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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 24TH, 1920.

*REX v. ZURA.

*REX v. OLLIKKILA.

Criminal Law—Having Prohibited Publications in Possession—Police Magistrate's Convictions—Motions to Quash—Publications in Enemy Language—Dominion Orders in Council—War Measures Act, 1914, sec. 6—"Prohibited Literature"—"Objectionable Matter"—Censorship—Refusal to Quash Convictions—Appeal—Amendment of Convictions.

Appeals by the defendants from the orders of HODGINS, J.A., in Chambers, 17 O.W.N. 163, 224, 226, 46 O.L.R. 382.

The appeals were heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, MASTEN, and ORDE, JJ.

J. G. O'Donoghue, for the appellants.

Peter White, K.C., and B. H. L. Symmes, for the Attorney-General.

THE COURT ordered that the convictions should be amended by limiting them to the offences charged in the informations, to which the defendants pleaded "guilty." Upon the convictions being so amended, the appeals should be dismissed without costs.

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

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

RANGER v. RANGER.

Marriage—Bigamous Marriage—Action for Declaration of Nullity—Jurisdiction of Supreme Court of Ontario—Marriage Act, R.S.O. 1914 ch. 148, secs. 36, 37.

Appeal by the plaintiff from the judgment of MIDDLETON, J., dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

T. F. Slattery, for the appellant.

A. C. Heighington, for the defendant, respondent.

MULOCK, C.J.Ex., reading the judgment of the Court, said that the action was brought for a declaration that the marriage solemnised between the parties was illegal, null, and void ab initio, and should be set aside.

The plaintiff alleged that on the 28th October, 1916, he and the defendant were married, and that he had since been informed, as the fact was, that the defendant was the lawful wife of John Mitchell, who was living at the date mentioned.

The action was dismissed in the absence of the plaintiff and his counsel; an application was made to MIDDLETON, J., to vacate the judgment; but he refused to do so.

The learned Chief Justice said that, if the plaintiff had no cause of action, no useful purpose would be served by sending the case back for trial; and, therefore, it was proper for the Court to determine whether or not the Court had jurisdiction to grant the relief asked.

The Marriage Act, R.S.O. 1914 ch 148, secs. 36 and 37, and amendments, purport to confer jurisdiction on the Supreme Court of Ontario to declare certain marriages invalid. Only so far as thus empowered has the Court jurisdiction to declare a marriage invalid. Even if the Legislature has power to do so, it has not seen fit to give or to purport to give to the Court jurisdiction to declare a bigamous marriage invalid. Therefore, the Court is powerless to grant the relief asked. It is unnecessary to express an opinion as to whether any of the provisions of the Act or amending Acts are or are not ultra vires.

The appeal should be dismissed with costs.

This disposition of the case does not interfere in any way with the plaintiff's right to proceed to have the defendant restrained from harassing him.

Appeal dismissed.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*BEST v. BEATTY.

*CALVERT v. BEATTY.

Trusts and Trustees—Assignment of Parts of Debt—Contract—Performance—Actions by Assignees—Necessity for Joining Assignor as Party—Rule 85—Addition of Assignor upon Appeal from Judgment Dismissing Action for Want of Parties—Consolidation of Actions—Costs—Trustee and Cestui que Trust—Claim to Set off Debt Due by Trustee in Personal Capacity—Assignment of Chose in Action.

Appeals by the plaintiffs from the judgments of HODGINS, J.A., the trial Judge, 17 O.W.N. 327.

The appeals were heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and MASTEN, JJ.

J. J. Gray, for the appellants.

W. J. McCallum, for the defendant, respondent.

MASTEN, J., read a judgment in which he said that the trial Judge dismissed the action on the ground that one Ash was a necessary party thereto.

Counsel for the appellants in opening the argument of the appeals said that he had failed to make his position clear at the trial; that he had never intended to withdraw from his offer to add Ash as a co-plaintiff; and he applied to this Court for an order making Ash a co-plaintiff, undertaking to file his consent, and representing him on the hearing of the appeals. Counsel for the defendant consented to the adding of Ash. An order was made accordingly, and the two actions were consolidated. This was all without prejudice to the plaintiff's right to contend, on the question of costs, that separate actions had been properly launched by the two plaintiffs.

The argument then proceeded upon what was admitted to have been throughout the real issue in controversy between the parties, namely, whether the defendant was entitled to deduct from the sum of $5,900, claimed by the plaintiffs, $857.06, being the amount of liabilities which he said he had paid in excess of what he had undertaken to pay. The issue was as to the right to set off against the $5,900 due by the defendant to Ash as trustee the overpayment made by the defendant on account of general liabilities, for repayment of which Ash was alleged to be personally

responsible. In other words, the defendant claimed to set off against a debt due to Ash as trustee a claim against him personally. But these were not mutual debts, and could not be set off either in law or in equity: Ambrose v. Fraser (1887), 14 O.R. 551.

The plaintiffs were, therefore, entitled to recover the full amount claimed without any set-off.

As to costs: if, as contended by their counsel, each of the plaintiffs was entitled to maintain his own action in his own name without adding Ash as a party, then the plaintiffs were entitled to their costs of the action throughout; but the learned Judge could not take that view.

Reference to Dunlop Pneumatic Tyre Co. v. Selfridge and Co. Limited, [1915] A.C. 847, 853; Faulkner v. Faulkner (1893), 23 O.R. 252, 258; Moot v. Gibson (1891), 21 O.R. 248; Daniell's Chancery Practice, 8th ed., p. 151.

The learned Judge had not overlooked Rule 85, nor the contention that the documents shewed an assignment of a chose in action by Ash to the plaintiffs and notice to the debtor entitling them to sue in their own names. This was not the true view. Ash was a trustee for the plaintiffs, and they never bargained with him to accept from him an unascertained share of a contested balance due from the defendant in lieu of their full claim as cestuis que trust against both Ash and the defendant.

But, even if this were an assignment of a chose in action, the plaintiffs' position was not improved. The learned Judge agreed with what was said by the trial Judge in this regard, and referred to the remarks of Moss, C.J.O., in Seaman v. Canadian Stewart Co. (1911), 2 O.W.N. 576, 579.

The action was therefore not properly constituted until the order was made by this Court joining Ash as a co-plaintiff. Up to that point the plaintiffs were wrong. There should be no costs of the action or appeal to either the plaintiffs or the defendants.

The should be judgment for the plaintiffs for the amounts of their claims without costs and without prejudice to the defendant's claim to recover from Ash the $857.06 and without prejudice to any defence which Ash may set up to such claim.

MULOCK, C.J.Ex., and CLUTE, J., agreed with MASTEN, J.

SUTHERLAND, J., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

WM. CROFT AND SONS LIMITED v. MESSERVEYS LIMITED.

Appeal—Question of Fact—Reversal of Judgment of Trial Judge—Consideration of Uncontradicted Facts, Documentary Evidence, and Inherent Probabilities—Sale of Goods—Agreement of Vendor to Take back and Repay Price—Evidence to Establish—Majority Judgment of Appellate Court.

Appeal by the plaintiffs from the judgment of the County Court of the County of York dismissing with costs an action to recover $820.25 for razors alleged to have been sold to the defendants.

The appeal was heard by MULOCK, C.J. EX., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

Gideon Grant, for the appellants.

George Wilkie, for the defendants, respondents.

MASTEN, J., read a judgment in which he said that the defendants denied the purchase of the razors from the plaintiff and denied any agreement to pay. The razors were imported by the defendants from Japan and sold and delivered to the plaintiffs in different lots during the year 1918. The plaintiffs paid for them in full, and no question arose until the latter part of April, 1919, when on examination the razors were found to be rusty. There was a controversy between the parties as to when the rust had originated. They could not agree. Stewart, the plaintiffs' departmental manager, stated that the defendants agreed to take back the razors and on the 1st September, 1919, to repay to the plaintiffs what they had paid for them. Messervey, the general manager of the defendant company, denied this agreement, and gave another account of what took place on the occasion mentioned by Stewart. The trial Judge preferred Messervey's account, and dismissed the action. The trial Judge arrived at the wrong conclusion, in the view of MASTEN, J., who said that, if Stewart's evidence were wholly eliminated from the record, the documentary evidence, the uncontradicted facts, and the inherent probabilities were such that he would decline to credit Messervey's evidence.

