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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*JONES v. TOWNSHIP OF TUCKERSMITH.

Appeal—Extension of Time for Appealing to Supreme Court of Canada—Special Circumstances—Appeal in Concurrent Proceeding—Substantial Identity of Proceedings—Leave to Appeal—Costs.

Motion by the plaintiffs to extend the time for appealing to the Supreme Court of Canada from the judgment of the Appellate Division, delivered on the 26th April, 1915, reported 33 O.L.R. 634, and noted 8 O.W.N. 344.

The motion was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. Proudfoot, K.C., for the plaintiffs.

R. S. Robertson, for the defendants.

MAGEE, J.A., in a written judgment, stated the facts and referred to the position of the case. Besides this action, there was a summary motion by the plaintiffs to quash a by-law of the defendant township corporation, which by-law was also in question in the action. The judgment of the Appellate Division dealt with both motion and action, and the result of the judgment was that sec. 2 of the by-law was quashed, the conveyance to the defendant Kruse of the land in question was set aside and the registration of it vacated; and the action and motion, so far as sec. 1 of the by-law was concerned, were dismissed. The plaintiffs appealed to the Supreme Court of Canada, but only from the order made upon the motion to quash. When their appeal came on for hearing, difficulty was experienced, and the Supreme Court

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

of Canada adjourned the hearing to permit this application to be made.

The learned Judge said that, if the extension of time were granted and the plaintiffs allowed to appeal in the action, it would practically not increase the expense. Though the actual value of the land in question was small, it might be of more value to the abutting owners as a street, and the question of the right to close a street on which a rear tier of lots fronts, was one of considerable general importance, and might well seem so to the plaintiffs. After the time for appealing has expired, it is ordinarily but just that a litigant should be able to feel assured that the matter is at rest and govern himself accordingly. But here the township corporation had not been lulled into security, for the very same rights were still before the Court in the concurrent proceeding. There was no cross-appeal to re-establish the conveyance to the defendant Kruse or sec. 2 of the by-law. Both he and the corporation had acquiesced in their declared invalidity. The sole question now was the vlaidity of sec. 1 of the by-law, closing the street. In that Kruse had no more interest than any one of the public who might hereafter be a possible bidder at a possible, though improbable, sale. So the only parties interested were already before the Supreme Court of Canada. The double litigation was apparently not the choice of the plaintiffs. It would seem to savour of technicality and injustice to say to these plaintiffs that, though they were protesting and appealing in the Courts against the identical pronouncement which was now set up against them, they should be considered, in one of the two proceedings to which that pronouncement equally and at the same instant applied, to have acquiesced in and to be bound by it, because their protest was made for the same purpose in the other proceeding. In the peculiar circumstances, it will not be a departure from the principles upon which extensions of time have been granted, when it is considered that the intention of these plaintiffs, manifested by actual proceedings, has been to have the decision dealt with by the Court above.

Reference to Concha v. Concha, [1892] A.C. 670.

The extension should be granted, but the plaintiffs must pay the costs of the application.

MACLAREN and HODGINS, JJ.A., concurred.

MEREDITH, C.J.O., dissented, for reasons given in writing.

Motion granted; MEREDITH, C.J.O., *dissenting.*

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*RE TOWNSHIP OF ASHFIELD AND COUNTY OF HURON

Municipal Corporations—Liability of County Corporation for Maintenance and Repair of Bridge Built by Township Corporation—Municipal Act, R.S.O. 1914 ch. 192, sec. 449—Length of Bridge—Embankments not to be Included.

An appeal by the Corporation of the County of Huron from an order of the Judge of the County Court of that county, made under sec. 449 of the Municipal Act, R.S.O. 1914 ch. 192, declaring that a bridge built by the Corporation of the Township of Ashfield, crossing Nine Mile river, is a county bridge.

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

C. Garrow, for the appellant corporation.

W. Proudfoot, K.C., for the township corporation, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the order left uncertain what was the bridge declared to be a county bridge. The road allowance between the 4th and 5th concessions of the township of Ashfield crosses a deep ravine about 1,500 feet in width, through which runs the Nine Mile river, and it also is crossed by the road allowance. The township corporation built a bridge (that in question) only 119 feet in length, and embankments at each end leading up to and from it. These embankments could not fairly and reasonably be called part of the bridge; the County Court Judge spoke of them as "approaches."

Section 442 of the Municipal Act indicates that the Legislature has treated the approaches to a bridge as something independent of the bridge itself, and it is reasonable to conclude, when in sec. 449 bridges are again dealt with, that it was intended that only the bridge itself, and not the bridge with its approaches, should be taken into consideration in determining the length of the bridge for the purposes of that section, which requires, among other things, that the bridge shall be of greater length than 300 feet.

This is not inconsistent with what was decided in In re Mud Lake Bridge (1906), 12 O.L.R. 159; but is opposed to the view expressed in Re Township of Maidstone and County of Essex (1908), 12 O.W.R. 1190, by a Divisional Court of the High Court.

The appeal should be allowed and the order below set aside with costs here and below to be paid by the township corporation, the respondent.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

FOX v. PATRICK.

Reference—Action upon Promissory Note—Defence of Payment—Account—Note Alleged to have been Given as Security for Debt of Another—Preliminary Question for Trial—Order Directing Reference Discharged—Practice.

Appeal by the plaintiff from an order of BOYD, C., in Chambers, upon a motion by the plaintiff to remove from the files of the Court an affidavit filed by the defendant with his appearance and for leave to sign judgment and upon a motion by the defendant to dismiss the action, referring the whole action to the Local Master at London.

