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HIGH COURT DIVISION.

MIDDLETON, J. NOVEMBER 1ST, 1917.

*UREN v. CONFEDERATION LIFE ASSOCIATION.

Mortgage—Power of Sale—Exercise of—Purchase by Second Mortgagee—Action to Set aside Sale and for Redemption—Notice of Sale actually Served, but not on all Persons Interested—Right of Mortgagee to Stand on Provision for Sale without Notice—Abortive Auction Sale—Test of Value—Advertisement of Sale—Two Parcels Offered together—Bona Fides of Sale—Value of Land—Expert Testimony—Right to Redeem.

Action to set aside a sale by the defendant association to the defendant Harris, under a power of sale contained in a mortgage to the association, of a part of the mortgaged land in which the plaintiff had an interest, and for redemption.

The action was tried without a jury at Toronto.
Shirley Denison, K.C., for the plaintiff.
G. H. Kilmer, K.C., for the defendants.

MIDDLETON, J., in a written judgment, after setting out the facts, said that the *first* contention was, that the mortgagee-defendant was put to its election, and, having chosen to give a notice of exercising the power of sale, must, at its peril, give a valid notice. With this the learned Judge did not agree. There was a power of sale, and it might be exercised upon the arising of either of two conditions precedent—two months' default and notice, or three months' default without notice. The right to

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

sell on three months' default without notice was not lost by notice being given to some of those entitled to notice under the earlier provision. If notice should be given requiring payment within ten days, even after three months' default, then the mortgagee would be precluded from selling within the time so given, because it would be inconsistent with the notice he had given: Stevens v. Theatres Limited, [1903] 1 Ch. 857.

Second, complaint was made as to the way in which the auction sale was advertised. Both parcels were put up together—the better way would have been to offer each separately; but the property was not then sold; and the Court must deal with the sale actually made without regarding the abortive auction sale as any real test of the selling value of the property.

Third, it was contended that there was not any actual exercise of the power of sale at all. Some things were pointed out by counsel for the plaintiff, in his careful and fair presentation of the case, that might be regarded as suspicious, if suspicion had first been awakened, but which seemed to the learned Judge to be of no moment when, as was the case, he was entirely satisfied of the good faith of all concerned. The property was valued by the mortgagee-defendant's own valuator and by an outside valuator of experience at $350 per foot, and the sale to the defendant Harris was at a price computed according to that valuation. It was a real sale and free from any taint or suspicion of wrong-doing.

Fourth, it was contended that the sale was at an undervalue, and that the mortgagee-defendant should be charged on the basis of a sale at $400 per foot. Evidence was given by an expert that in his opinion the land was worth that much. [Remarks upon the weight of expert testimony as to the value of land.] There was no foundation for any claim against the mortgagee-defendant upon this head.

Fifth, it was contended that there was still a right to redeem outstanding in the plaintiff. It was admitted that, if the sale to the defendant Harris stood, the fact that he was a second mortgagee did not prevent his setting up an absolute title. This ground of action, therefore, also failed, but it was not a matter of practical importance, as the defendant Harris by his counsel offered to sell the land now remaining for a sum that would clear him, and would probably accept considerably less.

In every aspect of the case the action failed.

Action dismissed with costs.

MASTEN, J. NOVEMBER 5th, 1917.

*CITY OF TORONTO v. QUEBEC BANK.

Assessment and Taxes—Business Tax—Bank Ceasing to Do Business in Municipality—Taxes Based on Assessment of Previous Year—Assessment Act, sec. 95 (3) (7 Geo. V. ch. 45, sec. 9)—"Removal from Municipality of Person Assessed"—"Person"—Interpretation Act, sec. 29 (x)—Court of Revision—Power to Remit Taxes—Assessment Act, sec. 118 (1) (7 Geo. V. ch. 45, sec. 11).

Motion by the Corporation of the City of Toronto, the plaintiff, for judgment on the pleadings, in an action to recover from the defendant bank the amount of a tax known as "business tax" for the year 1917.

The defendant bank transferred its assets in the city of Toronto to the Royal Bank of Canada on the 31st December, 1916, and had not done business in the city during 1917. The defendant bank contended that it was not liable to pay the tax for that year.

The motion was heard in the Weekly Court at Toronto.

