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COURT OF APPEAL.

MACLAREN, J.A., IN CHAMBERS. JULY 26TH, 1910.

EARL v. REID.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Affirming Judgment at Trial—Terms—Costs—Security.

Motion by the defendant Reid for leave to appeal to the Court of Appeal from the order of a Divisional Court (ante 1067) affirming a judgment based on a verdict of a jury for $500 for injuries sustained by the plaintiff from the falling of a building in London, of which the defendant was the owner, and which was being altered by an in-coming tenant under agreement with the defendant.

C. A. Moss, for the applicant.

H. S. White, for the plaintiff.

MACLAREN, J.A.:—Among the grounds urged in support of the motion are: that the law is not at all settled as to the liability of the owner of a building where alterations or repairs are being done by the occupier, but that the weight of authority is against the judgment in question; that the judgment of the trial Judge and of the Divisional Court are based on different grounds; and that other actions arising out of the same accident are pending, and the law ought to be authoritatively settled.

I am of opinion that this is a proper case for the application of the practice adopted in numerous recent cases by appellate Courts whereby an unsuccessful party who desires to have the law settled may be allowed the opportunity, in case he is willing to do so at his own expense, and not at the expense of the party

who has been successful in the Court or Courts which as a rule finally decide in such cases.

The defendant may have leave to appeal on his undertaking to pay the plaintiff's costs in this Court in any event. Counsel for the defendant was willing as a term to give security not only for the costs of the appeal, but also for the amount of the verdict and the costs below in case of failure. The payment of the plaintiff's costs in this Court in any event may be included in the bond. Costs of the motion to be costs in the appeal.

HIGH COURT OF JUSTICE.

SUTHERLAND, J. JULY 22ND, 1910.

PITTSBURG-WESTMORELAND COAL CO. v. JAMIESON.

Guaranty—Construction — Limitation to one Year — Release of Sureties—Extension of Time Given to Principal—Proof or Inference of Binding Agreement to Extend Period of Credit.

Action upon a guaranty.

The plaintiffs were a foreign corporation dealing in coal. The defendants (David Jamieson and Richard H. Williams), prior to the 18th March, 1907, were shareholders in the Crescent Coal and Coke Co., a company incorporated under the laws of Ontario.

The agreement sued upon by the plaintiffs as a guaranty was dated the 18th March, 1907. It recited that the defendants were interested in the Crescent company; that it was the purpose of the defendants to handle, through that company, 100,000 tons of coal, more or less, during the year beginning the 1st April, 1907, to be purchased from the plaintiffs; and that, on account of the small capital of the Crescent company, this agreement was entered into; and proceeded: "Now, therefore, in consideration of the premises and the covenants herein contained, it is hereby agreed and understood by the parties hereto that David Jamieson and Richard H. Williams, parties of the first part, will be responsible for the prompt payment of all coal shipped by the Pittsburg-Westmoreland Coal Co. . . . to the said Crescent Coal and Coke Co., or to other concerns at the instance and request of said Crescent Coal and Coke Co. or first parties, and that the first parties hereto guarantee to the said Pittsburg-Westmoreland Coal Co. the prompt payment for such coal at and upon the times when the same is due and payable."

The plaintiffs alleged that this document was a continuing guaranty, and was valid and subsisting in the year 1909.

Between the date of the document and July, 1909, the plaintiffs had sold to the Crescent company considerable quantities of coal from time to time, and these had been paid for. During the months of July, August, and September, 1909, the plaintiffs sold to the Crescent company coal to the value of $14,774.64. The plaintiffs admitted a credit against this of $71.03, and claimed the balance of $14,703.61 as payable by the defendants, by reason of the guaranty, because of default in payment by the Crescent company. That company got into difficulties in 1909, and went into liquidation on the 28th September, 1909.

The defendants set up (first) that the agreement was for only one year; and (second) that the plaintiffs, without the knowledge of the defendants, changed the financial relationship existing between the Crescent company and the plaintiffs and extended the time for payment by the Crescent company to the plaintiffs for coal shipped, and so released the defendants from liability, even if the agreement were then in force.

M. H. Ludwig, for the plaintiffs.

A. G. MacKay, K.C., for the defendants.

SUTHERLAND, J. (after setting out the facts):—In connection with the first defence it is necessary to determine whether the contract in question is a specific or a continuing guaranty. The general rule with reference to the construction of guaranties is that all words are to be taken strictly against the guarantor or contractor: De Colyar on Guaranties, 3rd ed., p. 140. Other rules applicable are, "that the surety is not to be charged beyond the precise terms of his engagement:" De Colyar, p. 41; and "that the whole instrument must be considered in construing a guaranty. Thus, when the guaranty is by bond, the extent of the condition of such bond might be restrained by the recitals," etc. . . .