In holding that the judgment ought to be reversed, the learned Judge said, he was not in any way infringing upon the rule regarding findings of fact arrived at by the Judge who has tried the case and seen the witnesses. He referred to Dominion Trust Co. v. New York Life Insurance Co., [1919] A.C. 254, 257; Beal v.

Michigan Central R.R. Co. (1909), 19 O.L.R. 502, 506; and Continental Costume Co. v. Appelton & Co. (1919), 17 O.W.N. 258.

The appeal should be allowed and judgment should be entered for the plaintiffs with costs throughout.

RIDDELL and SUTHERLAND, JJ., agreed with MASTEN, J.

CLUTE, J., read a dissenting judgment. He reviewed the evidence, and stated that, in his opinion, there was nothing in the evidence to lead to the conclusion that the judgment of the trial Judge, who had all the facts before him and considered the whole question, was erroneous. The appeal should be dismissed.

MULOCK, C.J. Ex., agreed with CLUTE, J.

Appeal allowed (MULOCK, C.J. Ex., and CLUTE, J., *dissenting*).

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*MILLMINE v. EDDY.

Municipal Corporations—Payment out of Funds of Township Corporation of Expenses of Delegation to Dominion Government to Urge Repeal of Order in Council respecting Military Service—Farm-workers in Agricultural Township—"Matter Pertaining to or Affecting the Interests of the Corporation"—Municipal Act, sec. 427 (4 Geo. V. ch. 33, sec. 19)—Powers of Council—Action by Ratepayer qui tam—Parties—Refusal of Council to Permit Corporation to be Added as Plaintiff—Amendment—Addition of Corporation as Defendant.

Appeal by the defendants other than the defendant Barker from the judgment of the County Court of the County of Brant in favour of the plaintiff in an action to compel the restoration to the treasury of the Municipal Corporation of the Township of Burford of a sum of $219.13 paid out of corporation funds, upon a resolution of the council, for the expenses of a deputation to Ottawa in support of the repeal of an order in council.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and MASTEN, JJ.

W. S. Brewster, K.C., for the appellants.

Gordon Waldron, for the defendant Barker.

W. T. Henderson, K.C., for the plaintiff, respondent.

MULOCK, C.J.Ex., read a judgment in which he said that the plaintiff, a ratepayer of the township, who sued on behalf of himself and all other ratepayers, contended that the payment made to the defendants, who were the members composing the township council and who directed the payment to be made, was illegal, and that the defendants should be ordered to repay the amount, $219.13, to the municipal corporation.

Objection was taken to the constitution of the action, it being argued that it could not be maintained at the suit of an individual ratepayer, though suing on behalf of himself and all other ratepayers, but should have been brought in the name of the corporation.

The learned Chief Justice said that the corporation was the proper plaintiff, but circumstances may entitle an incorporator, on behalf of himself and all others of his class, to bring an action for the benefit of the corporation; in such a case he must first shew to the Court sufficient reason for the corporation not being a party plaintiff, and must make the corporation a party defendant. If the corporation is not a party, there is no person before the Court to receive any moneys that may be found due to it or to give acquittance in respect thereof. Moreover, the corporation would not be bound, and the defendants would be liable to as many actions as there are ratepayers: Bowes v. City of Toronto (1858), 11 Moore P.C. 463, and other cases.

So far as appeared, no attempt was made before action to make the corporation bring the action, but after the defendants (other than Barker) had denied the right of the plaintiff to maintain the action, the plaintiff's solicitor wrote to the township council asking that the corporation should join in the action as a party plaintiff. The council by resolution refused the request, and intimated that the council would not bring an action in the corporation's name for the purpose of recovering the $219.13.

In these circumstances, the plaintiff, suing on behalf of himself and all other ratepayers, was entitled, on adding the corporation as a defendant, to maintain the action, and leave so to amend should be given.

The council, unless authorised by statute, would have no right to expend moneys of the ratepayers in payment of the travelling expenses of the delegation. The defendants contended that the payment was authorised by sec. 427 of the Municipal Act, as enacted by 4 Geo. V. ch. 33, sec. 19, which provides that the council of a township may pay "for or towards the travelling or other expenses incurred in respect to matters pertaining to or affecting the interests of the corporation in any year." The object of the delegation's mission to Ottawa was to induce the

Government to exempt from military service men who in the township were engaged as farm-workers.

A public measure such as the order in council which the delegation sought to have repealed would, if acted upon, have the effect of reducing the number of farm-workers in the agricultural township of Burford, with the consequent impairment of the corporation's ability to perform its statutory duties; and therefore the matter was one "pertaining to or affecting the interests of the corporation."

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

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.Ex.

MASTEN, J., read a judgment in which he gave reasons for agreeing that the action should be dismissed. He expressed no opinion as to the constitution of the action or the propriety of allowing an amendment.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

RE METROPOLITAN THEATRES LIMITED.

Company—Winding-up—Directors—Payment of Dividend out of Capital—Liability—Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 95.

Appeal by E. C. Eckert, P. Noble, and S. Stevely from the order of FALCONBRIDGE, C.J.K.B., 16 O.W.N. 241.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and MASTEN, JJ.

J. M. McEvoy, for the appellants.

A. C. McMaster, for the liquidator of the company, respondent.

MULOCK, C.J.Ex., reading the judgment of the Court, said that the Master in Ordinary had found the appellants liable for the amount of a dividend illegally paid by the directors, the appellants being three of them. The company carried on a theatre business, and the board of directors, at a meeting held on the 31st March, 1916, declared and directed payment of a dividend of 2 per cent. on the paid-up capital. The dividend amounted

to $1,500, and was paid on the 1st May, 1916. The company became financially embarrassed, and on the 27th February, 1917, an order was made, under the provisions of the Winding-up Act, R.S.C. 1906 ch. 144, declaring it insolvent and directing that it be wound up in the Master's office. In the course of his inquiries the Master found in effect that the company was insolvent when the dividend was paid, that its payment diminished the company's capital and was therefore illegal, and that in consequence the appellants were liable to the extent of $1,500 and interest. This finding of fact was fully supported by the evidence.

It was not material to the question involved in the appeal to determine the precise extent of the company's insolvency when the dividend was paid. The evidence shewed that at that time the capital stock was greatly in excess of the value of the assets, and that the payment of the dividend to the extent of $1,500 further diminished the capital. In these circumstances, the Master was right in holding that, under the provisions of the Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 95, the appellants were liable to make good the dividend thus illegally declared and paid, together with interest thereon. The finding was affirmed by the order of the late Chief Justice of the King's Bench, and the appeal from his order should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*RE McCARTY.

Principal and Agent—Power of Attorney—Authority to Convey Lands—Provision that Power not to be Revoked by Death of Donor—Powers of Attorney Act, R.S.O. 1914 ch. 106, secs. 2, 3—Absence of Provision Authorising Conveyance in Name of Representatives—Construction of Instrument—Land Titles Act—Transfer of Land by Instrument Executed in Name of Deceased Donor—Validity.

Appeal by Thomas McCarty from the judgment of MIDDLETON, J., 17 O.W.N. 270, 46 O.L.R. 405, upon a case stated by the Master of Titles.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

William Proudfoot, K.C., for the appellant.

E. C. Cattanach, for the Official Guardian.

F. B. Brennan, for the Attorney-General.

A. M. Denovan, for the purchasers.

SUTHERLAND, J., read a judgment in which (after setting out the facts) he said that sec. 3 of the Powers of Attorney Act provides that, although the donor of the power has died, certain acts thereafter done pursuant to the power were valid. It was stated on the argument that the adult heirs had approved of the sale and that the Official Guardian would probably approve if necessary.