C. M. Colquhoun, for the plaintiff corporation.

Gideon Grant, for the defendant bank.

MASTEN, J., in a written judgment, after setting out the pleadings, said that the case was argued on the assumption that the facts were as stated in the defence.

The defendant took the preliminary objection that the application was premature, and relied upon sec. 118 (1) of the Assessment Act, R.S.O. 1914 ch. 195 (sec. 11 of the Assessment Amendment Act, 1917, 7 Geo. V. ch. 45), whereby the Court of Revision is empowered to give a remission or reduction of taxes where the person assessed "for business" has not carried on business for the whole year in which the assessment was made. As to this objection, the learned Judge said that the application to the Court of Revision is a proceeding independent of and unconnected with the action, and that application might be made thereunder by the defendant, even though the taxes were found to be legally payable. Objection overruled.

The learned Judge then referred to sec. 10 (1) (*c*) of the Act, and said that the defendant occupied and used land for the purpose of its business during 1916, and the assessment roll

prepared and returned in that year properly included a business assessment of the defendant.

The plaintiff corporation availed itself of sec. 56 (1) of the Act, and in 1917 adopted the assessment which had been made in 1916 as the basis for levying the rate in 1917.

The learned Judge then referred to secs. 70 and 95 (1) of the Assessment Act, and sec. 29 (*x*) of the Interpretation Act, R.S.O. 1914 ch. 1, and to the provision (sub-sec. (3)) added to sec. 95 by 7 Geo. V. ch. 45, sec. 9, as follows: "Subject to the provisions of section 118 every person assessed in respect of business or income upon any assessment roll which has been revised by the Court of Revision or County Judge shall be liable for any rates which may be levied upon such assessment roll, *notwithstanding the death or the removal from the municipality of the person assessed* or that the assessment roll had not been adopted by the council of the municipality until the following year."

This enactment came into force on the 12th April, 1917; the by-law levying the taxes in question was passed on the 30th April, 1917.

Effect cannot be given to the contention that it is not a person who has removed from the municipality, but one who has gone out of business entirely. The defendant bank was in the city in 1916, and was not there in 1917. It must, therefore, have removed from the municipality; and "person" includes a corporation: Interpretation Act, sec. 29 (*x*). The defendant bank is, therefore, liable.

No opinion was expressed on the power or duty of the Court of Revision if application is made under sec. 118 (1), as enacted by 7 Geo. V. ch. 45, sec. 11.

Judgment for the plaintiff corporation for the amount of its claim, with costs.

BRITTON, J. NOVEMBER 6th, 1917.

RE BELL.

Distribution of Estates—Will—Absent Legatee—Presumption of Death before Death of Testatrix—Advertising.

Motion by the surviving children of Louisa Maria Johnston, deceased, for an order determining certain questions arising upon the will of Rachel Ann de Hertel Bell, as to the distribution of her estate.

After making certain specific gifts and giving certain directions, the testatrix proceeded: "As to one-half of the said residue, to pay the same to my sister Louisa Maria Johnston for her sole and separate use absolutely . . . The said sum of $4,000 and all accumulations thereof shall be divided equally between my said sisters Louisa Maria Johnston, Charlotte Fenwick, and Frances Margaret Cunningham, for their sole and separate use . . . Provided always that if any of my said sisters . . . shall die in my life leaving a child or children who shall survive me . . . such child or children shall respectively take (and if more than one equally between them) the share and benefit which his, her, or their parent would have taken . . . if such parent had survived me."

The testatrix died on the 3rd December, 1897; the sister Louisa Maria Johnston predeceased the testatrix.

The motion was heard in the Weekly Court at Toronto.

W. S. Middlebro, K.C., for the applicants.

F. W. Harcourt, K.C., Official Guardian, representing the interest of the absentee.

J. F. Orde, K.C., for the surviving executor of the will.

BRITTON, J., in a written judgment, said that the first question was, whether John Johnston, one of the children of Louisa Maria Johnston, predeceased the testatrix. It was established that he left his home and family in 1877. He had not been heard from by his family nor by any known friend since that year; nor had he or any one on his behalf claimed his share in his own mother's estate. He would be presumed to be dead on the 1st January, 1885. He thus predeceased both his mother and the testatrix.

(2). The share to which John Johnston would have been entitled passed to his surviving brothers and sisters.