It would appear to be clear . . . that the agreement was entered into with reference to a prospective quantity of coal approximating 100,000 tons to be handled by the defendants through the Crescent company during the year commencing the 1st April, 1907. It is true that the agreement, in the binding portion thereof, further states that the defendants "will be responsible for the payment of *all coal* shipped . . . ," and that the defendants guarantee to the plaintiffs prompt payment for such coal at and upon the times when the same should be due and payable. These are general statements, but, in my opinion, and upon

the proper construction of the whole document, refer to and are controlled by the approximate quantity and the defined period set out in the recitals.

Sansom v. Bell, 2 Camp. 39, was much relied on by the plaintiffs, but a careful perusal of it seems to shew a marked point of difference between it and this case. . . .

I think the case of Lord Darlington v. Monck, 3 Saunders 411a, is a case in point. . . . Applying the principle of that case to the one in question, I think the guaranty must be restricted to the period of one year from the 1st April, 1907; and, so construing the document, the defendants succeed in the first-mentioned defence.

One is strengthened in this view if one looks at the surrounding circumstances when the contract was entered into. . . . The usual custom of the plaintiffs was to make contracts for a year from the 1st April in each year. . . .

Next, as to the second defence put forward by the defendants. It appears that the mode of payment for coal sold by the plaintiffs to the Crescent company after the date of the contract in question was that coal shipped in one month was to be paid for some time in the next month. . . . That was the arrangement before the guaranty was entered into, and it was to be continued under the guaranty. The parties appear to have understood this to be the arrangement, and carried it out for a considerable time after the guaranty. Some time, apparently, during 1908, a change in the mode of payment occurred. . . . Notes at 30 days were sent instead of cheques. . . . From November, 1908, to the 28th August, 1909, the course of giving notes, as indicated, was pursued, and the result was that the Crescent company got 30 days and 3 days' grace extra-time. . . . Can a company who conduct their business in such a way from November, 1908, to August, 1909, as that notes are taken apparently each month from the Crescent company, carried into their books, treated as regular, and paid at maturity, be heard afterwards to say that they knew nothing about it and did not authorise it? It looks as though some such agreement had been arrived at.

But it is said that the defendants, to succeed upon this defence, must shew a binding agreement and a consideration therefor, and that they have not done so. I am inclined to think that perhaps this contention is sound. I am referred to Croydon Gas Co. v. Dickson, 2 C. P. D. 46. . . .

I am inclined to think that, in any event, having accepted, as I find, the note of the 28th August, 1909, the plaintiffs varied

the terms of payment as to the amount of coal delivered in July, and represented thereby, and must fail as to it. Of course, this question is not important if I have rightly decided as to the question of the construction of the guaranty.

The action will be dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. JULY 23RD, 1910.

RE FRASER.

Lunatic—Application for Declaration of Lunacy—Conflict of Evidence—Expert Testimony—Limitation of Number of Expert Witnesses—Evidence Act, 9 Edw. VII. ch. 43, sec. 10, Application of—Order Directing Trial of Issue—Lunacy Act, 9 Edw. VII. ch. 37, secs. 6 (1), 7 (1), (2), (5)—Jury—Costs.

Application on behalf of Catherine McCormick, one of the next of kin of Michael Fraser, for an order declaring him to be a lunatic, or directing the trial of an issue as to his alleged lunacy.

The application was made under sub-sec. 1 of sec. 6 and subsecs. 1 and 5 of sec. 7 of 9 Edw. VII. ch. 37, which read as follows:—

"6.—(1) The Court upon application supported by evidence may by order declare a person a lunatic if the Court is satisfied that the evidence establishes beyond reasonable doubt that he is a lunatic."

"7.—(1) Where in the opinion of the Court the evidence does not establish beyond reasonable doubt the alleged lunacy, or where for any other reason the Court deems it expedient so to do, instead of making an order under sub-section 1 of section 6, the Court may direct an issue to try the alleged lunacy."

"(5) On the trial of the issue the inquiry shall be confined to the question whether or not the person who is the subject of the inquiry is at the time of the inquiry of unsound mind and incapable of managing himself or his affairs, and the presiding Judge shall make an order in accordance with the result of the inquiry."

The alleged lunatic was a retired farmer, 80 years old. On the 13th January, 1910, he was married to one Hannah M. O. Robertson, then about 30 years old.

Subsequent to the marriage, an action was commenced, in the name of Michael Fraser, by Catherine McCormick as next friend, against Hannah M. O. Robertson (otherwise Hannah M. O. Fraser)

and William Robertson, her father, to have the marriage declared invalid. In that action, at the instance of Michael Fraser, an application was made for an order dismissing the action as frivolous and an abuse of the process of the Court, before RIDDELL, J., and on the 28th May, 1910, he made an order staying all proceedings until further order, on the undertaking of the next friend to take proceedings to have Michael Fraser declared a person of unsound mind: Fraser v. Robertson, ante 800, 843. From that order Michael Fraser appealed to a Divisional Court, and on the 7th June, 1910, the Court, by consent of counsel, varied the order of RIDDELL, J., by directing that the next friend of the plaintiff be at liberty to have medical experts examine Michael Fraser as to his sanity; proceedings under the Lunacy Act, if any, to be launched within four days after the medical examination: Fraser v. Robertson, ante 894.