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

H. S. White, for the appellant.

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

MEREDITH, C.J.O., in a written judgment, said that the action was brought to recover a balance of the amount of a promissory note for $1,500 made by the defendant on the 25th August, 1904, payable to the order of the Standard Bank of Canada, two months after date, and endorsed by the bank to the plaintiff, upon which $100 was said to have been paid on the 20th June, 1911. The writ of summons was specially endorsed. The defendant appeared on the 9th September, 1916, and filed with his appearance his affidavit, in which he deposed that the note was given by him "as accommodation security to the Standard Bank of Canada" for his brother; and that certain moneys which he sent to the plaintiff, who was manager of a branch of the bank, were or ought to have been applied in payment of the note sued upon and other notes.

The Chancellor made the order appealed against of his own motion, and made no order upon the motions before him, except that the costs of them should be costs in the cause.

The learned Chief Justice said that he doubted whether it was proper to make the order in the circumstances; but the appeal might be disposed of on another ground.

The plaintiff became the holder of the note after its maturity, and therefore took it subject to all the equities with which it was affected in the hands of the bank; but that was immaterial in view of the defence set up—payment.

Upon the argument of the appeal, it was stated that the defendant desired a reference to take the account between the bank and his brother in order to shew that the brother owed nothing, and that there was, therefore, no liability on the notes if they were given as security for the brother's indebtedness. No such defence was set up in the defendant's affidavit; and, even if it were, it would not be proper, according to the practice of the Court, to direct a reference until the defendant had proved that the notes were given for that purpose; and the plaintiff was entitled to have that question first disposed of at a trial—if the defendant failed to establish that upon which the right to an accounting depended, the reference would involve a useless waste of money.

For that reason, and because it is not proper to direct a reference where the defence is payment, the order appealed from should be discharged; costs here and below to be costs in the action.

MACLAREN, HODGINS, and FERGUSSON, JJ.A., agreed in the result without expressing any opinion upon the point that a reference was not proper in a case where the defence is payment.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Appeal—Leave to Appeal to Privy Council Given by Judicial Committee—Power of Court below to Stay Execution—Privy Council Appeals Act, R.S.O. 1914 ch. 54, sec. 10—Inherent Jurisdiction of Court.

Appeal by the defendants (by leave of HODGINS, J.A., ante 290) from an order of RIDDELL, J., in Chambers, in so far as it refused an application for a fiat to stay execution. The order allowed the security on an appeal to the Privy Council from the judgment of a Divisional Court, leave to appeal having been obtained from the Judicial Committee; but the learned Judge held that there was no power under the Privy Council Appeals Act, R.S.O. 1914 ch. 54, to stay execution in cases where the Judicial Committee has given leave to appeal, there being no right of appeal under the statute.

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

Gideon Grant, for the appellants.

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

MEREDITH, C.J.O., reading the judgment of the Court, said that he agreed with the conclusion of RIDDELL, J., that sec. 10 of the Privy Council Appeals Act has application only to the appeals for which it provides; and the power to stay execution must, therefore, depend upon the inherent jurisdiction which the Court possesses over proceedings in it.

That the Court has inherent jurisdiction to stay execution is beyond doubt: Halsbury's Laws of England, vol. 14, para. 60; Polini v. Gray (1879), 12 Ch.D. 438; Warwick v. Bruce (1815), 4 M. & S. 140; Yates v. Dublin Steam Packet Co. (1840), 6 M. & W. 77; Barker v. Lavery (1885), 14 Q.B.D. 769; Cotton v. Corby (1859), 5 U.C.L.J.O.S. 67; Sharpe v. White (1910), 20 O.L.R. 575; Hughes v. Cordova Mines Limited (1915), 8 O.W.N. 372; The Khedive (1879), 5 P.D. 1.

The Indian cases, Mohesh Chandra Dhal v. Satrughan Dhal (1899), L.R. 26 Ind. App. 281, and Nityamoni Dasi v. Madhu Sudan Sen (1911), L.R. 38 Ind. App. 74, do not help upon the question of inherent jurisdiction, but are important as shewing that the fact that special leave to appeal to His Majesty in His Privy Council has been granted will not prevent the Court appealed from exercising any power it may possess to stay execution on the judgment appealed from.

Reference also to Quinlan v. Child, [1900] A.C. 496.

The appeal should be allowed, and an order made staying execution until after the disposition of the appeal to the Privy Council; no costs of the appeal to either party.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

BANK OF OTTAWA v. DICK AND WALKER.

Banks and Banking—Money Applied by Bank for Purposes of a Business—Ownership of Business—Liability for Money—Contract—Evidence—Finding of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of KELLY, J., ante 180.

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

I. F. Hellmuth, K.C., and Wentworth Greene, for the appellants.

N. G. Larmonth, for the defendant Dick, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to recover $13,394.07 alleged to have been advanced by the plaintiffs to the defendant Dick and his co-defendant, trading under the name of "The Dick & Walker Company." The defendant Dick contended that the business carried on under that name was in fact the business of the plaintiffs, and that what the plaintiffs asserted to have been advances to Dick and Walker were really expenditures made by the plaintiffs on their own account. The learned trial Judge accepted Dick's version of the transaction between him and Walker and the plaintiffs; and found that there was no concluded bargain between the parties, and that Dick was not liable to repay the advances that had been made.

The learned Chief Justice said that he was, with great respect, unable to agree with the conclusions of the learned Judge.