(3). The surviving executor should pay over the money in his possession or control to the surviving children of Louisa Maria Johnston.

(4). There was no necessity for further advertising for John Johnston. Reference to Re Ashman (1907), 15 O.L.R.42; Re Moore (1915), 9 O.W.N. 282; Olsson v. Ancient Order of United Workmen (1916), 38 O.L.R. 268.

Order declaring accordingly; costs of all parties out of the money in the hands of the surviving executor.

SUTHERLAND, J. NOVEMBER 8TH, 1917.

RE CIVIL SERVICE CLUB.

FURNISS WITHY & CO. LIMITED'S CLAIM.

Company—Winding-up—Club Subscription—Offer to Return—Acceptance—Contract—Consideration—Creditor's Claim—Preferred Claim—Moneys Deposited in Bank—Trust—Earmarking.

Appeal by the claimant company from the certificate of the Local Master at Ottawa, in a reference for the winding-up of the club, which was incorporated as a company, of his finding against the claim of the appellant company to rank as a creditor upon the assets of the club in liquidation. The appellant company's claim was to rank not only as a creditor but as a preferred creditor.

The appeal was heard in the Weekly Court at Ottawa.
W. L. Scott, for the appellant company.
G. F. Henderson, K.C., for the liquidator.
Clarke, for one Ebbets, a creditor.

SUTHERLAND, J., set forth the facts in a written judgment. He said that, as the result of solicitation on the part of an agent of the club, the appellant company agreed to pay $250 to the club for a life-membership. The appellant company paid the $250, and a life-membership certificate was issued in favour of J. R. Binning, its manager, and sent to the company. The directors of the club, learning that persons had been induced by doubtful methods of solicitation to become life-members, on the 20th October, 1916, resolved that the subscriptions of these persons should be returned. The appellant company was notified of the resolution, and returned the certificate of life-membership to the club, in a letter in which the company said, "We note you will arrange to refund the cost of this membership."

The winding-up order was made shortly afterwards, the subscription-money not having been refunded.

It appeared that the moneys obtained for life-memberships through the efforts of the agent were wholly or in part carried into an account in a bank, commencing with a deposit of $2,750 on the 25th September, 1916. The appellant company's cheque was sent to the club on the 21st September, 1916. The company

contended that it was not only a creditor but a preferred creditor, because its money was deposited in a separate account and earmarked.

The learned Judge agreed with the Master that, while nominally the company was dealt with in the negotiations for membership, it was in reality a representative of the company who was to be and was selected and elected. The certificate issued in the name of the company's representative, and was received by it without protest or objection.

The conclusion of the Master that the company was not a creditor at all was wrong. It was competent for the directors, finding that improper representations had been made, to offer to cancel the certificate and return the money received. When the company accepted the club's proposal and returned the certificate, the club became indebted to the company, and the company became a creditor.

But the mere placing of the money in a bank account with other moneys—against which cheques were apparently drawn from time to time—could not be said to raise any trust in favour of the company for the amount of the money paid by it.

The appellant company should be declared to be a creditor, but not a preferred creditor; and, as success upon the appeal was divided, there should be no order as to costs, except that the costs of the liquidator be paid out of the assets of the club.

SUTHERLAND, J., IN CHAMBERS. NOVEMBER 9TH, 1917.

*APPELBE v. WINDSOR SECURITY CO. OF CANADA LIMITED.

Mortgage—Action for Foreclosure—Mortgage Made in 1915—Renewal or Extension of Mortgage Made in 1911—Interest and Taxes not in Arrear—Principal Overdue—Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, sec. 2 (1)—Sec. 4 as Amended by 6 Geo. V. ch. 27, sec. 1.

Application by the defendants to dismiss the action, on the ground that it was brought without the leave of a Judge required by the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, sec. 2 (1).

W. E. Raney, K.C., for the defendants.
A. W. Langmuir, for the plaintiff.

SUTHERLAND, J., in a written judgment, said that on the 8th February, 1911, one Davenport bought the lands in respect of which the action was brought, and executed a mortgage in favour of the vendor to secure the unpaid purchase-money, $28,000, payable in 5 years from the day mentioned, with interest half-yearly at 6 per cent. per annum. On the 18th June, 1913, the vendor assigned the mortgage to the plaintiff. Later in 1913, Davenport sold the lands to McBain, who assumed the mortgage, and afterwards transferred the lands, subject to the mortgage, to the defendants. On the 8th February, 1915, the defendants executed a mortgage in favour of the plaintiff for $28,025, payable at the expiration of 2 years, with interest half-yearly at 7 per cent. per annum.