This motion was accordingly launched, and a large number of affidavits were filed on both sides.

A. McLean Macdonell, K.C., for the applicant.

J. King, K.C., for the alleged lunatic.

SUTHERLAND, J. (after setting out the facts as above):—The applicant files a dozen affidavits, original and in reply, and on behalf of the alleged lunatic some seventeen are filed. There were also examinations on certain of these affidavits. . . . Apart from the medical testimony . . . several affidavits were filed on each side of persons acquainted for longer or shorter periods, and more or less intimately, with Michael Fraser, and of a most contradictory character. In some he is alleged to be of sound mind and competent to do business, and in others not. These affidavits were also contradictory as to what occurred before and at the time of the marriage.

On the part of the applicant the affidavits of two medical men, namely, Dr. Edward Ryan, Superintendent of the Rockwood Hospital for the Insane, Kingston, and Dr. Arthur J. Johnson; and on behalf of Michael Fraser the affidavits of no less than eight medical men, were read; some of the medical men are experts of high standing in matters of lunacy. All of these experts had examined the alleged lunatic, and their affidavits are equally contradictory as to the mental condition of Michael Fraser. . . .

[Extracts from the affidavits.]

Counsel for the applicant contended that under the Evidence Act, 9 Edw. VII. ch. 43, sec. 10, counsel for Michael Fraser could not read upon the application affidavits of more than three medi-

cal experts. . . . I decline to give effect to the contention, holding that the section applies to the calling and examination of witnesses at a trial. . . .

While, on the weight of testimony before me, and even on the character of the testimony as a whole, it would be impossible for me, on this application, to make an order as asked by the applicant, that Michael Fraser is of unsound mind, there is, nevertheless, the absolute contradiction of witnesses, other than the medical men, on the material facts in question, and the direct contradiction of the medical men themselves, as to his sanity or insanity. It seems to me, therefore, necessary that an inquiry should be directed. . . .

[Reference to Howell v. Lewis, 4 O. W. R. 88, and Fry v. Fry, referred to in that case; also Lee v. Ryder, 6 Madd. 294; Tatham v. Wright, 2 R. & My. 1; Harrod v. Harrod, 18 Jur. 853; Palmer v. Walesby, L. R. 3 Ch. 732.]

Counsel for Michael Fraser contends that Fry v. Fry is authority for the proposition that, where there is a bona fide and substantial dispute as to the insanity of the person, an application such as the one with which I am dealing must be dismissed. As I view that case, however, such an argument is only relevant here on the question of a decision under sec. 6 of the Lunacy Act. . . Upon the disputed facts as to the sanity or insanity of Michael Fraser, I have come to the conclusion . . . that I cannot properly make an order that he is a lunatic, under that section. Indeed . . . the weight of evidence appears to me to be the other way. . . .

As one of the next of kin has applied for an inquisition, or, as it is put in our Act, sec. 7, sub-sec. 1, . . . "the Court may direct an issue to try the alleged lunacy," such an issue should be directed.

An order will, therefore, go directing the trial of an issue whether or not Michael Fraser is, at the time of such inquiry, of unsound mind and incapable of managing himself or his affairs: and that such issue be tried by Britton, J., at the approaching sittings of the High Court for the trial of actions with a jury to be held at Barrie commencing on the 26th September, 1910. I think the issue can be better tried without a jury, and, under sub-sec. 2 of sec. 7 of the Lunacy Act, . . . I so direct, unless the presiding Judge at the trial shall see fit to order otherwise, and also unless, under sec. 8 of the Act, the alleged lunatic shall demand a jury in the manner therein mentioned. I think the trial Judge should also dispose of the costs of this application.

SUTHERLAND, J. JULY 23RD, 1910.

TOWN OF NORTH BAY v. MARTIN.

MARTIN v. TOWN OF NORTH BAY.

Contract—Illegality—Stifling Prosecution—Evidence—Action for Principal upon Default of Payment of Interest at Time Fixed —Interest Paid before Action—Relief from Payment of Principal—Judicature Act, sec. 57 — Action and Cross-action — Costs.

Both actions arose out of a contract in writing dated the 17th July, 1908, made between William Martin senior and William Martin junior, of the one part, and the Municipal Corporation of the Town of North Bay, of the other part.

For some time prior to that date William Martin senior had been treasurer and William Martin junior collector of taxes of the town corporation. It was said that each became in default in respect of moneys belonging to the municipality; and actions were brought by the municipality against each of them on the 3rd July, 1908, which actions were pending when the agreement was made. No criminal proceedings were pending at the date of the agreement, but it was said that such proceedings were threatened or contemplated.