If the power of attorney had expressly provided, as indicated in the first part of sec. 2, that it might be exercised in the name of and on behalf of the heirs, etc., it also providing (as it does) "that these presents shall not be revoked by my death," it would be clear that it could be validly exercised after the death of the donor. In that case it would also be open to the criticism that it was testamentary in its character, even though not executed with the "formalities attending a last will." Section 2 deals with two distinct cases: (1) the case of the power providing that it may be exercised in the name of and on behalf of the heirs, etc.; (2) the case of the power providing by any form of words that the same shall not be revoked by death; while the clause following applies to each and enacts that each provision shall be valid and effectual.

As the power of attorney contains plain words "providing that it shall not be revoked by the death of the person executing it," these words must be given effect and held to be valid and effectual.

Therefore, under the power of attorney, the attorney was enabled to execute a valid transfer, after the death of the donor.

The transfer, however, should be executed by the attorney for and in the name of the donor—"Mary McCarty by her attorney Thomas McCarty." He did not so execute it, but in his own name; and in his affidavit be described himself as the transferor and spoke of the power under which he conveyed.

For that reason the Master could not properly receive and register the transfer in its present form. If amended and re-executed it should be received and executed. If and when the amended or new transfer is executed by Thomas McCarty and the money is paid to him, he will receive it for the estate of the donor and be responsible to the estate therefor.

It was suggested by the Court upon the argument that the purchase-money might be paid into Court. Counsel for the appellant, although contending that this was not necessary, agreed that it should be done, and the order made on this appeal should contain a provision therefor.

The costs of all parties should, in the circumstances, be paid out of the purchase-money or estate.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

CLUTE, J., also agreed with SUTHERLAND, J., reading a judgment to the same effect.

MASTEN, J., read a judgment in which he dissented from the view of the majority that the attorney could execute a valid transfer. The learned Judge was of opinion that the appeal should be dismissed.

RIDDELL, J., agreed with MASTEN, J.

In the result, the appeal was dismissed, with a declaration that the attorney can, by a deed in the proper form, make a valid transfer under the Land Titles Act.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*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.

Appeal by the plaintiffs from the judgment of KELLY, J., 17 O.W.N. 9.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

Grayson Smith, for the appellants.

J. E. Irving, for the defendant, respondent.

RIDDELL, J., in a written judgment, said that the defendants—one of them (Peterson) being a solicitor—gave a promissory note for $1,000 to the deceased Bryans as collateral security for a chattel mortgage for $2,700, given by one Tees to Bryans, part due in one year and the balance at a later day. Bryans filed the chattel mortgage, but omitted to file a statement of renewal. Bryans consulted Peterson, who advised him to take a new chattel mortgage; and Bryans took one, for $2,700, payable at a later day.

The plaintiffs, as executors of Bryan, brought this action on the note, and failed at the trial.

As against all but Peterson, it was plain that the granting of time, by the second chattel mortgage, released the sureties. It was argued, however, that Peterson was not released, as he

advised the whole transaction, and did not warn his client, Bryans, of the effect. That contention was well-founded. A solicitor is not allowed to advantage himself by his own neglect or ignorance: Gemmill v. Macalister (1863), 7 L.T.R. 841, and other cases.

Looking at it from another angle, the solicitor must be held to have consented to the substitution of the new mortgage for the old and to be bound as surety for the new as for the old.

But, before the default on the part of Peterson, he had been released. The creditor must keep his securities from the debtor in the same condition as when the guaranty was given; and, if registration or the like be necessary to make them valid and effective, he must register: Watson v. Alcock (1853), 1 Sm. & G. 319, and other cases.

To make a chattel mortgage a valid security for all purposes, it must be filed; and, before the end of the year, a renewal statement must be filed. The chattel mortgage was filed, but no renewal statement was filed. Thereupon the mortgage was effective between mortgagor and mortgagee only, and the rights of creditors became paramount. This may have done no harm in fact, but that is not the test. The surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration; and, if he has not so consented, he will be discharged. See Ebert v. National Crown Bank, [1918] A.C. 903, 908, 909; Croydon Gas Co. v. Dickenson (1876), 2 C.P.D. 51.

The learned Judge said that he could see no difference (to the disadvantage of the surety) between an alteration in the express contract between creditor and debtor and in the implied contract between creditor and surety. Here the creditor desired the surety to accept a chattel mortgage invalid against creditors for one valid against creditors. This was not a case where it was "without inquiry evident that the change is unsubstantial, or that it cannot be otherwise than beneficial to the surety:" the Egbert case (supra), at p. 908; and the surety is relieved.

The subsequent conduct of Peterson may give rise to some other and different right in the plaintiffs, but the Court is not called on to express any opinion on that point.

The appeal should be dismissed with costs.

MAGEE, J.A., and CLUTE and SUTHERLAND, JJ., agreed with RIDDELL, J.

MASTEN, J., agreed in the result, for reason stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Stay of Proceedings—Second Action Brought Vexatiously—Jurisdiction of Court to Stay—Effect of Judgment—Res Judicata—Action for Reformation of Contract upon which Former Action Brought—Fraud—Time-limit for Bringing Action—Ontario Insurance Act, sec. 194, condition 24—Estoppel—Rules 124, 222—Appeal—Costs.

Appeal by the plaintiffs from the order of MIDDLETON, J., 17 O.W.N. 166, 46 O.L.R. 291.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

H. J. Macdonald, for the appellants.

Shirley Denison, K.C., for the defendants, respondents.

MAGEE, J.A., in a written judgment, said (after stating the facts and referring to authorities) that the plaintiffs here were in the position of the plaintiffs in Carroll v. Erie County Natural Gas and Fuel Co. (1899), 29 S.C.R. 591, affirmed in Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105, 111, where rectification was granted. It was said in the Supreme Court of Canada (29 S.C.R. at pp. 593, 594): "No case for rectification having been made by the first action . . . it is impossible upon any recognised principle applicable to the defence of res judicata to hold that such an answer to the" (second) "action can be maintained. . . . It is not material to say that the appellants might, if they had so elected, have made an alternative case for relief on the ground of mistake in their first action; it is sufficient to say that they did not in fact do so and that no such question was there in issue."

If it was not open there, it would not be open here; and, if not res judicata, there was no other respect in which the action could be said to be either vexatious or frivolous. It did not present itself to the learned Justice of Appeal as a case in which what has been called the "might and ought" principle should be applied on the ground that the plaintiffs had fair opportunity and might and ought to have brought up their present claim in the former action.

The Court has inherent jurisdiction to prevent abuse of its process and merely vexatious actions. This was made use of in Lawrance v. Lord Norreys (1890), 15 App. Cas. 210, but it was

pointed out (p. 219) that the power should be very sparingly exercised, and only in very exceptional cases.

That inherent jurisdiction is partly embodied in Rule 124 of the Rules of the Supreme Court of Ontario. That Rule has been acted upon only in plain and obvious cases. It can hardly be said here that the facts disclosed as to the former action bring the case within such a category that the plaintiffs should be turned out of Court upon an interlocutory motion made in Chambers, though after argument given the status of a Court motion.

On the other ground—that the action is too late—the plaintiffs perhaps are on weaker footing. By Rule 222, a party may, at any stage of an action, apply for such judgment or order as he may, upon any admissions of fact, be entitled to, or where the only evidence consists of documents. The present pleading shews that the fire was more than 3 years before this action. The policies contain statutory condition 24 without any variation. That condition bars any action for the recovery of any claim by virtue of the policy after one year. The plaintiffs allege that they applied for policies subject to these statutory conditions. If, therefore, the policies were rectified, the plaintiffs would still be seeking to recover by virtue of them, and would be too late by their terms.

But it appeared that these policies were issued in 1913 and renewed in 1916, a three years' premium being paid on each occasion. The plaintiffs may be able to shew such facts as to estop the defendants from setting up the time-limitation in the face of the course they pursued. This is not a case in which the defendants should be relieved from pleading in the ordinary way, or the plaintiffs prevented from setting up such reply as the facts might seem to them to justify, and having the issues of law or fact disposed of in the ordinary way.