This action was brought in August, 1917, upon the last-mentioned mortgage, for foreclosure; at that time neither interest nor taxes was in arrear—the principal money was all overdue.

Section 2 (1) of the Act provides that no person shall (*a*) take or continue proceedings by way of foreclosure for the recovery of principal money secured by any mortgage of land made or executed before the 4th August, 1914, except by leave of a Judge.

By sec. 4 of the Act (as amended by 6 Geo. V. ch. 27, sec. 1), secs. 2 and 3 of the principal Act shall not apply to any mortgage made or entered into after the 4th August, 1914, or to any extension or renewal made or entered into after the 4th August, 1914, of a mortgage made or entered into prior to that date, where such extension or renewal is for not less than 3 years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal.

Upon the evidence it seemed plain to the learned Judge that, though in form a new one, the mortgage sought to be enforced was in substance and fact an extension or renewal of the pre-existing mortgage, and, being made for a term of less than 3 years and at a higher rate of interest than that provided for by the original mortgage, it was not covered by the exception in sec. 4 as amended, and was therefore subject to the necessity, imposed by the original Act sec. 2 (1), on the mortgagee, taxes and interest not being in arrear, of obtaining the leave of a Judge before beginning the action.

Upon the material as a whole, if there was power or discretion to grant the leave in this action, nunc pro tunc, it should not be exercised.

Order dismissing the action with costs.

MULOCK, C.J. EX. NOVEMBER 9TH, 1917.

VICTORIA ELECTRICAL CO. v. MONARCH ELECTRICAL CO. LIMITED.

Contract—Formation—Purchase and Sale of Goods—Letter—Quotation—Acceptance—Signatures of Parties—Evidence—Finding of Trial Judge.

An action for damages for the breach of a contract to supply certain goods to the plaintiffs, who were jobbers in electrical supplies in Toronto, the defendants being manufacturers of electrical supplies in Montreal.

The action was tried without a jury at Toronto.

John Jennings, for the plaintiffs.

Peter White, K.C., and Alfred Bicknell, for the defendants.

MULOCK, C.J. EX., in a written judgment, said that the negotiations leading up to the alleged contract were conducted by Arthur Wynston, manager and proprietor of the plaintiff company, and J. R. Lewis, secretary of the defendant company; and they did not agree upon the facts.

A letter was written by Lewis, on behalf of the defendants, to the plaintiffs, on the 9th November, 1915, which was headed "Quotation," and began, "As per your request, we are pleased to quote you on supplies as follows." Then followed a list of various electrical supplies with prices set opposite. At the bottom of the first page, these words were printed: "All orders and agreements are contingent upon fires, strikes, accidents, and other causes beyond our control, and subject to changes in Customs Tariffs." On the next page, the list of supplies with prices was continued; and the document concluded: "Above prices are f.o.b. Toronto, Ont. Terms net 30 days. The said prices to remain in force for . . . 3 months from date."

Lewis said that he delivered the letter and a duplicate of it to Wynston; that Wynston did not sign either of them, but took them both away, and that he (Lewis) subsequently received by post one of them signed by the plaintiff and having certain pencil markings thereon.

The learned Chief Justice accepts Lewis's evidence, and finds that what Wynston asked was a mere quotation of prices; that Lewis explained to him that any quotation he might furnish would be contingent upon the defendants being able to procure raw

material at previous prices; that the letter, when given to Wynston, was fully signed by the defendants; that Wynston did not then sign either copy; and that neither party then regarded the quotation as constituting an offer which might become the basis of a contract, but regarded it merely as a quotation.

Wynston asserted that the paper was signed by both parties in order to evidence the alleged oral contract. In order to give it the character of a contract, it would be necessary to read into it material terms which the parties did not see fit to insert. To do so would be making a contract for the parties, not interpreting their words. Even if the paper was intended by the parties to be a contract, it would be void because of no consideration flowing from the plaintiffs. The question of contract or no contract should not be left to doubtful inference: Harvey v. Facey, [1893] A.C. 552; and see Boyers v. Duke, [1905] 2 I.R. 617.