The agreement was in settlement of the claims against the two Martins, and contained a clause "that all actions pending shall be withdrawn." In pursuance of the agreement the Martins transferred certain properties to the corporation, their wives joining to bar dower, etc.

On the 2nd September, 1909, the town corporation began the first of the two actions now before the Court, against the two Martins, alleging default in payment of certain interest under the agreement of the 17th July, 1908, and claiming payment in full of the balance of principal money, alleged to be $23,974.36.

The defendants in that action set up as a defence that the consideration for the agreement was the settlement of pending civil actions and threatened criminal proceedings and to stifle the prosecution of the defendant William Martin junior, that the conveyances and transfers referred to in the agreement were procured from the Martins by duress on the part of the plaintiffs and as a consideration for an agreement that William Martin junior would not be prosecuted, and that Martha Martin and Edith Martin, the wives, made or joined in the conveyances in order to pre-

vent the criminal prosecution, and under an agreement with the corporation that the younger Martin would not be prosecuted; and the defendants asked, by way of counterclaim, that the agreement should be declared illegal and void and should be delivered up to be cancelled, and for a reconveyance of lands and securities and repayment of moneys.

On the 12th October, 1909, when the action and counterclaim came on for trial, an order was made striking out the counterclaim and postponing the trial of the action.

On the 27th October, 1909, the second of the actions now before the Court was brought by William Martin junior, Edith Martin, and Martha Martin, against the corporation, claiming the same relief as the counterclaim above referred to.

The two actions were tried together.

M. G. V. Gould, for the corporation.

T. W. McGarry, K.C., for the Martins.

SUTHERLAND, J.:— . . . I have come to the conclusion that the defendants in the original action and the plaintiffs in the second action have failed to make out that the agreement . . . was entered into by the municipal corporation . . . in pursuance of any agreement made with the Martins for the withdrawal of any threatened criminal proceedings or to stifle the prosecution of William Martin junior, or that the conveyances and transfers were procured from the Martins and their wives by duress or as consideration for an agreement on the part of the corporation that William Martin junior should not be criminally prosecuted. I find . . that the agreement is a valid and legal one and binding upon all parties thereto.

The defendants . . . in the original action . . . . made, however, another claim . . . that if the agreement and the conveyances therein referred to are binding on them, then they are governed by the provisions of the Act respecting short forms of mortgages, R. S. O. 1897 ch. 126, and that, . . . upon payment of all arrears of interest, the defendants were relieved from the consequences of non-payment . . . .

On the 9th August, 1909, William Martin junior paid to the corporation, by a cheque of that date, the sum of $1,443.04. There is no doubt, upon the evidence, that this sum was just about, if not exactly, the sum then due under the agreement for arrears of interest. . . . Upon the disputed question whether the cheque was or was not . . . in full of all arrears of interest, and it being reasonably certain from all the evidence that it did pay

such arrears, and having regard to the discretionary power conferred by sec. 57 of the Judicature Act, R. S. O. 1897 ch. 51 . . I think I should give effect to the prayer of the defendants . . and relieve them from the consequences of the non-payment of the interest at the time it accrued due, and determine that the plaintiffs in the original action were not entitled, at the time of commencing the action, to collect the principal moneys secured by the agreement and the conveyances in question. To this extent I grant the relief asked by the defendants in the original action and the plaintiffs in the second action. In all other respects the claims of the defendants in the original action and plaintiffs in the second action are dismissed. . . .

In the circumstances, the order I shall make as to costs is that the costs of the one action be set off against the costs of the other. . . .

It is said that the corporation . . . have taken proceedings to realise upon some of the securities in question. . . . I do not intend by this judgment to call in question or affect any of the proceedings they may have taken.

SUTHERLAND, J. JULY 23RD, 1910.

SCOTT v. MERCHANTS BANK OF CANADA.

Banks and Banking—Custom or Practice between Banks—Uncertified Cheque Initialled by Local Manager—Credit Given by another Bank on Strength of—Authority of Manager—Evidence—Undertaking of Local Manager—Acting on—Assignment of Chose in Action—Judicature Act, sec. 58 (5)—Absence of Notice—Amendment—Parties.

Action by T. M. Scott against the bank to recover $10,000 in the following circumstances:—

On Saturday the 20th February, 1909, the plaintiff was the local manager or agent at Berlin, Ontario, of the Dominion Bank, and one Deavitt was local manager or agent of the defendants' bank at the same place. One C. N. Huether, a brewer, was a customer of both banks, having his general account with the defendants and his malt account with the Dominion Bank.

