Grantor's whole Property—Action by Administrators of Estate of Grantor to Set aside—Evidence—Improvidence—Absence of Independent Advice—Fraudulent Device to Protect Property from Incidence of Costs of Pending Litigation—Public Policy—Grantor not Entitled to Assistance of Court to Get back Property—Representatives and Heirs in no Better Position—Impossibility of Setting aside for Improvidence.

Action by the administrators of the estate of Emma Wycott, deceased, to set aside a deed of lands in the town of Picton and in the township of Hallowell, made by the deceased, a spinster, to her sister-in-law, Ethelwyn Wycott, one of the defendants.

The action was tried without a jury at Picton.

J. M. Ferguson, for the plaintiffs.

Gideon Grant, for the defendants.

LENNOX, J., in a written judgment, said that the deed was dated the 7th December, 1918, and registered on the 28th February, 1919. The grantor, at the date of the deed and when it was registered, was living with the defendant Ethelwyn and her co-defendant, Charles Wycott, a brother of the grantor, and she continued to make their house her home until her death on the 27th October, 1919.

The learned Judge, after a discussion of the evidence, said that the onus was on the defendants to establish that the grantor was not unduly influenced in making an improvident disposition of what was at the time practically all she possessed, and that the gift was the voluntary and deliberate act of a person mentally competent to know, and that she did in fact know, the nature and effect of her act. The learned Judge was of opinion that Emma Wycott, as well with regard to her ability or inability to understand and appreciate the nature and effect of what she was doing, as with reference to the situation in which she was at the date in question, was peculiarly in need of careful, competent, and independent assistance and advice; that she had not competent and independent professional assistance and advice in the making of the deed in question; and that, if it was an honest transaction on her part, the deed ought not to be allowed to stand.

The learned Judge said, however, that the evidence, coupled with all the surrounding circumstances, made it impossible for him to escape from the conclusion that one of the purposes of the grantor in making the deed was to protect herself and the property which she conveyed by it from liability for the costs of a certain litigation which was pending. It was possible, but seemed improbable, that there was some other purpose combined with this in the mind of the grantor, but that made no difference. If the design of the grantor in vesting the property in the defendant Ethelwyn Wycott was fraudulent and contrary to public policy, and the transaction was a completed one, she could not in her lifetime have obtained the assistance of the Court to get it back; and her personal representatives and heirs were in no better position. How could they, as volunteers, claim a right she had forfeited by offending against public policy?

And, if the execution of the deed was a fraudulent device, it could not be set aside on the ground of improvidence, or of want of understanding, or of lack of competent advice and proper warning.

Action dismissed without costs.

MASON & RISCH LIMITED v. BURNETT—KELLY, J.—DEC. 6.

Appeal—Report of Local Judge—Findings—Evidence.]—An appeal by the defendant from the report of a Local Judge. The appeal was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the Local Judge had set out facts which, if substantiated, entitled the plaintiffs to succeed. A careful perusal of the material satisfied the learned Judge sitting in appeal that the evidence was quite sufficient to support the findings, and there was no reason for interfering—in fact ample reasons for upholding the report were apparent. The appeal should be dismissed with costs. L. C. Raymond, K.C., for the appellant. H. F. Upper, for the plaintiffs, respondents.

WHYTE v. TOWNSHIP OF TISDALE—LENNOX, J.—DEC. 11.

Appeal — Referee's Report — Evidence — Interest—Costs.] — An appeal by the Municipal Corporation of the Township of Tisdale, the defendants, from the report of the Judge of the District Court of the District of Temiskaming, finding that the plaintiff was entitled to judgment against the defendants for $750, with interest thereon at 5 per cent. per annum from the 20th June, 1912. The appeal was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that the conclusion reached by the Referee was right, and that the plaintiff was entitled to recover the $750 and interest thereon. The appeal should be dismissed with costs, and judgment should be entered for the plaintiff accordingly and for the costs of the action, the reference, and this appeal. McGregor Young, K.C., for the appellants. J. M. Ferguson, for the plaintiff, respondent.

GATTO v. WILLIS—LENNOX, J.—DEC. 11.

Damages—Assessment of, upon Judgment by Default—Breach of Contract to Purchase Land—Possession Taken by Purchaser—Rental Value—Plaintiffs Confined to Claim Made in Pleading—Costs of Obtaining Possession—Costs of Action.]—Action by Antonio Gatto and Agostino Concillo against Annie Willis to recover damages for the defendant's breach of an agreement to purchase land in the city of Toronto. The defendant did not defend, and judgment was entered against her for default. The action came before LENNOX, J., for assessment of damages, at a Toronto sittings. LENNOX, J., in a written judgment, said that the plaintiff Concillo gave evidence and made a claim for the value of the premises during the time the plaintiffs were out of possession, 6 months, at $200 a month, $1,200, and costs of ejecting the defendant's tenant, $47.50. The defendant was not represented, and the learned Judge said that he must be alert to confine the plaintiffs to their strict legal rights. Recovering by default, the plaintiffs could get nothing outside of what was clearly set out in their statement of claim. Nothing was alleged about recovery of possession or costs, and there could be no judgment in respect of the $47.50 claimed at the trial for costs. It was alleged in the statement of claim that at the time the agreement was entered into the defendant was tenant of the premises at a rental of $60 a month; that John Christoff occupied the premises under her; and that the defendant had not paid rent subsequent to the 15th July, 1919. The agreement was entered into on the 24th July. The rental agreed upon would be a safer guide in determining the plaintiff's damages than what was sworn to as an estimate. The plaintiff Concillo did not swear that neither the defendant nor Christoff had paid anything by way of rent or in respect of occupation for the 6 months spoken of. An affidavit of one of the plaintiffs, clearing up this point, must be filed before judgment is entered. Subject to deduction of such sums, if any, as had been received, judgment should be entered for the plaintiffs for $360 with costs on the County Court scale and without set-off of costs. E. M. Dillon, for the plaintiffs.