From all the circumstances, it must be found that both parties used the word "quotation" in its ordinary, popular sense, not as an offer, but as a mere statement of prices.

No contract existed between the parties.

Action dismissed with costs.

MASTEN, J. NOVEMBER 9TH, 1917.

*RE CITY OF TORONTO AND GROSVENOR STREET PRESBYTERIAN CHURCH TRUSTEES.

Municipal Corporations—Expropriation of Land—By-law—Declaration that Land Forms Part of Highway—Authorisation of Use of Land before Award of Compensation—Municipal Act, sec. 347—Application of—Repeal of Expropriating By-law after Award—Right of Land-owner to Enforce Award—Municipal Arbitrations Act, sec. 7—Municipal Act, sec. 332—Right of Desistment.

Motion by the trustees to enforce an award of compensation for lands expropriated by the city corporation.

The motion was heard in the Weekly Court at Toronto.

J. A. Paterson, K.C., and W. N. Tilley, K.C., for the trustees.

Irving S. Fairty and C. M. Colquhoun, for the city corporation.

MASTEN, J., in a written judgment, said that on the 6th January, 1914, the city council passed by-law 6884, to extend Teraulay street northerly 86 feet wide to Grenville street and to straighten and widen St. Vincent street and for its extension northerly to St. Mary street, to a width of 86 feet. In further pursuance of this purpose, the council, on the 23rd March, 1914, passed by-law 6927, to expropriate 13 different parcels of land, including the lands of the applicants, upon which church buildings were standing. This by law, after describing the parcels, declared that they were thereby expropriated and taken for the proposed extension, and declaring that all the said parcels formed part of the several highways named.

Upon notice given by the applicants, the Official Arbitrator, pursuant to the Municipal Act, R.S.O. 1914 ch. 192, and the Municipal Arbitrations Act, R.S.O. 1914 ch. 199, proceeded with an arbitration to determine the compensation to be allowed to the applicants; and, on the 7th December, 1916, made his award, by which he determined that the city corporation should pay to the applicants $57,500 in full compensation for the taking of their lands, buildings, and church-organ, with interest from the date of their giving possession of the premises.

The award was duly filed, and had not been moved against or appealed from; but had not been adopted by the council.

On the 14th May, 1917, the council repealed by-laws 6884 and 6927.

Section 7 of the Municipal Arbitrations Act provides that the award may be appealed against, and shall be binding and conclusive upon all parties to the reference unless appealed from within 6 weeks after notice that it has been filed.

Section 347 of the Municipal Act provides that, if the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award, except for the purpose of survey, the award shall not be binding on the corporation, unless it is adopted by by-law, within 3 months after the making of the award.

By sec. 332 of the Municipal Act, the provisions of Part XVI., which includes sec. 347, are made subject to the Municipal Arbitrations Act.

The learned Judge said that, with some doubt, he was of opinion that, in construing sec. 7 of the Municipal Arbitrations Act, regard must be had to the purport of the whole Act; that the Act relates solely to the ascertainment of the quantum of compensation; and that sec. 7 must be construed as meaning that no appeal shall lie against the award unless it is brought within 6

weeks, and not as declaring that unless an appeal is so brought the right of desistment lapses.

The applicants contended that the case did not fall within the provisions of sec. 347 of the Municipal Act—that the expropriating by-law professed to authorise a use to be made of the land before the award—the concluding words of the by-law, referring to the lands expropriated, being: "*and the same are hereby declared to form part of the said highway.*" The learned Judge adopted this contention, saying that these words professed to authorise the immediate use of the lands for the purpose of a highway.

The statute, he said, in the public interest, gave to the corporation an unusual privilege or right, but prescribed conditions precedent to the exercise of that right. The Court must construe those statutory conditions strictly; and the respondents had failed to bring themselves within the conditions prescribed by sec. 347.

Motion to enforce the award granted with costs.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL—LATCHFORD, J.—OCT. 29.