On that Saturday Huether drew two cheques on the Dominion Bank for $7,950 and $2,050 respectively, each payable to cash or bearer and signed by himself. He presented these at the Dominion Bank, and at the same time informed the plaintiff that Deavitt

would certify a cheque for $10,000 drawn on the defendants, to cover the two cheques. Upon this statement being made by Huether, the plaintiff instructed the accountant of the Dominion Bank to cash the two cheques if the covering cheque were brought in, and then left the bank office to go to Toronto. Later in the day Huether returned with a cheque bearing the same date, drawn on the defendants, payable to cash or bearer, for $10,000, signed by himself, and having upon it the letter or initial "D"—placed there by Deavitt. This cheque was deposited with the Dominion Bank, who paid the two first-mentioned cheques on the same day.

The $10,000 cheque, when presented to the defendants by the Dominion Bank on the following Monday, was not paid. The plaintiff returned on Monday evening, and learning, on Tuesday morning, what had occurred, went to see Deavitt, and asked the reason for the refusal of the defendants to honour the cheque. The plaintiff said that Deavitt then told him to send the cheque in the next morning, and it would be paid.

It was said that on this Tuesday there was, as between the two banks in connection with their daily transactions, a balance of $6,518 due from the Dominion Bank to the defendants, and that the plaintiff declined to pay this until assured by Deavitt that the $10 000 cheque would be paid. Upon receiving such assurance, the plaintiff paid the balance.

On Wednesday morning, the cheque for $10,000 having been again sent to the defendants' office, the plaintiff personally went there and asked the accountant if it was paid. He was told in reply that it was not. He then asked to see the cheque, and, on it being produced, noticed that the letter "D" had been erased. On asking the ledger-keeper who it was that had done this, he was told that he (the ledger-keeper) had done it under instructions from Deavitt. The plaintiff then saw Deavitt, and was told by him that the inspector of the defendants was in the Berlin branch, and the cheque for the $10,000 could not be paid. The plaintiff then saw the inspector, and explained the entire transaction to him, but got no satisfaction.

In consequence of the failure of the defendants to pay the $10,000 cheque, the Dominion Bank called upon the plaintiff to do so, and suspended him. The defendants also suspended Deavitt. The plaintiff paid the $10,000 to the Dominion Bank, and took an assignment to himself of that bank's claim against the defendants, and brought this action in his own name to recover the $10,000 and interest.

G. T. Blackstock, K.C., and T. P. Galt, for the plaintiff.

G. C. Gibbons, K.C., and G. S. Gibbons, for the defendants.

SUTHERLAND, J.:— . . . It was contended . . . that the payment of the sum of $6,518 by the Dominion Bank to the defendants was obtained on the distinct undertaking of the local manager of the defendants that the $10,000 cheque . . would be paid, and that this is important in considering whether the plaintiff should or should not have judgment for the $10,000 in this action. I cannot, however, see that any effect can be given to such a contention. The $6,518 was a sum which represented a balance on other transactions, quite apart from the $10,000, and, I think I must assume, was properly payable by the Dominion Bank to the defendants, and the Dominion Bank could have been compelled to pay it quite apart from the question of the cheque. . . .

It appears from the evidence of one Beamer, the accountant of the Dominion Bank at Berlin in February, 1909, and from circulars of that bank to which he was referred in his cross-examination, that their usual course as to certifying cheques is that the ledger-keeper must initial them and put the folio of the ledger upon them; that this is the general rule; and that the initial of the bank manager is the authority to the ledger-keeper so to do. . . . It is said by Mr. Braithwaite, the manager of the Bank of Montreal in Toronto, and a banker of experience, that the initial of the bank manager is merely an authorisation to the ledger-keeper to certify the cheque as against the customer's account, and that cheques or drafts should be entered in the ledger, stamped and initialled by the ledger-keeper. He says he knows of no other course in bank practice, and that any other course would be a dangerous one. . . .

[Reference to other evidence to the same effect.]

I have been referred by counsel for the plaintiff to . . . Re Agra and Masterman's Bank, L. R. 2 Ch. 391, and Bank of Montreal v. Thomas, 16 O. R. 503, but I do not think these cases can be said to apply. . . . I was referred by the defendants' counsel to . . . Gaden v. Newfoundland Savings Bank, [1899] A. C. 281; Imperial Bank of Canada v. Bank of Hamilton, 31 S. C. R. 344; and Northern Bank v. Yuen, 11 W. L. R. 698.

During the progress of the trial counsel for the defendants took the point that, under sec. 58 (5) of the Judicature Act, no notice (before action) of the assignment to the plaintiff from the Dominion Bank was proved, and the plaintiff, therefore, had no cause of action. This had not been pleaded, and an amendment was asked for that purpose. . . . Counsel for the defendants asked that if that amendment were permitted, and it were necessary, he should have leave to have the Dominion Bank added

as a party plaintiff. In case it should hereafter appear necessary, in order to a proper disposition of this case, that such proposed amendments should be allowed, I make an order to that effect. However, as I view the case, it does not turn upon that question.