Apart from the circumstances that tended to throw light upon the transactions between the parties, the Chief Justice was unable to understand why the testimony of Dick should be accepted in preference to that of Mr. Mulkins, the manager of the plaintiffs' bank, with whom the negotiations on the part of the plaintiffs were carried on, Mr. Finney, the plaintiffs' assistant general manager, and Mr. Hill, a reputable solicitor, which was in direct conflict with the testimony of Dick, and which, if believed, established that the agreement which the plaintiffs set up was entered into—especially when Walker was not called as a witness, and had allowed judgment against him to go by default.

Not only did the defendant Dick fail to displace the prima facie case which the documentary evidence made against him; but the plaintiffs had affirmatively established by the evidence their claim against Dick.

The appeal should be allowed with costs, and there should be judgment for the plaintiffs against the defendant Dick for the amount of their claim with interest and costs. If the defendant Dick desires a reference and the plaintiffs do not object, there will be a reference to the Local Master at Ottawa, and the costs of it will follow the result. If the plaintiffs do not consent to a reference, and the defendant Dick desires a reference, the case may be spoken to within 15 days.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

BANK OF OTTAWA v. SMITH.

Guaranty—Bank Overdraft—Amount of—Action against Guarantors—Defences—Satisfaction—Execution of Guaranty on Understanding as to Execution by Others—Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendant Draper from the judgment of LENNOX, J., 10 O.W.N. 394.

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

V. A. Sinclair, for the appellant.

A. McLean Macdonell, K.C., and J. S. Duggan, for the plaintiffs, respondents.

MEREDITH, C.J.O., read a judgment in which he said that the action was brought on a guaranty dated the 8th January, 1908, executed by the five defendants, by which they jointly and severally guaranteed to the plaintiffs the payment by the Great West Coal Company of Canada Limited of its indebtedness, past and future, to the plaintiffs, to the amount of $4,000—the guaranty being declared to be a continuing one and to cover the whole indebtedness to that amount or the ultimate balance from time to time due upon it to that amount.

The other defendants did not dispute their liability, but the appellant set up two defences: (1) that the indebtedness guaranteed had been satisfied; and (2) that the guaranty was signed by him upon the understanding and agreement that it should not take effect or be binding upon him until signed by all the other shareholders of the company, and that, not having been so signed, he was not liable upon it.

The trial Judge found against these defences, and rightly so.

That the coal company's indebtedness to the plaintiffs amounted to the sum for which they had recovered judgment was well proved; and the other defence was not established by the evidence. There was no evidence to shew that there was an understanding or agreement between the appellant and the plaintiffs such as he set up. The most that was shewn was, that it was intended, if it should be practicable to do so, to obtain the signatures of Fyfe and Mather to the guaranty, and that Fyfe's signature was not obtained. The evidence left no doubt that it

was not the appellant who was anxious for this; it was probable that it was desired by the plaintiffs' manager (Lee) to add strength to the security.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., took no part in the judgment.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

TOBEN v. ELMIRA FELT CO.

Master and Servant—Injury to Servant—Negligence—Defective Condition of Machine—Causal Connection with Injury—Absence of Contributory Negligence—Evidence—Findings of Jury—Judge's Charge.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of the jury at the trial, in favour of the plaintiff for the recovery of $4,000 damages for injuries sustained by the plaintiff by being struck on the head by part of a shoddy-picker machine which he was feeding for the defendants in their factory, by reason, as the plaintiff alleged, of the negligence of the defendants in regard to the condition of the machine or otherwise.

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

R. McKay, K.C., and W. Morrison, for the appellants.

W. N. Tilley, K.C., and N. Jeffrey, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that, according to the testimony of the plaintiff, the machine "would not go," and he was engaged in picking pieces of felt out of the apron of it with his right hand and holding in his left hand a wrench with which he had just before tightened the screws of the machine that had become loose. He stooped in order to do the picking, and when in a stooping position he was struck on the right side of the head by something and rendered un-

conscious. His teeth were damaged, his jaw broken, and his injuries were severe. There was no eye-witness, and no one in a position to say what caused the blow which the plaintiff received.

There was evidence that the machine was not adapted for the use to which it was being put; that there was danger, in using it for picking felt, of the machine becoming jammed; and that, if that had happened, it would account for the condition in which the machine was found to be immediately after the accident; and there was evidence the other way, though it was satisfactorily shewn that the machine was not adapted for the use to which it was being put.

The case was fairly left to the jury, and the contentions of the parties were clearly explained.

The jury found: (1) that the accident was caused by the negligence of the defendants; (2) that the negligence was, that the machine was not adapted for the work and not in proper repair; (3) that the plaintiff could not, by the exercise of reasonable care, have avoided the accident.

The jury evidently accepted as true the plaintiff's testimony; and therefore, eliminating as a cause of the accident any negligent act or omission on his part, the accident must have been caused by some defect in the machine, or have been due to a cause attributable to the fault of neither party.

The jury were warranted in rejecting the last mentioned hypothesis. The defendants' case at the trial was inconsistent with it, and the view of both parties was that the accident was due to some one's fault, and that the question for the jury was, to whose fault it was to be attributed.

The jury's findings were sufficient to entitle the plaintiff to judgment. When read in connection with the evidence and in the light of the charge, it seemed plain that they rejected the defendants' theory and accepted that of the plaintiff; and by the first finding they connected the negligence found by the second with the plaintiff's injuries, because they said that it was that negligence that caused the accident.

The jury having found that the accident was not caused or contributed to by the plaintiff, and having found—and there was evidence to sustain the finding—that the machine was not adapted for the work and was not in proper repair, it followed (a cause attributable to neither party being eliminated) that the condition of the machine must have been the cause of the accident.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*ATKINS v. DAVIS.