Account—Moneys of Deceased Intestate Received by Niece—Accounting at Instance of Personal Representatives.]—Action by the administrators of the estate of Ellen Broderick, a deceased intestate, against Minnie Campbell, niece of the deceased, for an account of the moneys and personal property of the deceased said to have come to the hands of the defendant or to have been converted by her. The action was tried without a jury at Toronto. LATCHFORD, J., in a written judgment, found, upon the evidence, that the defendant was liable to account to the plaintiffs for the moneys which she received from her aunt and did not expend on the aunt's account during her lifetime or pay after her death for funeral or other expenses and for the erection of a monument over her grave; the moneys to be accounted for including a sum of $150 with which the defendant's trust account in a bank was opened on the 6th January, 1909, and all deposits subsequently made to the credit of that account; and also a sum of $2,538.62 which the defendant had credited to her personal account in the same bank on the 19th January, 1911; and other sums referred to in the judgment. The plaintiffs should be allowed to amend their pleading or particulars so as to cover all the sums as to which

evidence was given at the trial. Judgment requiring the defendant to account for and pay over to the plaintiffs all moneys received by her from or on account of the deceased. Reference to the Master in Ordinary. The defendant should pay the plaintiffs' costs of the trial. Costs of the reference and further directions reserved until after report. T. N. Phelan, for the plaintiffs. T. R. Ferguson, for the defendant.

TORONTO TYPE FOUNDRY CO. LIMITED v. A. B. ORMSBY CO. LIMITED—KELLY, J.—OCT. 30.

Sale of Goods—Action for Price—Machinery not Fit for Work for which Intended—Finding of Fact of Trial Judge—Dismissal of Action.]—Action for the price of a boring-mill sold by the plaintiffs to the defendants. The contract, which was in writing, provided that the machine should be "all tooled up and ready for operation for 4.5 shells, also countershaft for the same," the price being $1,200. The defence was, that the machine was not "tooled up and ready for operation" when it was delivered; and that the plaintiffs afterwards endeavoured, but without success, to make it do the work for which it was intended. The action was tried without a jury at Toronto. KELLY, J., in a written judgment, said that the case turned mainly on questions of fact; and his finding, after reviewing the evidence, was in favour of the defendants. Action dismissed with costs. E. G. Long, for the plaintiffs. J. E. Jones and V. H. Hattin, for the defendants.

BANK OF NOVA SCOTIA v. SALTER—MIDDLETON, J.—OCT. 30.

Guaranty—Bank—Account of Customer—Liability of Guarantor—Fraud of Associate—Findings of Fact of Trial Judge.]—Action to recover from the defendant $50,300 and interest on a bond executed by the defendant guaranteeing to the plaintiff the indebtedness of the Canadian Oak Leather Company Limited, which was a customer of the plaintiff at its Brantford branch. The defendant was a shareholder, director, and vice-president of the company. The action was tried without a jury at Hamilton. MIDDLETON, J., set out the facts in a written judgment and stated that his findings on the evidence were in favour of the plaintiff.

Once the facts were ascertained, there did not seem to be any room for legal discussion. The gist of the findings was, that the liability on the bond was exactly as intended by the parties. Thornton, the president and managing director of the company, had been guilty of an extensive series of frauds, but he was the business associate and colleague of the defendant and represented him in all the dealings with the plaintiff—the loss more fairly fell upon the defendant than on the plaintiff. Judgment for the amount claimed with costs. W. N. Tilley, K.C., and R. H. Parmenter, for the plaintiff. A. M. Lewis, for the defendant.

WAIT v. FINNEN—SUTHERLAND, J., IN CHAMBERS—NOV. 1.

Venue—Motion to Change—Practical Disposition of, by Trial Judge—Costs.]—An appeal by the defendant from an order of the Master in Chambers dismissing a motion on the part of the defendant to change the venue from Hamilton to Goderich. SUTHERLAND, J., in a written judgment, said that he had learned on inquiry that the motion had been already disposed of by MIDDLETON, J., at the Hamilton sittings. On a motion by the defendant to postpone the trial of the action, on the ground of the absence of a material witness, MIDDLETON, J., gave the defendant the option of going to trial at such sittings and of taking the evidence of a certain witness *de bene esse*, or of going down to the winter sittings at Hamilton; and, on being asked by the defendant to leave the question of a change of venue to Goderich open, declined to do so. The defendant not electing to take the first course thus proposed to him, the trial of the action was fixed for the winter sittings at Hamilton. In these circumstances, the appeal should be dismissed; and, as the defendant must be taken to have known the actual position of the matter, with costs. William Proudfoot, K. C., for the defendant. J. H. Spence, for the plaintiff.