It seems to me that this is a case in which it was necessary for the plaintiff, in order to succeed, to shew that there was such a custom between the banks as to authorise payment of the cheque in question, in the circumstances indicated. He has failed to do this. On the contrary, it has been shewn that the well-known and customary rule of banks in such cases is against such a mode of payment. There is nothing to indicate that the defendants gave their local manager or agent, Deavitt, any authority to depart from their well-known rules. The defendants themselves made no representation to the plaintiff or to the Dominion Bank. If Deavitt did so, it was without the defendants' authority, and I do not see how they can in any way be held liable to the plaintiff or to the Dominion Bank. It simply amounts to this, that individual officials of the Dominion Bank, on their own responsibility, relied too much at first on the initial and then on the word of a fellow-banker in the same town. I have come to this conclusion with regret, in the circumstances.

The action will be dismissed with costs, if the defendants ask for them.

TEETZEL, J. JULY 23RD, 1910.

STECHER LITHOGRAPHIC CO. v. ONTARIO SEED CO.

Assignments and Preferences—Insolvent Company—Chattel Mortgage—Assignment of Book Debts—Preference—R. S. O. 1897 ch. 147, sec. 2—Intent—Actual Advance by Officer of Company—Knowledge of Insolvency—Payment of Debt to Bank—Relief of Officer as Surety—Transaction Void in Part.

Action on behalf of the plaintiff and all other creditors of the defendant company to set aside a chattel mortgage and assignment of book-debts made by the company to the defendant Uffelman, on the ground that it was made with intent to defeat, hinder, delay, or prejudice the creditors of the company, within the meaning of R. S. O. 1897 ch. 147, sec. 2, sub-sec. 1.

M. A. Secord, for the plaintiffs.

Gibbons, K.C., and H. J. Sims, for the defendant Uffelman.

W. M. Reade, K.C., for the defendant company.

TEETZEL, J.:— . . . The chattel mortgage in question, which also contains an assignment of the company's book-debts, is dated the 12th August, 1909, and covers all personal property of the defendant company. At that date the defendant company was indebted to the Merchants Bank in the sum of $8,254.52, in respect of which Jacob Uffelman, brother of Adam Uffelman (the defendant), and who was also secretary-treasurer of the company, was liable to the bank under a bond as surety for the company, and as indorser of notes discounted by the company, to the extent of about $7,700, and who was, therefore, a creditor of the company, within the meaning of sub-sec. 5 of sec. 2 of the Act. The bank also held an assignment of the company's book debts as further collateral security for this claim.

For some time before the chattel mortgage was executed, the company had been pressed by its creditors, some of whom had threatened and others started actions, and the company was unable to meet its liabilities as they matured; and I find as a fact that at the date of the chattel mortgage the company was in insolvent circumstances, within the meaning of sec. 2 of the Act.

I also find as a fact that, when the chattel mortgage was executed, the company, through its officers, Otto Herold, vice-president, and Jacob Uffelman, secretary-treasurer, knew that the company was insolvent, and that the company, through the said officers, when they executed the chattel mortgage in the name of the company, intended thereby to defeat, hinder, delay, or prejudice all the creditors of the company except the Merchants Bank and Jacob Uffelman; and further, that it was the intention of the company, through the said officers, to defeat the objects of the Act by raising the money advanced under the chattel mortgage to pay the claim of the Merchants Bank, and, by paying the same, to give an unjust preference to the bank and Jacob Uffelman, as surety, over their other creditors, to the extent that at that time the bank and Jacob Uffelman were not already protected by the assignment of book-accounts held by the bank.

I also find as a fact that the $8,300 advanced to the company in the name of Adam Uffelman was raised upon the credit of Jacob Uffelman and placed in the hands of Adam Uffelman to make the advance, and that Adam, in taking the mortgage in his own name, was allowing himself to be used by Jacob Uffelman as an instrument to do what, under the law, Jacob Uffelman could not successfully have done in his own name.

I also find as a fact that the defendant Adam Uffelman, if he did not actually know, ought, in the circumstances which were known to him, to have known, that the company was insolvent,

and that it was the intention of the company and of his brother, in raising the money under the chattel mortgage, to effect an unjust preference over the company's creditors other than his brother and the bank. . . .

The transaction was really the affair of Jacob Uffelman. . . . The money advanced by Adam Uffelman was only nominally his money. All but $200, which was furnished by Jacob out of his own funds, was raised on Jacob's credit, so that it was really Jacob's own money, which he could not himself lend to the company to satisfy his own claim without the transaction being void under sub-sec. 2 of sec. 2.

Immediately after Adam Uffelman handed the cheque for $8,300 to Jacob or to Herold, the vice-president, it was deposited to the company's credit, and the company's cheque for $8,254.52 was at once issued to the bank in payment of its claim. This occurred on the 13th August, 1909.

I do not think, in all the circumstances, that the money could be said to have been given to the company in good faith, as the chief intent and object of the transaction was, so far as concerned the company and Jacob Uffelman, to secure the payment in full of the bank's claim, and therefore to relieve Jacob Uffelman from liability, the necessary consequence of which was, and was known by them to be, that all the other creditors were to be hindered and delayed, if not defeated, in their remedies.