Indian—Judgment Recovered by one Indian against another—Enforcement—Recovery on Promissory Note Made by Defendant in Favour of Non-Indian and Endorsed to Plaintiff—"Person"—Indian Act, R.S.C. 1906 ch. 81, secs. 2(c), 102.

Appeal by the plaintiff from the judgment of the County Court of the County of Brant in favour of the defendant in an issue directed to try the question whether sec. 102 of the Indian Act, R.S.C. 1906 ch. 81, had the effect of preventing the plaintiff from enforcing a judgment against the defendant by seizure and sale of his goods and chattels upon his premises or dwelling-place in an Indian Reserve. Both parties were Indians, and the judgment against the defendant was recovered upon a promissory note made by him to the order of one Thompson, not an Indian, who endorsed and transferred it to the plaintiff.

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

H. Arrell, for the appellant.

W. A. Hollinrake, K.C., for the defendant Perry Davis, respondent.

A. M. Harley, for the defendant Sarah Davis, respondent.

MEREDITH, C.J.O., read the judgment of the Court. He referred to secs. 99, 100, 101, 102, 103, 104, and 105 of the Indian Act, and said that the plaintiff contended that sec. 102, read in connection with clause (*c*) of sec. 2, which says that "person" means an individual other than an Indian, in effect provides that "no individual other than an Indian shall take any security or otherwise obtain any lien or charge upon real or personal property of any Indian;" and that, as the plaintiff is an Indian, the prohibition does not extend to him.

It is not said in any section of the Act that property which cannot be seized as provided by sec. 102 can be levied upon under an execution issued on a judgment which an Indian has recovered; and it is reasonably clear that in some instances where the word "person" is used in the Act it is not used in the restricted sense mentioned in sec. 2 (*c*): see secs. 104, 129, 130, 131, 132, and 136.

If the contention of the plaintiff were to prevail, there would be nothing to prevent the provisions of sec. 102 being evaded. All that would be necessary for a non-Indian having a claim against

an Indian to do would be to transfer it to an Indian. If Thompson, who held the promissory note upon which the judgment was recovered, had given it to the plaintiff, the defendant would have had no answer to the plaintiff's action upon it, and judgment must have gone against him. It could not have been intended that that should be possible; and the Court was driven to the conclusion that the context required that the word "person," as used in sec. 102, is not to be read with the restricted meaning which sec. 2 (*c*) would otherwise give it.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*RE LITTLE AND BEATTIE.

Landlord and Tenant—Lease—Rent Payable in Advance—Proviso for Fixing New Rental upon Happening of Named Event during Term—Right to Distrain for Rent Reserved until New Rental Fixed—Rent Falling Due before Happening of Event—Apportionment Act, R.S.O. 1914 ch. 156—Application of.

Appeal by a tenant from an order of the Judge of the County Court of the County of Essex dismissing an application made by the appellant under sec. 65 of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, for an order staying all proceedings under a distress for rent, and directing that the rent, which had been paid into Court by the appellant, should be paid out to the landlord.

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

A. C. McMaster, for the appellant.

A. W. Langmuir, for the landlord, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant was tenant to the respondent of a parcel of land in the township of Pelee, which consisted in part of what was described as the hotel property of the lessor, under a lease dated the 13th March, 1912, for the term of ten years from the 1st May, 1912. The rent reserved was $800 per annum, payable quarterly in advance. The lease contained this proviso: "If local option or any Act or by-law preventing the sale of intoxicating liquors over the bar should come into force on Pelee Island during the

currency of this lease, the rental to be paid for all the premises leased while the same is in force shall be determined by arbitrators under the Arbitration Act."

On the 27th April, 1916, the Ontario Temperance Act, 6 Geo. V. ch. 50, was passed; it came into force (sec. 149) at 7 o'clock in the afternoon of Saturday the 16th September, 1916; and it was not open to question that the effect of the Act was to bring into operation the above-quoted proviso.

The quarter's rent which was payable in advance on the 1st August, 1916, was not paid when it became payable; and, it not having been paid afterwards, the respondent distrained for it. The appellant thereupon applied for relief under sec. 65 of the Landlord and Tenant Act, and was ordered to pay into Court the quarter's rent pending the disposition of his application.

The question for decision was, whether the effect of the lease and of what had happened was to entitle the appellant to refuse to pay the quarter's rent that fell due on the 1st August, 1916, and to suspend the right of the respondent to distrain for it.

There was nothing to interfere with the respondent's common law right to distrain for the rent that was in arrear and unpaid when he made the distress. It was not the case of rent falling due after the Act had come into force; and even as to such rent it was at least doubtful whether, until after award, there would be anything to prevent the landlord distraining for it, whatever right the tenant might have, in the event of the result of the arbitration being to reduce the rent payable by the terms of the lease, to have repaid to him what he had paid in excess of the reduced rent.

None of the cases cited supported the appellant's contention. Reference to Bickle v. Beatty (1859), 17 U.C.R. 465; Mitchell v. McDuffy (1880), 31 U.C.C.P. 266; Hessey v. Quinn (1910), 20 O.L.R. 442.

Until the event mentioned in the proviso happened, the reservation of the rent of $800 continued; and the landlord had the right to require payment of the rent which fell due before the happening of the event, and, if not paid, to distrain for it either before or after the event happened.

The language of the proviso, "the rental to be paid . . . shall be determined," was consistent only with the application of the proviso to rent which by the terms of the lease should become payable after the happening of the event.