As to the alternative relief asked by the plaintiffs—damages for loss occasioned by their being induced to receive and act upon policies meaning something different from what they appeared to be—there was no reason why such an action should not lie. To justify the application of Rule 124, a statement of claim should not be merely demurrable; it should be manifest that it is something worse so that it will not be curable by amendment: Dadswell v. Jacobs (1887), 34 Ch. D. 278, 281; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: Boaler v. Holder (1888), 54 L.T.R. 298.

On the face of things, these plaintiffs shew a meritorious claim to relief of some sort. It may be that they will not ultimately succeed, but they are entitled to have all the facts dealt with, and not have their action snuffed out thus summarily.

The appeal should be allowed, the defendants should have time

to plead, and the plaintiffs, if they desire it, leave to amend; costs in the cause throughout.

CLUTE and SUTHERLAND, JJ., agreed with MAGEE, J.A.

RIDDELL, J., in a written judgment, said that he agreed with MIDDLETON, J., except as to the alternative claim for damages. The appeal should be allowed, but only as to the claim for damages, and there should be no costs of the motion or of the appeal.

MASTEN, J., also read a judgment; he reached the same result as RIDDELL, J.

Order as stated by MAGEE, J.A. (RIDDELL and MASTEN, JJ., *dissenting in part*).

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

CARSON v. MIDDLESEX MILLS LIMITED.

Appeal—Strangers to Action Appealing from Order of Judge of High Court Division—Status of Appellants—No Leave to Intervene Obtained—Application to Appellate Court for Leave—Lack of Material to Found Application—Proper Forum for Application—Expiry of Time for Appealing—Judicature Act, sec. 16 (f).

Appeal by the Neil Drug and Chemical Company of Canada Limited and the Fort William Coal Dock Company Limited from an order made by FALCONBRIDGE, C.J.K.B., in the Weekly Court, on the 22nd November, 1919, dissolving an injunction and vacating the registry of a certificate of lis pendens and approving and directing the carrying out of an agreement by which Oliver Masters acquired the assets of the defendants the Middlesex Mills Limited.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

J. A. E. Braden, for the appellants.

P. H. Bartlett, for the plaintiff, respondent.

A. C. McMaster and J. B. McKillop, for the defendants the Fidelity Trust Company and the Dominion Savings Company.

F. P. Betts, K.C., for the Canada Trust Company.

MASTEN, J., reading the judgment of the Court, said that the appellants claimed as creditors of the Middlesex Mills Limited, for the price of goods supplied. The appellants were not parties to this action, nor were they present or represented when the order complained of was made. They applied to this Court to set aside the clause of the order approving the agreement, without having obtained any leave to intervene in the action.

A preliminary objection was taken that, in these circumstances, the appellants had no status to appeal, and the Court had no jurisdiction to entertain their application.

The learned Judge said that he knew of no Rule or provision of the Judicature Act, and the Court had been referred to none, authorising such an appeal by strangers to the action; but the Court was referred to the old Chancery practice as stated in In re Markham (1880), 16 Ch.D. 1, referred to in In re Securities Insurance Co., [1894] 3 Ch. 410. That case made it clear that leave to appeal may be granted to a person who, without being a party, is either bound by the order or is aggrieved by it, or is prejudicially affected by it; but it also made it clear that, unless such leave is granted on application for that purpose, such person cannot intervene and appeal.

In the present case no leave has been granted, and the appeal must therefore be dismissed.

With respect to the motion by the appellants for an order of this Court granting leave to appeal *nunc pro tunc*, there is no material before the Court on which to found such an application; the application should be made not to this appellate Court, but to the High Court Division; and on the facts now disclosed it should not be granted *ex parte*, even if the Rules permit such a course. And again, it was plain that the time for appealing from the order had long since expired.

As a motion for leave might hereafter be made by these appellants to the High Court Division, on notice to the other parties interested, the learned Judge refrained from discussing the merits of the case, as they appeared on the statement of counsel.

It was sufficient to say that the present application to this Court must be dismissed with costs.

It was not intended by anything said in this judgment to interfere with any claim that might be made under sec. 16 (*f*) of the Judicature Act.

Appeal dismissed.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

*HARRIS v. HARRIS.

Contract—Oral Promise of Father to Convey Land to Son—Consideration—Services of Son—Evidence—Corroboration—Possession Given to Son—Part Performance—Statute of Frauds—Subsequent Acceptance of Lease by Son—Estoppel—Specific Performance of Agreement—Claim for Improvements Made by Son—Claim for Wages—Amendment—Reference—Costs.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 16 O.W.N. 216.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

Shirley Denison, K.C., for the appellant.

M. H. Ludwig, K.C., for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said, after stating the facts, that it seemed fairly clear that the defendant intended to give the plaintiff (his son) the farm now in question at some time, but that was not enough. The rules to be followed in such cases as this were laid down most carefully and conclusively in the leading case of Orr v. Orr (1874), 21 Gr. 397, and it could not be necessary to restate them at length.

Even if it could be assumed that the Statute of Frauds was met by the possession—and the plaintiff would have great difficulty in that regard, as it was admitted that the possession was taken at the father's instance because the plaintiff's house was burned down, and there could be no pretence that the possession was given or taken in pursuance of any contract—the plaintiff would not be advanced. An assertion that he had given the farm, however frequently repeated, did not amount to a contract: the Orr case, at p. 410; and the plaintiff failed to come up to the stringent requirements of the rules laid down in that case. See, per Street, J., in Smith v. Smith (1898), 29 O.R. 309, affirmed in appeal (1899), 26 A.R. 397; Jibb v. Jibb (1877), 24 Gr. 487; Campbell v. McKerricher (1883), 6 O.R. 85.

As at present advised, the learned Judge did not think that the plaintiff was estopped by reason of his alleged tenancy: Hillock v. Sutton (1883), 2 O.R. 548. At the worst, he might have a declaration of his rights if the facts justified such a course.

But he failed in limine; and, notwithstanding Biehn v. Biehn (1871), 18 Gr. 497, this Court was concluded by Smith v. Smith, supra, from giving him a lien for his alleged improvements.

The appeal should be allowed on this point, with costs throughout.

The plaintiff was entitled to recover any balance of wages due to him after the contract for wages was definitely made. Should counsel not be able to agree upon the amount, there should be a reference to the Local Registrar to take the accounts and determine what amount, if any, was due; the costs of the reference, if had, should be in the discretion of the Registrar; there should be no other costs on this branch of the case.

Judgment accordingly.

SECOND DIVISIONAL COURT. MARCH 26TH, 1920.

HOSTETTER v. TOWNSHIP OF GRANTHAM.

Highway—Road Laid out and Opened in Place of Original Road-allowance—Municipal Act, R.S.O. 1914 ch. 192, sec. 493—Land-owner—Private Way—Removal of Gate by Township Corporation — Public Highway — Evidence — Counterclaim — Striking out, with Leave to Bring Action for Relief Claimed.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 17 O.W.N. 218.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and MASTEN, JJ.

A. C. Kingstone, for the appellants.

H. H. Collier, K.C., for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that the township of Grantham was surveyed and laid out before the end of the 18th century; the usual reservations for roads were made, amongst them a side-road between lots 22 and 23, concession 10, running across the township from north to south, and a concession-road between concessions 9 and 10. The original road-allowance between the two lots would cost a large sum to open, and it had in fact not been opened through, and the concession-road at this point was in the same case. For many years the Pelham road had been used; it was not on the original road-allowances, but answered the same purposes as would be answered by them if they were opened and passable.

The plaintiff, the owner of lots 22 and 23 or parts thereof, and her predecessors in title, had sometimes kept a gate at the point E.

(indicated in a sketch of the locality); the defendants recently removed the gate; and the plaintiff brought this action for a declaration of her rights in the premises and for proper relief. The defendants counterclaimed a declaration that the road from E. to F. was a public highway.

The plaintiff's claim was based upon the hypothesis that the road A. to B. was in the place of the road-allowance G. to E. (Municipal Act, R.S.O. 1914 ch. 192, sec. 493); and the trial Judge gave effect to her contention.