CLOISONNÉ AND ART GLASS LIMITED v. ORPEN—FALCONBRIDGE, C.J.K.B.—NOV. 3.

Contract—Assumption or Adoption—Holding out—Agency—Breach—Damages.]—Action for damages for breach of a contract, tried without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the correspondence shewed the adoption and assumption of the contract by A. M. Orpen senior, as sole proprietor of the Hessco Company, and there was both holding out and actual agency of William Ile, Guyette, and F. S. Orpen. True, the plaintiffs never bought the goods at the advanced price; but, if they had had them, they could have sold them at the new figure and made a profit of $1,857.20, for which sum judgment should be entered for the plaintiffs, with costs. J. Jennings, for the plaintiffs. J. R. Roaf, for the defendant.

HAMER v. O'BRIEN—BRITTON, J., IN CHAMBERS—NOV. 6.

Money in Court—Stop-order—Payment out of Court—Costs.]—Application by the plaintiffs to set aside a stop-order and for payment out of the money in Court. BRITTON, J., in a written judgment, said that the plaintiffs were entitled to an order directing and permitting the payment out of Court to them, under the terms of the judgment recovered on the 18th July, 1917, of the balance of the sum of $8,095.62 paid into Court by the defendants on the 1st October, 1915, with accrued interest thereon, notwithstanding the order made by the Master in Chambers on the 27th October, 1915; and for the cancelling and setting aside the stop-order made by the Master in Chambers, in so far as that order prevented payment out of Court. The order for payment out should be made subject to the plaintiffs' solicitors filing an undertaking to pay any balance that belonged to A.T.E. Hamer, after satisfying the plaintiffs' claim and costs, to the Imperial Bank of Canada or their assigns. No order as to damages, as none were shewn to have been sustained. The costs of the plaintiffs and of the bank, if any, of the stop-order and of this application, to be paid by M. McGinnity. J. B. Holden, for the plaintiffs. E. H. Brower, for M. McGinnity. A. McLean Macdonell, K.C., for the bank.

HELLER v. HELLER—FALCONBRIDGE, C.J.K.B.—NOV. 9.

Husband and Wife—Alimony—Failure of Plaintiff to Shew Reasonable Cause for Leaving Defendant—Evidence—Cruelty—Dismissal of Action—Costs—Rule 388.]—An action for alimony, tried without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff had failed to make out a case. She was practically uncorroborated as to the alleged violence in language and conduct of the defendant. Half a dozen apparently credible witnesses—near neighbours, some of them under the same roof—said that they never heard any sounds of quarrelling, abusive language, blows, or throwing of crockery. It was impossible that such things could have taken place in small, thinly-constructed houses, without persons in the neighbourhood knowing about it. Also on the question of the plaintiff's neglect to look after the defendant's comfort as to meals, etc., and her staying out late at night, the evidence preponderated in the defendant's favour. There was no imputation on the moral character (in the sense of marital infidelity) of either party; and the plaintiff would be well-advised if she availed herself of the defendant's expressed willingness to receive her back to his home and to support her and her infant child. She left him without reasonable cause. Action dismissed. Costs as provided by Rule 388. E. E. Wallace, for the plaintiff. W. R. Wadsworth, for the defendant.

DISTRICT COURT OF THE DISTRICT OF TEMISKAMING.

HAYWARD, JUN. DIST.CT. J. SEPTEMBER 21ST, 1917.

RE TEMISKAMING TELEPHONE CO. LIMITED AND TOWN OF COBALT.

Assessment and Taxes—Income Assessment—Town Corporation—Telephone Company—Assessment Act, R.S.O. 1914 ch. 195, sec. 14—5 Geo. V. ch. 36, sec. 1—Gross Receipts from Equipment in Town—Receipts from Long Distance Lines—Central Exchange Situated in Town.

Appeal by the company from the decision of the Court of Revision of the Town of Cobalt fixing at $8,000 the assessment of the company's income for 1917.

It was shewn that the gross receipts from all telephone and other equipment situated within the limits of the town in 1916 was $7,644.65.