The Apportionment Act, R.S.O. 1914 ch. 156, is not applicable to rent payable in advance: Ellis v. Rowbotham, [1900] 1 Q.B. 740; Linton v. Imperial Hotel Co. (1889), 16 A.R. 337, 343.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

ZOLLER v. TANNER & GATES.

Contract—Agreement to Procure Loan of Money at Current Rate—Breach—Evidence — Onus — Commission — Duty of Agent—Appeal—Reduction of Amount of Judgment—Costs.

Appeal by the defendants from the judgment of the County Court of the County of York (DENTON, Jun.Co.C.J.) in favour of the plaintiff in an action for breach of contract.

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

J. M. Ferguson, for the appellants.

R. G. Smythe, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the action was brought to recover damages for the alleged breach by the appellants of an agreement in writing entered into by them with the respondent's husband on the 21st May, 1914, by which they agreed to get for him or the plaintiff loans on her houses at the current rates of interest—the loans to be as near 50 per cent. of the selling value of the houses as they could arrange, and the houses to be built of solid brick. There was no obligation upon the appellants to procure the loans until the houses were completed; and the onus was upon the respondent to prove that the rate which she agreed to pay on the loan which was ultimately effected was in excess of the current rate at that time, or at the time the buildings were completed; and that onus she failed to satisfy.

The trial Judge's view was that the loan should have been procured at 8 per cent.; and, because the respondent secured it at 7 per cent. by paying a bonus of 2 per cent., one-half of which was repaid to him by the vendor of the land, the Judge gave the respondent judgment for $71.50, which he found to represent the excess over 8 per cent. which the respondent by paying the one per cent. in cash had paid. The allowance of $71.50 ought not to have been made.

The learned Judge also allowed the respondent $32, half of $64 which the mortgagees deducted from the amount of the loan. This deduction was intended to pay a commission of 2 per cent. to the person who introduced the loan to the mortgagees. The appellants had nothing to do with its being deducted—that was arranged between the respondent and the mort-

gagees, and the only connection that the appellants had with the matter was that they received $64 from the mortgagees after the transaction was completed, one-half of which they paid over to the respondent, and the other half to a person who acted as agent for the mortgagees.

As to this the learned Chief Justice said that, if it was a term of the arrangement for the loan that a commission should be paid to the mortgagees' broker, no objection could be urged; the payment of a commission did not make the loan any less a loan at the current rate; if the commission was improperly deducted by the mortgagees, that was a matter between them and the respondent.

There was another item, $10, for which the trial Judge made the appellants liable. But the onus was on the respondent to prove that the $10 was an improper payment, and that she failed to do.

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

FERGUSON, J.A., in a written judgment, stated that he agreed with the reasons of the Chief Justice and in the result as to the items of $71.50 and $10; but not as to the $32 item.

On the proper reading of the contract between the parties, no commission could be charged or paid by the defendants for obtaining the loan. Had the defendants, in obtaining the loan for the plaintiff, been obliged to pay a commission, they were not entitled under the contract to charge the plaintiff with any part thereof. Had the plaintiff obtained the loan himself and been obliged to pay a commission, that would be a proper item of damages to be charged by the plaintiff against the defendants. The defendants, having taken the position that they did obtain this loan for the plaintiff under the contract, must be in the position of agents for the plaintiff, obliged to account to him for any sum, profit or benefit, they received out of the transaction, outside of that stipulated for in their contract of agency; and, having received $64 commission, they could not pay half of it to their sub-agent Marshall without the plaintiff's assent. The judgment should be affirmed as to this item.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with FERGUSON, J.A.

In the result, the appeal was allowed as to the items of $73.50 and $10, and dismissed as to the $32 (MEREDITH, C.J.O., dissenting); the amount recovered to be reduced to that sum, with costs on the appropriate scale; no order as to the costs of the appeal.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*REX v. BAUGH.

Criminal Law—Trial for Conspiracy—Evidence—Depositions of Witness Taken at Former Trial—Absence of Witness from Canada—Proof of—Authentication of Depositions—Criminal Code, sec. 999—Time for Signing by Judge—Injustice to Defendant—Same Judge Presiding at both Trials—Judge's Charge—Misdirection or Nondirection—Criminal Code, sec. 1019—Substantial Wrong or Miscarriage.

Case stated by the Senior Judge of the County Court of the County of York upon the trial and conviction of the defendant on a charge of conspiring with others to prosecute G. A. Stimson for an alleged offence, knowing him to be innocent thereof.

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

I. F. Hellmuth, K.C., and T. C. Robinette, K.C., for the defendant.

J. R. Cartwright, K.C., and J. B. Clarke, K.C., for the Crown.

MEREDITH, C.J.O., read a judgment in which he said that the following questions were stated for the opinion of the Court:—

(1) Were such facts proved upon oath from which it could reasonably be inferred that Louis Britain, whose evidence was given at a fomer trial, was absent from Canada at the time of this trial?

(2) Was I wrong in admitting the said evidence, in view of the fact that, at the time the application to admit the said evidence was made, such evidence was not signed by the Judge before whom it was taken, but was signed by me after objection to the receipt of such evidence was taken by counsel for the accused?

(3) Should there be a new trial on the ground of misdirection or nondirection in my charge to the jury?

It was conceded by counsel for the prisoner that the answer to the first question must be in the affirmative; and it should be so answered.

The question as to the admissibility of the evidence of Louis Britain related only to the manner in which the stenographer's transcript of it was authenticated by the signature of the Judge, and not to the other requirements of sec. 999 of the Criminal

Code. The previous trial had taken place before the same Judge; and it appeared that a transcript of the stenographer's notes of the evidence, without any authentication of it by the Judge, was offered in evidence by the Crown, and that its admissibility was objected to by counsel for the prisoner, whereupon the trial Judge looked over the transcript and signed it, and it was then admitted in evidence.