It did not appear how or when the cut-off A. to B. was first made; it seemed probable that it was when the Act of 1810, 50 Geo. III. ch. 1, was in force; but Beemer v. Village of Grimsby (1884-86), 8 O.R. 98, 13 A.R. 225, made it clear that, no matter when it was opened, the present Act applied. If then it could be said that the road A. to B. "has been laid out and opened in the place of the original road allowance," the plaintiff might have a strong case.

But the learned Judge was unable to see how this short cut was in place of any road other than those which would answer the purpose of enabling the traveller to go from A. to B.

The plaintiff failed upon the facts; the defendants' appeal on this branch of the case should be allowed, with costs throughout.

As to the counterclaim, the learned Judge was not satisfied with the evidence. He considered, however, that, instead of directing a new trial of the counterclaim, the Court should strike it out and leave the defendants, if so advised, to bring an action for the appropriate relief. This disposition of the counterclaim would prevent the judgment at the trial being set up under a plea of res judicata. There should be no costs of the counterclaim.

Judgment accordingly.

HIGH COURT DIVISION.

MIDDLETON, J. MARCH 22ND, 1920.

*CANADIAN DYERS ASSOCIATION LIMITED v. BURTON.

Contract—Formation—Sale and Purchase of Land—Correspondence—Quotation or Offer—Purchaser Treating Letter as Offer and Accepting it—Description of Subject-matter of Contract.

Motion by the plaintiffs for judgment on the pleadings and admissions of the defendant in an action by the purchasers for specific performance of an agreement for the sale of land.

The motion was heard in the Weekly Court, Toronto.

G. W. Mason and K. B. Maclaren, for the plaintiffs.

J. R. Roaf, for the defendant.

MIDDLETON, J., in a written judgment, said that the question argued was whether, upon the correspondence, a contract had been made out. There can be no contract for sale unless there can be found an offer to sell and an acceptance of that offer or an offer to purchase and an acceptance of that offer. In each case of this type it is a question to be determined upon the language used, in the light of the circumstances in which it is used, whether what is said by the vendor is a mere quotation of price or in truth an offer to sell.

Reference to Harvey v. Facey, [1893] A.C. 552; 35 Cyc., p. 50; Johnston v. Rogers (1899), 30 O.R. 150; Harty v. Gooderham (1871), 31 U.C.R. 18.

In May, 1918, the plaintiffs wrote the defendant: "With reference to purchasing this house (25 Hanna avenue), kindly state your lowest price."

On the 6th June, 1918, the defendant answered: "Re house 25 Hanna. The lowest price I would care to sell at for cash would be $1,650."

There was nothing more until the 16th October, 1919, when the plaintiffs wrote: "We would be pleased to have your very lowest price for 25 Hanna avenue."

On the 21st October, 1919, the defendant wrote: "The last price I gave you is the lowest I am prepared to accept. In fact I feel that under present conditions this is exceptionally low and if it were to any other party I would ask more."

This was treated as an offer, and (subject to a question to be mentioned) accepted. A cheque was sent for $500, and the defendant was asked to have a deed prepared. This was on the 23rd October. On the 27th, the defendant's solicitor sent a draft deed and said he would be ready to close on the 1st November. Some letters were exchanged about the deed and title, but no trouble developed until the 5th November, when the defendant's solicitor wrote that there was no contract, and returned the cheque.

There was here far more than a quotation of a price. The letter of the 21st October, 1919, was an offer, and it was accepted.

If the language was ambiguous, it would be fair to see how the defendant himself viewed the situation. When the letter of acceptance (23rd October, 1919) reached him, he did not say that there was no contract; he submitted a deed, suggested an immediate search of his title, and named an early day for closing —in the meantime retaining the cheque.

In all the earlier letters the property was spoken of as "25 Hanna avenue." In the letter of acceptance, the plaintiffs used the words, "We accept your offer of sale for property known as 25 Hanna avenue with rights of way etc." The defendant contended that the addition of the words "with rights of way etc." was such a variation and departure from the description of the property in the former letters as to prevent a contract. But these words were not part of the contracting words—they were words used in describing the subject-matter of the contract. The thing sold was "25 Hanna avenue," and this would carry with it all rights of way and other appurtenant rights. The words quoted added nothing to the description. It is not necessary that identical words be used in describing the subject-matter of the contract, so long as the thing described is the same.

There should be judgment for the plaintiffs with costs.

RIDDELL, J., IN CHAMBERS. MARCH 25TH, 1920.

YOLLES & ROTENBERG LIMITED v. H .H. ROBERTSON CO. LIMITED.

Appeal—Application for Leave to Appeal from Order of Judge in Chambers Vacating Registration of Claims of Mechanics' Liens upon Payment of Money into Court—Order Made in Action Brought inter Alia to Vacate Liens—Jurisdiction of Judge in Chambers—Mechanics and Wage-Earners Lien Act, secs. 27 (4), 33, 34—Amending Act, 6 Geo. V. ch. 30, secs. 1, 2—Rule 507—Necessity for Leave—Final Disposition of Part of Matter—Reason to Doubt Correctness of Order—Matters of Importance Involved—Leave Granted Quantum Valeat.

Motion by the defendants, under Rule 507, for leave to appeal from an order of MIDDLETON, J., in Chambers, vacating, upon payment into Court of $3,787.36, two mechanics' liens registered by the defendants against interests in certain lands in Toronto.

L. A. Landriau, for the defendants.
R. S. Cassels, K.C., for the plaintiffs.

RIDDELL, J., in a written judgment, said that the plaintiffs had a contract with Allen's Parkdale Theatre Limited to construct a building on the lands above referred to. The defendants made a contract with the plaintiffs to install the roof. The defendants, alleging non-payment, registered claims for liens against the interests of the estate of James Walsh and the Allen company.

On the 11th March, 1919, this action was begun by writ of summons, upon which were endorsed claims: (1) for $10,000 as liquidated damages for wilful delay; (2) for damages for breach of contract; (3) to "set aside and vacate, as wrongly and improperly filed," the two claims of lien registered by the defendants; and (4) for damages for wrongful registration of the liens.

The learned Judge thought that no leave was necessary, the order being one pronounced by a Judge in Chambers which finally disposed of part of the matter; Rule 507 (1).

But, as both parties treated the order as if leave was necessary, the learned Judge proceeded to deal with it on that basis.

Rule 507 (3) (*b*) must be strictly interpreted, and good reason must appear to doubt the correctness of the decision complained of: Robinson v. Mills (1909), 19 O.L.R. 162, and other cases.

On the strictest construction, there was room to doubt the correctness of this order.

Part of the relief claimed in the endorsement of the writ was the vacating of the registration of the claims of lien. The learned Judge said that he knew of no authority giving the Court the right to grant this relief on any ground, except after trial or on motion for judgment.

The order was not justified by sec. 27 (4) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140; the remedy there given is to be given in a proceeding under that Act—it is not extended into the general practice of the Court. Moreover, the order, under sec. 27 (4), can be made only by "the Court, Judge or officer having jurisdiction to try an action to realise a lien;" and, by sec. 33 of the Act (as enacted by 6 Geo. V. ch. 30, sec. 1), "the action *shall* be tried in the County of York before the Master in Ordinary or the Assistant Master in Ordinary;" while, by sec. 34 (as enacted by 6 Geo. V. ch. 30, sec. 2), the Master in Ordinary and Assistant Master are given the fullest authority.

There was good reason to doubt the correctness of the order of Middleton, J.; and the appeal involved matters of such importance that leave should be given if necessary.

The learned Judge accordingly gave leave (quantum valeat) to appeal; costs to be costs in the appeal. This course was, in his view, better than the alternative one of retaining the motion until it should appear that, in the view of the Appellate Di vision, leave was necessary.

KELLY, J. MARCH 25TH, 1920.

RE BOYLE.

Will—Construction—Devise and Bequest to Widow—Absolute Gifts, Liable to be Divested upon Remarriage—Disposition of Residue —"Heirs"—Legatees—Distribution.

Motion by the surviving executrix of the will of Samuel Boyle, deceased, for an order determining certain questions arising in the administration and distribution of his estate.

The motion was heard in the Weekly Court, Toronto.