It was part of the transaction that the bank should transfer to Adam Uffelman the book-accounts which they held under assignment from the company, and which they subsequently assigned to him; and, while I think the facts above found bring the case within the principle of Burns v. Wilson, 28 S. C. R. 207, and Allan v. McLean, 8 O. W. R. 223, 761, I think the transaction can only be impeached to the extent of the difference between the actual value of the book-debts held by the bank on the 13th August, 1909, and $8,300, because it was in fact only to the extent of that difference that either the bank or Jacob Uffelman, as surety, could be said to be unjustly preferred, and, therefore, to that extent only could the advance be said to have been mala fide for the purpose of avoiding the statute. It appeared from the evidence that after the mortgage the company was allowed to collect the book-accounts and to use the proceeds for the purpose of its business, and that only a small amount remains uncollected.

There was nothing to shew that this was done in bad faith, and I can find no reason why the defendant Uffelman should be deprived of the security to the extent of the value of the book-

accounts which at the time of the transaction were held as security for part of the claim which was satisfied by the advance.

The judgment will, therefore, declare the chattel mortgage void as against the plaintiff and other creditors of the company, to the extent of the difference between the actual value of the book-accounts on the 13th August, 1909, and $8,300.

If the parties cannot agree upon this difference, it will be ascertained by the Master at Berlin. In other respects the judgment will be in the usual form, with a reference to the Master at Berlin.

Costs of action and of reference to be paid by the defendants.

MEREDITH, C.J.C.P. JULY 26TH, 1910.

*RE RYAN AND TOWN OF ALLISTON.

Municipal Corporations — Local Option By-law — Submission to Electors—Voters' List—Complaint against List Prepared by Clerk by Person not a Voter—Notice of Holding Court for Revision — Non-publication—De Facto Certified Voters' List—Ontario Voters' Lists Act, secs. 17 (4), 21, 24 — Municipal Act, 1903, sec. 148.

Motion to quash a local option by-law of the town.

There were several objections to the by-law, but only one was reserved for consideration, viz., that there was no lawful or sufficient revised voters' list upon which to carry on the voting on such by-law.

The objection was rested on two grounds: (1) that there was no valid complaint against the list prepared by the clerk of the municipality, because, as was contended, the only person who complained was not a voter; (2) that the notice of the holding of the Court for the revision of the list was not published, as required by sub-sec. 4 of sec. 17 of the Ontario Voters' Lists Act.

J. B. Mackenzie, for the applicant.

W. A. J. Bell, K.C., for the respondents.

MEREDITH, C.J., referred to the fact that the provisions of sec. 21 of the Act had been followed; that by sec. 24 the certified list is made final and conclusive; also to the provisions of sec. 148 of the Municipal Act, 1903; and said that the certified list

* This case will be reported in the Ontario Law Reports.

used at the voting was the proper list, within the meaning of the Act, notwithstanding that the Judge may have omitted to comply with the requirements of sec. 17, sub-sec. 4, of the Voters' Lists Act, and that the only person who made a complaint was not entitled to be a complainant.

His conclusion was "that the last de facto certified voters' list filed in the office of the Clerk of the Peace is all that the clerk of the municipality is to concern himself with, and . . . where an election has been held at which such a list has been used, it was not intended that the election should be open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions."

Motion dismissed with costs.

DIVISIONAL COURT. JULY 27TH, 1910.

* FORD v. CANADIAN EXPRESS CO.

Malicious Prosecution — Separate Prosecutions for Forgery and Theft—Reasonable and Probable Cause—Undisputed Facts—Question for Judge, not for Jury—Determination by Court on Appeal.

Appeal by the defendants from the judgment of MULOCK, C.J. Ex.D., ante 119, in an action for malicious prosecution, tried with a jury.

The plaintiff claimed damages in respect of: (1) a prosecution for forgery; (2) several remands on that charge; and (3) a subsequent prosecution for theft, all of which, as he alleged, were instituted or caused by the defendants.

At the close of the plaintiff's case, the defendants' counsel objected that absence of reasonable and probable cause was not proved, and that the defendants were not liable for the acts of Mitchell, their agent at Toronto, who laid the information; and he moved for a nonsuit. The motion was refused, and the defendants adduced evidence in support of their defence.

* This case will be reported in the Ontario Law Reports.

After an elaborate charge, in which the evidence was reviewed, the Chief Justice left to the jury the following questions:—

1. In laying the information for forgery against the plaintiff was Mitchell acting within the scope of his authority as agent of the defendant company?

2. In laying such information was Mitchell acting on behalf of the defendant company?

3. In laying the information for stealing against the plaintiff was Mitchell acting within the scope of his authority as agent for the defendant company?