Nothing is said in sec. 999 as to the time when the evidence is to be signed by the Judge, and there is no reason why it may not be signed at any time before it is admitted in evidence. It was argued by counsel for the prisoner that what is contemplated by the section is, that the evidence shall be signed at the time when or immediately after it is taken; but nothing in the section requires that construction to be given to it; and such a construction would render the section nugatory in all cases in which the evidence is taken down by a stenographer.

The second question should be answered in the negative.

The third question should also be answered in the negative.

It was to be regretted that the Crown insisted upon the second trial taking place before the Judge who presided at the first trial. It was obvious that justice required that the second trial should take place before a different Judge, for it would be difficult for any Judge to rid his mind of impressions he had formed at a former trial when the prisoner had been convicted.

MACLAREN and MAGEE, JJ.A., agreed in the result.

HODGINS, J.A., read a judgment in which he stated his agreement in the result, for reasons given by him.

FERGUSON, J.A., also read a concurring judgment, in which he went into the 3rd question, as to misdirection or nondirection, at considerable length, and referred to authorities. He was of opinion that under sec. 1019 of the Criminal Code and the authority of The King v. Romano (1915), 24 Can. Crim. Cas. 30, the defendant had failed to make out a case for the interference of the Court; and the 3rd question should be answered in the negative. He agreed also that the first question should be answered in the affirmative and the second in the negative.

Judgment for the Crown.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1917.

*BANK OF BRITISH NORTH AMERICA v. STANDARD BANK OF CANADA.

Banks and Banking—Obligation of Bank on which Cheque Drawn by Customer to Bank Holding Cheque—Effect of Clearing House Transaction—Rules of Clearing House—Agency of one Bank for the other—Consideration—Contract—Breach—Damages.

Appeal by the defendants from the judgment of MIDDLETON, J., 34 O.L.R. 648, 9 O.W.N. 216.

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

Wallace Nesbitt, K.C., for the appellants.

W. N. Tilley, K.C., and G. L. Smith, for the plaintiffs, respondents.

The judgment of the Court was read by MACLAREN, J.A., who, after stating the facts, said that counsel for the defendants relied upon rule 2 of the rules and regulations respecting clearing houses, contained in by-law 16 of the Canadian Bankers' Association, incorporated by 63 & 64 Vict. ch. 93. The by-law was approved by the Treasury Board in May, 1901; both banks were members of the association, and were bound by the by-law. But rule 2 was intended simply to place the parties on the same footing as though they had dealt with each other directly, and not through the clearing house. The plaintiffs here were in no wise attempting to use the clearing house as a means of obtaining payment of a disputed claim; and there was nothing in the rule which militated against the claim of the plaintiffs. By the express terms of the rule, the rights of the parties were to be the same as they would have been if the exchanges of the cheques and other commercial paper had been made between them directly and without the intervention of a clearing house or any of its officers, and were to be determined by the law applicable to such a transaction, including the law merchant.

So far as the cheques now in question were concerned, there was an undertaking or agreement by the defendants to collect them for the plaintiffs by duly presenting the cheques to themselves (the defendants) and paying them if there were unappropriated funds to meet them while they remained in their possession. The agreement of the plaintiffs to perform a like service

for the defendants with regard to any bills or cheques held by the latter and either drawn upon or payable at the plaintiffs' bank would be a good consideration for such a contract. The defendants would then be the agents of the plaintiffs for the due presentment of the cheques to themselves (the defendants), and, like all paid agents, must use diligence and good faith.

The cheques in question reached the branch of the defendants' bank on which they were drawn, early on the morning of the 3rd October. Between 11 and 12 on that forenoon, the credit balance of Maybee & Wilson, the drawers of the cheques, was $6,860.44; and, so far as the evidence shewed, none of it was appropriated. It was the duty of the defendants to have then presented these cheques and to have paid them. Instead of doing so, they charged other claims against the account, and at the close of the day an overdraft of $1,044 was shewn. The defendants had no right to give to any of these items priority over the plaintiffs' cheques.

Reference to Kilsby v. Williams (1822), 5 B. & Ald. 815; Paget on Banking, 2nd ed., p. 291.

The defendants were liable to the plaintiffs for the damages directly resulting from this breach of duty; and on that ground, as well as on that taken by the trial Judge, the judgment should be upheld.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 5TH, 1917.

*AVERY & SON v. PARKS.

Costs—Scale of—Action in Supreme Court—Judgment Directing Reference to Assess Damages and for Payment of Costs forthwith—Damages Assessed at Sum within Jurisdiction of County Court—Rule 649—Application of—"Order to the Contrary."

Appeal by the plaintiffs from the ruling of the Senior Taxing Officer at Toronto, upon the taxation of the costs of the action, that the plaintiffs' costs should be taxed upon the County Court scale, and that the defendant was entitled to tax his costs on the Supreme Court scale and set off the excess over County Court costs against the plaintiffs' costs—acting upon which a balance of $2.02 was found in the defendant's favour.

The action was brought in the Supreme Court to recover damages for wrongful and excessive seizure and sale by the defendant of the plaintiffs' goods under certain chattel mortgages.

At the trial, the plaintiffs recovered $1,250 damages; but, upon the defendant's appeal, a Divisional Court held that the damages had been assessed upon an improper basis, and referred the action to the Master for an assessment.

The Master awarded $478.40 as damages—an amount admitted to be within the jurisdiction of a County Court.