G. G. McPherson, K.C., for the applicant and for Louis I. Boyle, a legatee.

W. H. Gregory, for Rachel Kellor.

F. W. Harcourt, K.C., Official Guardian, for the infants.

KELLY, J., in a written judgment, said that Samuel Boyle died in August, 1918; his will was executed in the previous July; and probate was issued to his widow and sister, the executrices named in the will—the sister died in March, 1919.

After a direction for payment of debts and funeral and testamentary expenses, etc., the testator gave specific legacies as follows: to Louis I. Boyle, his son, one year after the testator's decease, $1,000, and, 6 years after his decease, $10,000; to his granddaughter Dorothy V. Boyle, $1,000; to Margaret Henderson, Rachel Kellor, Hannah Cornell, and Rebecca Horn (called sisters), each $500. Rebecca Horn died in August, 1919, leaving a husband and 7 children, 4 of whom were infants.

The will continued (the style and punctuation of the draftsman are followed):—

"To my wife Mary Ann Boyle the House and Contents now occupied for me For her sole use—The stable and Contents on said Lot, Horse and Rigs—and Full control of The remainder of my estate, while she remains my widow, and should remarry—she get the use of House stable Contents Horse and rigs—and the use of 25000.00 Twenty Five Thousand Dollars while she Lives, and at Her Death the privilege of willing the Twenty Five Thousand Dollars to who she Pleases—and the Balance of my Estate not herein mentioned To be devided among remaining heirs according to respective legacyies." Then followed a provision that: "Any one of the heirs making trouble in law will be debarred of anything I have left them and their share will be equally divided among the remaining heirs." This was followed

by an incomplete clause: "All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto."

Certain questions were submitted which, with the learned Judge's answers, are as follows:—

(1) Is the devise to Mary Ann Boyle of the house occupied by the deceased an absolute devise of the house and village lot occupied by the house? A. Yes, if she do not remarry.

(2) Is the devise to Mary Ann Boyle of the stable and contents of said lot a devise of the stable separate from the devise of the house? A. No.

(3) Is the devise to Mary Ann Boyle of the house, stable, and contents an absolute devise liable to be divested on her remarriage? A. Yes.

(4) Does the bequest to Mary Ann Boyle of "the stable and contents of said lot, horse, and rigs and full control of the remainder of my estate while she remains my widow," operate as an absolute bequest of the remainder of the estate subject to be divested in the event of her remarriage except as to the use of the house, stable, contents, horse, and rigs and the use of $25,000 during her life with the right to make testamentary disposition of the $25,000? A. Yes.

(5) In the event of Mary Ann Boyle not remarrying, is there any estate to which the words "balance of my estate not herein mentioned to be divided among remaining heirs according to respective legacies" are applicable? A. No.

(6) Who are the heirs referred to in the last paragraph as entitled to share in the devise of the residue, if any, and are the sisters of the deceased included in the residuary bequest to heirs? A. The heirs entitled to share in the devise of the balance of the estate are the persons, other than the widow, to whom the testator has already given legacies, including the sisters of the deceased.

Order declairing according; costs out of the estate—those of the executrix as between solicitor and client.

ORDE, J. MARCH 26TH, 1920.

RE MACLAREN.

Will—Construction—Provision for Benefit of Creditors of Son of Testator—Assignment by Son for Benefit of Creditors—Provision Limited to Creditors Entitled to be Paid out of Moneys Coming to Hands of Assignee—Application to Claims Barred by Limitations Act—Effect of Act on Claims Filed with Assignee —Debts Incurred by Son after Assignment.

An application by the Toronto General Trusts Corporation, as executors and trustees under the will of David Maclaren, deceased, and also as assignees for the benefit of creditors of the testator's son James Gordon Maclaren, for the advice and direction of the Court upon a question arising upon the will.

The motion was heard in the Weekly Court, Ottawa.

W. L. Scott, for the applicants.

A. C. Hill, for the Bank of Nova Scotia and John R. Booth, creditors of J. G. Maclaren.

T. D'Arcy McGee, for Samuel McDougall, a creditor of J. G. Maclaren.

H. B. Johnson, for the Pembroke Lumber Company, a creditor of J. G. Maclaren.

ORDE, J., in a written judgment, said that on the 22nd May, 1906, J. G. Maclaren made an assignment for the benefit of his creditors. David Maclaren died on the 7th April, 1916, having made a will dated the 24th June, 1915, of which probate was granted to the applicants on the 10th June, 1916.

The testator by his will divided the residue of his estate into 20 equal shares, and directed the trustees, inter alia, to pay out of the proceeds of 3 of the shares the respective claims of those of the creditors of J. G. M. "who would be entitled to be paid out of any moneys coming into the hands of my trustees in their capacity as assignees for the benefit of creditors of my said son . . . except that my said son . . . shall be at liberty to contest and dispute the claims of any of the said creditors upon grounds other than any statute of limitations; and, if my said son shall notify my said trustees not to pay any one or more of his said creditors, the claim or claims of the creditor or creditors named in such notice shall not be paid unless and until they shall have proceeded to judgment or unless and until my said son shall have pleaded any statute of limitations . . . in answer to any such claim or claims. Any balance of the proceeds of the said 3 shares

which may remain after payment of the said claims of the said creditors . . . for principal, interest, and costs shall be paid . . to my said son . . ."

The question raised was, whether or not the trustees should pay the claims of creditors which were filed on the assignment being made, but which, as was suggested, may now be barred by the Limitations Act.

The learned Judge was of opinion that the trustees ought to pay all the creditors, whether judgment creditors or otherwise, who had filed claims with the assignees and who would be entitled to rank as creditors against the insolvent estate of J. G. M. It was not open to the trustees to contend that, by reason of lapse of time, the claims filed which had not been converted into judgments had been barred.

It seemed doubtful whether the Limitations Act could be successfully pleaded by the assignee against a simple contract creditor whose claim was filed in time and who claimed to be entitled to share in the distribution of assets coming into the hands of the assignees a long time after the making of the assignment—the assignees would hold as trustees for those creditors whose claims had been duly proved, and the statute would probably cease to run at the date of the filing of the claim.

Those creditors whose claims came into existence after the making of the assignment, and who would consequently have no right to rank against his estate, were excluded from the benefit of the testator's bounty. Their remedy, if any, must be by attachment of any surplus coming to the hands of J. G. M. after payment of the claims of the other creditors.

Order declaring accordingly; costs of all parties to be paid out of the 3 shares disposed of as above.

ORDE, J. MARCH 26TH, 1920.

SMITH v. CARVETH.

Fraud and Misrepresentation—Agreement for Sale of Land—False Representation by Purchaser—Inducement to Vendor to Enter into Contract—Dismissal of Purchaser's Action for Specific Performance—Counterclaim of Vendor for Rescission.

The plaintiff, as the assignee of the purchaser (her husband), claimed specific performance of a contract by the defendant to sell land to the husband.

The defendant said that the contract was signed by her on the false and fraudulent representations of the purchaser, and by way of counterclaim asked that it should be set aside.

The action and counterclaim were tried without a jury at a Toronto sittings.

W. A. Henderson, for the plaintiff.

J. E. Lawson, for the defendant.

ORDE, J., in a written judgment, said that the plaintiff was a voluntary assignee of her husband's interest, and it was not suggested that she stood in any better position than he would if he were suing.

Harry Wilson, the defendant's nephew, acted as her agent in respect of the property which was the subject of the contract. The defendant lived in Detroit. The price named in the contract was $2,600. The plaintiff's husband went to Detroit, taking with him a letter from Wilson to the defendant, in which it was said that Smith, the plaintiff's husband, had made an offer for the property, and "the offer that he has made is a very good one," but no sum was mentioned. Smith had told Wilson that he would be willing to give about $2,800. The defendant and her son, who was present at the interview between the defendant and Smith, said that Smith said that the offer he had made to Wilson was $2,600. Smith denied that he ever stated to the defendant that the offer he made to Wilson was $2,600. The defendant said that the statement of Smith that he had offered Wilson $2,600 was a false and fraudulent representation of fact entitling her to resist specific performance and to have the contract set aside.