Section 14 (1) of the Assessment Act, R.S.O. 1914 ch. 195, as amended by 5 Geo. V. ch. 36, sec. 1, provides "that every telephone company carrying on business in a . . . town . . . in addition to any other assessment to which it may be liable under this Act, shall be assessed for 60 per cent. of the amount of the gross receipts from all telephone and other equipment belonging to the company located within the municipal limits of the . . . town . . . for the year ending on the 31st day of December next preceding the assessment." Sub-section (2) provides that every telephone company shall be assessed in every township for its wires placed or strung on poles used by the company in the township, thus providing for the assessment of long distance lines; and the appellant company paid an assessment to the various municipalities through which it operated its lines.

The appellant company was notified in June, 1917, of an income assessment of $10,000. Upon appeal to the Court of Revision this was reduced to $8,000, apparently estimated by adding to $4,538, i.e., 60 per cent. of the company's gross receipts from its equipment in the town, a proportion of the total receipts and commissions shewn by the company's report for 1916 to have been earned from the whole of its long distance system.

The appeal was upon the ground that the town corporation had no right to assess income derived from the long distance lines and equipment.

F. L. Smiley, for the company.
George Ross, for the town corporation.

HAYWARD, JUN. DIST. CT. J., in a written judgment, after stating the facts, said that, under sec. 14 (1) as amended, the town corporation had the right to assess the company to the extent of 60 per cent. of its gross receipts for all equipment situated within the town; but it was not the intention, nor was it the meaning of the section, that the town corporation should, in addition, have the right to assess the company on income received from its long distance lines, or even on a portion of such income, simply because a central exchange for a long distance service is situated within the town. Therefore, the income received from the long distance system was not assessable by the town corporation; the appeal

should be allowed; and the assessment reduced from $8,000 to $4,538.

[See Re Bell Telephone Co. and Village of Lancaster (1917), ante 17.]

LEASK, JUN. DIST. CT. J. SEPTEMBER 27TH, 1917.

CLIFF PAPER CO. v. AUGER.

Bill of Sale—Bona Fide Transaction—Description of Goods—Consideration—Inaccurate Statement of—Absence of Fraud—Contract — Sunday — Evidence — Affidavit of Bona Fides—Affidavit Made by Assistant-Secretary of Mortgagee-company—Sufficient Authority not Shewn—Resolution of Directors—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, secs. 12 (2), 13—Fatal Defect—Interpleader Issue.

An interpleader issue, tried by the Junior Judge of the District Court of the District of Nipissing, acting for and at the request of the Senior Judge of the District Court of the District of Temiskaming.

J. W. Mahon, for the plaintiffs.
F. L. Smiley, for the defendants.

LEASK, JUN. DIST. CT. J., in a written judgment, found that the bill of sale from A. C. White to the plaintiffs, under which they claimed goods seized under the defendants' executions against the goods of White, covered all his available assets; that the purchase-price, $3,000, was actually paid over; that the transaction was a bona fide and absolute sale by White to the plaintiffs, without any knowledge on their part of the insolvency of White; and that the description of the articles in the bill of sale was sufficient.

It was said that the true consideration was not expressed, inasmuch as the $3,000 named as the consideration was not paid for the goods described in the bill of sale, but for those goods plus White's interest in two timber contracts. The evidence shewed that $3,000 was a fair price for the goods plus the interest in the timber contracts. The inaccuracy of statement was, therefore,

no indication of fraud and no sufficient reason for invalidating the bill of sale.

Upon the evidence, the contract was not made on a Sunday.

The affidavit of bona fides was made by one Mansfield, the assistant-secretary of the plaintiff company—not an officer permitted by the Act to make the affidavit without authorisation by resolution of the directors: Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, sec. 12 (2). The authority in writing, or a copy thereof, must be attached to and filed with the bill of sale: sec. 13. What purported to be an authority to the assistant-secretary was written on the bill of sale and signed by the secretary-treasurer of the company, with the seal of the company attached. This authority, however, did not purport to be a resolution of the directors, or a copy thereof, nor was it such; and no evidence was offered to shew that it was endorsed on the bill of sale as the result of any resolution of the directors, nor was it shewn that any resolution was ever passed by the directors authorising Mansfield to make the affidavit. This defect made the bill of sale absolutely null and void against the defendants, creditors of the bargainer.

Judgment for the defendants in the issue, with costs.