The Divisional Court gave the plaintiffs their costs of the action up to and including the trial, to be paid forthwith after taxation. The damages to be assessed were directed to be paid forthwith after the confirmation of the Master's report.

J. M. Ferguson, for the plaintiffs.
H. H. Davis, for the defendant.

MIDDLETON, J., in a written judgment, said that the question was, whether Rule 649 applied. Had the judgment been for $478.40, and not for an amount to be ascertained, then, according to Jackson v. Hughes (1910), 2 O.W.N. 15, the Taxing Officer was right. But Rule 649 does not apply to a case in which damages are uncertain and unascertained when the Court directs payment forthwith of the costs up to the trial. An order for immediate payment of costs without waiting to know the amount of damages to be paid is an "order to the contrary," within Rule 649.

The question was to be regarded as purely one of the applicability of the Rule—not one of intention.

Appeal allowed with costs.

KELLY, J. FEBRUARY 5TH, 1917.

WOODBECK v. WALLER.

Chattel Mortgage—Execution in Duplicate—Filed Instrument—Assignment of—Material Alterations in Duplicate Retained by Mortgagee—Assignment—References to Filed Instrument—References to Altered Instrument—Falsa Demonstratio—Seizure under Chattel Mortgage—Extension of Period for Payment—Breach of Covenant—Acceleration—Insecurity—Justification—Payment of Money into Court.

Action to restrain the defendant from dealing with the goods described in a chattel mortgage made by the plaintiff to one

Saylor until the amount secured by the mortgage should be due, and for damages for illegal seizure of the goods.

The mortgage was made on the 24th September, 1912, to secure $2,200, and was duly filed in the office of the Clerk of the County Court of the County of Peterborough.

The mortgage provided that the $2,200 should be paid in four years from the date of the mortgage without interest; and that if the money secured was not paid within the four years an extension for a year would be given. There were also terms by which the mortgage-money would become due at an earlier date in the event of the plaintiff's failure to observe and perform certain of the covenants contained in the mortgage.

On the 4th December, 1912, Saylor assigned the mortgage to the defendant.

The duplicate mortgage in the hands of Saylor when the assignment was made had on its face alterations in the proviso for payment by which it was made to appear that the principal became due in two years from the date of the mortgage and that it bore interest at 7 per cent.; but the provision for extension of the term from the end of four years remained unchanged.

In the instrument of assignment it was recited that the chattel mortgage bore interest at 7 per cent. and that the time of maturity was two years from the 24th September, 1912; and there was a covenant by Saylor that the principal and interest from that date, at the rate mentioned, were then unpaid.

Soon after the assignment, attention was directed to the variance between the terms of the filed mortgage and the altered duplicate, then in the defendant's possession, and the plaintiff became aware of the variance, and also had notice of the assignment.

The plaintiff alleged that the mortgage, after its execution, was so materially altered that it became null and void.

The evidence shewed that Saylor had disappeared soon after the assignment, and had not since been heard of.

The action was tried without a jury at Peterborough.

J. A. Macintosh and J. F. Strickland, for the plaintiff.

F. D. Kerr and V. J. McElderry, for the defendant.

KELLY, J., in a written judgment, after stating the facts, said that, so far as the parties litigant were concerned, they had treated the erroneous recital in the assignment as falsa demonstratio. The alterations in the duplicate were not made by or with the knowledge of the plaintiff or defendant.

A material alteration of a written contract might render the

contract void: Pigot's Case (1615), 11 Rep. 26 *b.*; Master v. Miller (1791), 4 T.R. 320; Suffell v. Bank of England (1882), 9 Q.B.D. 555. But what was assigned was a mortgage duly filed on the 30th September, 1912, as No. 15919; and the erroneous reference to the date of maturity and the rate of interest did not invalidate the mortgage; so that the allegation that the mortgage was void was not sustained.

Upon the next question, the finding should be that the plaintiff, without consent, sold and allowed to be removed from the premises some of the mortgaged goods, thereby breaking a covenant in the mortgage; that the defendant honestly felt unsafe and insecure; and was justified (the mortgage-money being unpaid) in making the seizure complained of on the 26th September, 1916, which was after the expiry of the four years, but while the additional year which the plaintiff was to have, if he so elected, was current.

There should be an order that the amount of the mortgage ($2,200) and interest from the 26th September, 1916, less any sum already paid into Court by the plaintiff, shall now be paid into Court by him, the whole then to remain subject to the further order of the Court, having regard to the interest of the defendant by virtue of his assignment, and the interests of Saylor and of others who may be found entitled.

The defendant to be paid his costs of the action by the plaintiff.

SUTHERLAND, J., IN CHAMBERS. FEBRUARY 10TH, 1917.

*REX v. CHAPPUS.

Criminal Law—Magistrate's Conviction—Motion to Quash—Appeal to Division Court Quashed because Security not Given—Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, sec. 10 (1), (3)—Criminal Code, sec. 1122—Remedy by Appeal—Forum—Objection to Motion.

Motion by Alveric Chappus, A. F. Healey, and Henry Ledyard, who were convicted by a magistrate, in one conviction, upon three separate informations, to quash the conviction, which was for trespass upon the lands of the Bar Point Land Company Limited, in contravention of the Petty Trespass Act, R.S.O. 1914 ch. 111.

M. K. Cowan, K.C., and A. G. Ross, for the defendants.

W. E. Raney, K.C., for the complainants, objected that the defendants, having appealed from the conviction, could not be heard upon a motion to quash.