Counsel for the plaintiff relied on Turner v. Green, [1895] 2 Ch. 205, in which it was held that mere silence as regards a material fact which one party is not bound to disclose to the other is not a ground for rescission or a defence to an action for specific performance. He also referred to Chadwick v. Maning, [1916] 1 A.C. 231, 238. Had the question here been simply whether or not Smith should have disclosed to the defendant the fact that he had offered $2,800 to Wilson, this principle might have some application. But the charge was that, with Wilson's letter referring to the "offer" before them, he deliberately told the defendant that that offer was $2,600.

The learned Judge found that the defendant's version of what took place was the true one; that she was induced to enter into the contract upon the faith of Smith's false and fraudulent statement that his offer to Wilson was $2,600; that she repudiated the contract as soon as she discovered that she had been misled; and that she did nothing afterwards to prejudice her position.

The action should be dismissed, and there should be judgment for the defendant declaring the contract of sale void and setting it aside and vacating its registration, with costs of the action and of the counterclaim.

KELLY, J. MARCH 27TH, 1920.

HOFFMAN v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R.W. CO.

Negligence—Collision of Motor-car with Electric Street-car at Highway Crossing—Injury to Driver of Motor-car and Wife—Findings of Jury—Negligence of Motorman of Electric Car—Contributory Negligence of Driver and Owner of Motor-car—Ultimate Negligence of Motorman not Shewn—Failure of Owner and Driver to Recover—Wife not Affected by Husband's Contributory Negligence—Right of Wife to Recover—Costs.

An action by Rolph J. Hoffman and his wife, Eva Hoffman, to recover damages for injuries sustained by each of them, for the death of their son, a boy of 3½ years, and for damage to a motor-car, driven by the plaintiff Rolph J. Hoffman, all alleged to have been caused by the negligence of the defendants' motorman in the operation of a car of the defendants, which struck the car in which the plaintiffs and their sons were driving easterly on the Hamilton and Grimsby stone road, at a place where the defendants' line of railway crosses the stone road.

The action was tried with a jury at a Hamilton sittings.

M. J. O'Reilly, K.C., for the plaintiffs.

George Lynch-Staunton, K.C., and A. H. Gibson, for the defendants.

KELLY, J., in a written judgment, said that the jury, in answer to questions, found that there was negligence of the defendants, consisting of "increasing speed in vicinity of accident;" that the plaintiff Rolph J. Hoffman was guilty of contributory negligence, in that he "should have observed more keenly or stopped his car;" and that there was no ultimate negligence on the part of the defendants. The jury found no damages in respect of the death of the plaintiff's son, and assessed the plaintiff Rolph J. Hoffman's damages in other respects at $644.55 and his wife's at $400.

The defendants contended that, under the Motor Vehicles Act, it must be assumed that the plaintiff Eva Hoffman was liable.

That position was untenable. There was no evidence that she was either the owner or the driver of the car; but there was positive evidence that her husband was both the owner and the driver.

It did not necessarily follow from the evidence that the defendants' motorman, in the circumstance which arose at the time, had reason to believe, until it was too late to avoid the collision, that Hoffman was about to get into a place of danger, or that, when the motorman became aware or should have become aware that danger to the plaintiffs was imminent, it was the increased speed that then made any reasonable attempt to stop before the collision ineffectual or impossible. Taking the evidence as to the distance the electric car was from the place of the collision when the motorman observed or had reason to believe that Hoffman intended to proceed across the tracks, it was not an unreasonable deduction that, unless the electric car was proceeding at a very low rate of speed, it could not have been so brought under control as to avoid striking the motor-car. It was not, therefore, a necessary conclusion that the defendants, by some unlawful act or omission, had made it impossible to prevent the accident after the motorman became aware of Hoffman's negligence in proceeding upon the tracks. The jury, with the evidence of all these conditions before them, had declared that after Hoffman's negligence there was nothing the defendants could have done to prevent the collision.

The plaintiff Rolph J. Hoffman was, therefore, not entitled to judgment.

But no negligence had been found against the plaintiff Eva Hoffman, and she was not responsible for her husband's negligence. There was evidence that she requested him to stop; if that was the fact, and if he heard her request, he did not comply.

Reference to Mathews v. London Street Tramways Co. (1888), 5 Times L.R. 3.

There should be judgment for the plaintiff Eva Hoffman for $400 and costs on the County Court scale without set-off. The action should be dismissed as to the claim of the plaintiff Rolph J. Hoffman, who should pay half the costs of the defendants on the Supreme Court scale.

LENNOX, J. MARCH 27TH, 1920.

TORONTO GENERAL TRUSTS CORPORATION v. RAHELLY.

Limitation of Actions—Exclusion of Owner (Son) of Undivided Half Interest in Land—Possession of Co-owner (Father)—Extinction of Interest of Son in Lifetime of Father—Death of Father Intestate—Share of Son Claiming under Father—Possession Taken by Mother and Daughters—Exclusion of Son—Right Acquired by Possession—Interest of Mother—Limitations Act, R.S.O. 1914 ch. 75—Mortgage—Claim of Mortgagees under Foreclosure—Redemption—Consent Judgment—Costs.

Action by the Toronto General Trusts Corporation, as personal representatives of John Foy and James J. Foy, deceased, and by Jane Rahelly and her son and daughter, as heirs at law of Thomas Rahelly, deceased, to recover possession of lot 70 and the northerly half of lot 69 on the west side of O'Hara avenue, in the city of Toronto.

The action was tried without a jury at a Toronto sittings.

A. E. Knox, for the plaintiffs.

Gideon Grant, for the defendants.

LENNOX, J., in a written judgment, said that the Foys were mortgagees, and had obtained a final order of foreclosure; but it was arranged at the trial that the parties entitled should be allowed to redeem the Foy mortgage, and consent minutes of a judgment disposing of the claim based on the mortgage and final order were filed.

Thomas Rahelly died intestate on the 31st December, 1912; and the question raised upon the other branch of the case was, what rights, if any, his widow and children had in the property. The property consisted of a dwelling-house and garden, and from the time it was acquired by Gerald Rahelly and his son Thomas, the above-mentioned, in 1884, had been occupied and used as the home of members of the Rahelly family. Since the 12th December, 1915, it had been in the exclusive occupation and possession of the defendants, who were the three daughters of Gerald and sisters of Thomas. Gerald died intestate on the 30th May, 1907. After Gerald's death, his widow continued to live with her daughters, the defendants, in the house upon the property, until her death on the 12th December, 1915.

The learned Judge finds that Thomas Rahelly was the owner of an undivided one-half interest in the property in August, 1894,

when he went away, discontinued possession, and left the property in the sole occupation and possession of the Rahelly family.

Gerald Rahelly continued to occupy and use the premises for himself, his wife and three daughters, constantly, openly, visibly, and notoriously as any owner absolutely seised in fee would do. The exclusion of Thomas and the possession of his share must be attributed to Gerald, and to him alone, until he died in 1907.

The right of Thomas to re-enter first accrued immediately after he went out. Time began to run against him and in favour of Gerald in August, 1904; and the undivided one-half share or interest of Thomas became extinguished in August, 1904, by force of the Limitations Act.

Gerald was the sole owner in fee when he died in 1907. As Gerald died intestate, Thomas immediately became entitled to a one-fifth share. (There was another son, Thomas's brother Daniel.) Immediately upon Gerald's death, the defendants and their mother assumed and took possession, to the exclusion of Thomas, and occupied, used, and treated the property as their own. During the 5 years after this before the death of Thomas he did nothing. Time was running against him in his lifetime, and ran on, whether his children were of age or not after he died. The Rahelly plaintiffs' claim to one-fifth as accruing through their grandfather, Gerald, therefore failed.

The mother of the defendants, who died in December, 1915, acquired no interest in the land in her husband's lifetime. She survived her husband less than 8 years, and acquired nothing. She had a dower-right, but dower was never assigned. She was in possession, so far as she could be said to be, as dowress or as a trespasser, and had acquired no statutory right up to the time of her death. The claim of the Rahelly plaintiffs based on some right accruing through their grandmother therefore failed.

There should be judgment for the plaintiffs the trusts corporation, in terms of the consent minutes, upon the first branch of the case, with costs. In all other respects the action should be dismissed without costs. There should be no deduction from the costs of the successful plaintiffs by reason of their having joined the unsuccessful plaintiffs.

NORTHERN GROCERY CO. v. PARADE—MASTEN, J.—MARCH 24.

Contract—Agreement to Refrain from Bringing Action—Conditions—Onus of Proof—Findings of Master—Appeal.]—An appeal by the defendant from the report of an Official Referee and a motion by the plaintiffs for judgment on the report. The appeal

and motion were heard in the Weekly Court, Toronto. MASTEN, J., in a written judgment, said that the first ground of appeal was, that there was a definite and precise agreement that the plaintiffs' right of action should be postponed for a period which did not elapse until after this action had been begun. The Master's finding was against that contention, and the learned Judge was of opinion that the evidence supported the finding. The second ground was, that, by the terms of the arrangement, no action was to be taken by the plaintiffs unless the existing situation was so altered as to imperil the security of the plaintiffs. For this term a letter written by the solicitor for the plaintiffs to the solicitor for the defendant, as follows, was relied upon: "Am expecting the November payment of $50 to be made forthwith, and, if the payments of $50 are made regularly on the 1st of each month, and providing that nothing happens to impair the security, *in the opinion of my clients*, suit will not be entered." The Master found that the plaintiffs had reason to feel apprehensive at the time that a certain payment was demanded, and did feel apprehensive, that the conduct of the defendant's business, at that time, was such as to imperil the security afforded by the business being carried on in the ordinary way. Against this finding the defendant appealed. The learned Judge considered that the onus was upon the defendant to shew that the plaintiffs had no such bona fide opinion. There was nothing in the evidence to justify a finding that the defendant had shewn that. The appeal should be dismissed with costs, and judgment should be entered for the plaintiffs for the amount found due by the Official Referee with costs. A. A. Macdonald, for the defendant. C. M. Garvey, for the plaintiffs.

TORNO v. CALLAGHAN—ORDE, J.—MARCH 25.

Trust and Trustees—Purchase of Vessel—Alleged Purchase in Trust for Plaintiff—Evidence—Failure to Prove Trust—Findings of Fact of Trial Judge—Costs.]—Action for a declaration that the defendants hold the steamer "Chicora" as trustees for the plaintiff, and for an order vesting in the plaintiff all the interest therein of the defendants, upon payment of $4,400. The action was tried without a jury at a Toronto sittings. ORDE, J., in a written judgment, said that the steamer, which had been damaged and taken over by the underwriters, was advertised to be sold by tender on the 19th January, 1920. The time for receiving tenders was extended to the 26th January, but no tender was accepted. Afterwards an offer to purchase the vessel for $4,400, made by the

defendant Callaghan, was accepted. The plaintiff asserted that the defendant Callaghan purchased the vessel in circumstances which constituted him a trustee for the plaintiff and which entitled the plaintiff to a transfer of the vessel upon payment to Callaghan of $4,400. To succeed, the plaintiff must establish clearly and definitely, first, that the defendants Shaw and Sweet were employed as agents to purchase the vessel for him; and, second, that Callaghan bought the vessel either on behalf of Shaw and Sweet or under an arrangement with them whereby they acquired an interest in the vessel. The plaintiff must establish both these things; and, in the learned Judge's opinion, he had failed to establish either. Callaghan purchased the steamer for himself, and Shaw and Sweet never had any interest in her whatever. The action should be dismissed with costs. The costs of the injunction motion should also go to the defendants, but there should be no additional costs in connection with an amendment to the pleadings which was afterwards abandoned by the defendants. H. J. Macdonald, for the plaintiff. J. W. McFadden, for the defendant Callaghan. J. Cowan, for the defendants Shaw and Sweet.

RE REID—LATCHFORD, J.—MARCH 26.

Executors—Passing Accounts—Gifts of Money Made by Testator to his Father—Improvidence—Money not Chargeable against Executors.]—An appeal by the executors of the will of R. H. Reid, deceased, from the order of a Surrogate Court upon passing the executors' accounts. The appeal was heard in the Weekly Court, Toronto. LATCHFORD, J., in a written judgment, said that upon the hearing of the appeal he suggested that counsel for the widow of the testator should consider the advisability of bringing an action to determine the validity of the gifts alleged to have been made by the testator to his father. The learned Judge, having been informed that no action would be brought, proceeded to consider the appeal upon the evidence adduced. He was of opinion that the gifts made by the deceased to his father of $600 and $2,690—however improvident they might have been—were not chargeable against the executors. The appeal should, therefore, be allowed, but, in the circumstances, without costs other than those of the Official Guardian, which should be paid out of the estate of the testator. W. C. Mikel, K.C., for the executors. E. J. Butler, for the widow. E. C. Cattanach, for the Official Guardian.

RE CURRAN—MIDDLETON, J.—MARCH 26.

Trusts and Trustees—Failure of Trustees to Agree—Removal of Trustees and Appointment of Trust Company in their Stead—Disposition of Rentals of Trust Property—Costs.]—Motion by Alfred Curran for an order directing that rents of trust property be paid to the executors and trustees under a will, and appointing the National Trust Company trustees in lieu of the present trustees. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that the right and duty of the trustees was plain from an order made by RIDDELL, J.; and, as the trustees could not agree, the best thing to do was to remove them and appoint the National Trust Company in their stead. The order might provide that any person beneficially entitled should be allowed to remain in possession so long as he or she paid the trustees enough to meet the expenses of carrying the property and preserving it for the remaindermen. Costs should be paid out of the rentals, so that each would bear his share. W. D. McPherson, K.C., for the applicant. W. D. M. Shorey, for Walter and A. E. Curran and Mrs. Spice.

RE SARNIA METAL PRODUCTS CO. LIMITED—KELLY, J.—MARCH 26.

Sale of Goods—Reliance of Buyer on Skill of Seller—Machine Required for Specific Purpose to Knowledge of Seller—Machine Found Unworkable—Right to Reject—Waiver—Return of Machine—Return "on Consignment"—Evidence—Findings of Master—Appeal—Disallowance of Claim of Creditor against Insolvent Estate in Winding-up Matter.]—Appeal by the A. R. Williams Machinery Company Limited from a report of the Local Master at Sarnia stating that he had disallowed all of the appellants' claim of $4,292.49, filed with the liquidator of the Sarnia company in a winding-up, except $300. The appeal was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the appellants' claim was made up of 9 distinct items, the principal one being $2,772, the price of a machine purchased by and delivered to the Sarnia company and afterwards returned to the appellants as unfit for the purposes required. The appellants contended that the machine was taken in by them on consignment. The Master found that the machine did not work satisfactorily nor at all, and was valueless to the Sarnia company, who complained to the appellants without result; that the machine was defective; and that this was notified to the appellants promptly. One ground of the appellants' objection to the Master's findings was the admission in evidence of statements made by two persons (S. and J.) to other persons who

were called as witnesses, S. and J. not having been called. If the finding that the machine was unworkable and did not answer the purposes for which the appellants knew it was required, depended upon that evidence alone, there would be ground for complaint. But there was other evidence sufficient to support the Master's finding; and the learned Judge was unable to say that there was not sufficient admissible evidence to justify that finding. On the appellants' further contention that the machine was returned to them on consignment, the report should not be disturbed. The Sarnia company having relied, as the appellants knew, upon the judgment and skill of the appellants in procuring for them a machine required for a specific purpose and for use in a particular operation, and the machine supplied having turned out unfit for that purpose, the Sarnia company's right was to reject and return it, unless some other bargain was come to by which that right was relinquished. The appellants contended that in the correspondence which followed the purchasers' rejection of the machine they waived that right; but, when the whole correspondence was considered, coupled with the purchasers' repeated insistence on their rights, the appellants could not successfully contend that the Master erred in regard to that obligation of the appellants. There was nothing in the evidence to justify disturbing the Master's conclusions as to the other items. Appeal dismissed with costs. G. W. Mason, for the appellants. J. M. Bullen, for the liquidator.