SUTHERLAND, J., in a written judgment, said that the defendants served a notice of appeal from the conviction to the proper Division Court; and on the 4th January, 1917, the Judge presiding in that Court quashed the appeal with costs, on the ground that it was "improperly launched," meaning thereby, as counsel agreed, that the defendants had failed to give the security which was necessary under the statute.

The learned Judge referred to secs. 2 and 4 of the Petty Trespass Act; sec. 10, sub-secs. 1 and 3, of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90; and sec. 1122 of the Criminal Code; and said that he felt obliged to give effect to the objection and dismiss the motion. If there had been a hearing before the Division Court, it would have been open to the applicants to have raised their several objections to the conviction before the Judge of that Court; and that was the forum contemplated and provided by the Act. It was their own fault that they did not, by perfecting their security, avail themselves of their right of appeal. If they had done so, it would have afforded an adequate remedy, or at all events it could not be said that it would not: Rex v. Keenan (1913), 28 O.L.R. 441.

Reference to Ex p. Bradlaugh (1878), 3 Q.B.D. 509; Colonial Bank of Australasia v. Willan (1874), L.R. 5 P.C. 417, 443; Regina v. Washington (1881), 46 U.C.R. 221; Rex v. Cook (1908), 18 O.L.R. 415; Ex p. Cowan (1904), 9 Can. Crim. Cas. 454; Ex p. Roy (1907), 12 Can. Crim. Cas. 533; Rex v. Carter (1916), 26 Can. Crim. Cas. 51.

Motion dismissed without costs.

JENNER v. BERE—FALCONBRIDGE, C.J.K.B.—FEB. 9.

Deeds—Action to Set aside—Agreement—Quit-claim Deed—Conveyance of Land—Evidence—Corroboration—Lunatic—Lunacy Act, R.S.O. 1914 ch. 68, sec. 37.]—An action to set aside an agreement, a quit-claim deed, and a conveyance of land to the defendant. The action was tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said (1) that the attack on the agreement of the 17th May, 1910 (exhibit 1), failed in every respect. If the plaintiff had any real ground for her attack, it could not have been sustained without the other parties being before the Court. No case was made out for an amendment.—(2) The attack on the quit-claim deed of the 2nd May, 1916, was equally ineffectual. The transaction was perfectly explained by the defendant, who stood to gain nothing by it.—(3) As to the lands purchased from Sifton, the defendant's statement should be accepted as being absolutely true. If, under all the circumstances, corroboration was required, it was supplied by the fact of the father's consenting to the deed being taken in the defendant's name and by the recital in exhibit 1 that the farm stock of the value of $1,500 was the only property, real or personal, left by William Bere, deceased.—(4) The condition of Mary Bere was said to have improved. The family said that they would take care of her among themselves, and there was no object in pronouncing a declaration of lunacy or making any order under sec. 37 of the Lunacy Act, R.S.O. 1914 ch. 68.—Action dismissed with costs. W. R. Meredith, for the plaintiff. P. H. Bartlett, for the defendant.

LINK v. THOMPSON—BRITTON, J.—FEB. 9.

Discovery—Examination of Defendant—Refusal to Answer Questions—Order Striking out Defence.]—Motion by the plaintiff to strike out the defence because of the refusal of the defendant, upon re-examination for discovery, pursuant to an order made by SUTHERLAND, J., on the 2nd January, 1917 (ante 282), to answer questions which she was by the order directed to answer. The motion was heard in the Weekly Court at London. The learned Judge, after explaining the facts in a written judgment, made an order striking out the defence, without prejudice to any application that might be made to the trial Judge to have the plain-

tiff's daughter represented. Costs to be costs in the cause to the plaintiff unless the trial Judge otherwise orders. C. G. Jarvis, for the plaintiff. T. G. Meredith, K.C., for the defendant.

BADENACH v. INGLIS—SUTHERLAND, J.—FEB. 9.

Settlement of Action—Dispute as to whether Items of Account Included—Reference to Take Accounts—Report—Appeal—Evidence —Absence of Mistake or Fraud—Costs.]—Appeal by the defendant Annetta Blanche Inglis from the report of a special referee upon the taking of the accounts of the estate of Edgar A. Badenach, deceased; and motion by the plaintiff for judgment on further directions and costs. The appeal and motion were heard in the Weekly Court at Toronto. The appeal was upon the ground that the referee should have found that two sums of $5,098.69 and $500 due to the defendant Sarah H. Badenach by the estate of Edgar A. Badenach, deceased, were included in the settlement of a former action. SUTHERLAND, J., in a written judgment, said that, after a careful perusal of the evidence, he was unable to conclude that the matters in dispute in this appeal so came up for discussion at the time the settlement of the former action was brought about that it could be said that they were included therein and covered thereby. The parties were represented at the time by careful solicitors, and if the sums now in question had been intended to be included, they would doubtless have been mentioned in the written memorandum. Nothing in the way of mistake or fraud was made out. The appeal should be dismissed with costs.—The costs of all parties of the reference should be paid out of the estate of Edgar A. Badenach. The defendant Sarah H. Badenach should have, against the other parties to the action, the costs of a previous appeal from the report of the referee and of the reference back directed by the order made by HODGINS, J.A., upon that appeal. The first report, in so far as not confirmed by the order of HODGINS, J.A., and the subsequent report after the reference back, are confirmed, and judgment is to be entered pursuant thereto, and the costs of all parties of the motion for judgment should be paid out of the estate. Alexander MacGregor, for the defendant Annetta Blanche Inglis. C. H. Porter, for the plaintiff. D. O. Cameron, for the defendant Sarah H. Badenach.