4. In laying such information for stealing was Mitchell acting on behalf of the defendant company?

5. Were all the facts of the case laid fairly before Crown Attorney Corley by Mitchell, Allan, and Wilson, or any of them, or by any other person before the warrant for forgery issued?

5a. In charging the plaintiff with forgery did the company act in good faith, relying on the judgment of the Crown Attorney, and believing the plaintiff guilty?

10. Were they or any of them actuated by malice when the information for stealing was laid?

11. Did Mitchell, at the time he laid the information for forgery, honestly believe the plaintiff guilty of forgery?

12. Did Mitchell, at the time he laid the information for stealing, honestly believe the plaintiff guilty of stealing?

13. Was the plaintiff guilty of the forgery charged?

14. Was the plaintiff guilty of the stealing charged?

15. If you consider the plaintiff entitled to damages, what sum do you award him: (A) down to the time of his arrest for forgery and the first remand; (B) from the first remand down to the time that the charge of forgery was abandoned; (C) in respect of the prosecution for stealing?

Owing to some oversight, the sheet of paper on which questions 6, 7, 8, 9, and 9a, were written, was not given to the jury, and the mistake was not discovered until after they had given their answers to the other questions, and had been discharged.

The jury answered questions 1 to 4 inclusive and question 10 in the affirmative, and questions 5, 5a, 11, 12, 13, and 14, in the negative, and they assessed the damages down to the first arrest for forgery and the first remand at $1,500; the damages from the first remand down to the time when the charge of forgery was abandoned, at $250; and the damages in respect of the prosecution for stealing, at $750.

Upon motion for judgment on the findings of the jury, the Chief Justice, in consequence of the jury's answer to question 12, ruled that there was an absence of reasonable and probable cause, and directed that, if the plaintiff so desired, judgment should be entered in his favour for the $750, the damages awarded in respect of the prosecution for theft, leaving him to go to trial again on the other issues; and that course was adopted by the plaintiff.

The grounds of appeal were: (1) that absence of reasonable and probable cause was not shewn, and that the Chief Justice should have so ruled and have withdrawn the case from the jury; (2) that there was no evidence to warrant the submission to the jury of the question whether Mitchell in doing what he did was acting within the scope of his employment so as to make the defendants responsible for his action.

The defendants asked in the alternative for a new trial.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

C. Millar, for the defendants.

H. H. Dewart, K.C., and J. S. Lundy, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J. (after setting out the facts as above):—If the law is as it was laid down by the majority of the Court in Hamilton v. Cousineau, 19 A. R. 203, it may be that the Chief Justice was right in leaving to the jury the question which he put to them as to the honest belief of Mitchell; but I am of opinion that it is not, and that the effect of the decision of the Supreme Court of Canada in Archibald v. McLaren, 21 S. C. R. 515, is to overrule that case and to settle the law, as far as the Courts of this province are concerned, in accordance with the views expressed by Armour, C.J., and Street, J., in the Divisional Court, and the dissenting judgment of Burton, J.A., in the Court of Appeal, in the earlier case. . . .

[Reference to Still v. Hastings, 13 O. L. R. 322, 324; Abrath v. North Eastern R. W. Co., 11 Q. B. D. 79, 440, 11 App. Cas. 247.]

I come now to consider whether there was anything in the evidence to warrant the submission to the jury of the question as to honest belief, which was answered in favour of the plaintiff, or the question as to the exercise of reasonable care to ascertain the true facts, which was not answered. . . .

[The learned Chief Justice then stated what he took to be the undisputed facts appearing in evidence.]

The question is, whether the Chief Justice should have ruled that the plaintiff had shewn an absence of reasonable and probable cause for the prosecution.

In my opinion, his ruling should have been in favour of the defendants. . . .

Nothing appeared upon the evidence justifying even the suspicion, much less the finding, that Mitchell did not at the time he laid the information for forgery honestly believe the plaintiff guilty of forgery. . . . So far as appeared, Mitchell did not know him even by sight, and no motive for his making a false charge against him is suggested. . . .

Nor was there, in my opinion, anything which warranted the submission to the jury of the question as to the defendants having taken "reasonable care to ascertain the true facts of the case before Mitchell laid the information for forgery." . . . .

[Reference to Hamilton v. Cousineau, 19 A. R. at pp. 210, 230.]

The plaintiff claims damages for his remand on the charge of forgery, and in Fancourt v. Heaven, 18 O. L. R. 492, the plaintiff recovered such damages. The circumstances of the case at bar are different. . . . In the case at bar, while the prosecution was not discontinued when Stanton (a handwriting expert) gave an opinion, as he afterwards did, that the forged documents were not in the handwriting of the plaintiff, there is nothing to shew when that opinion was given, further than that it was before the 2nd October, when the charge of forgery was withdrawn. In the meantime the plaintiff had been arrested on the charge of forgery, and had been identified. . . .

I do not see how any different conclusion can be reached as to the prosecution for theft than that to which I have come with regard to the prosecution for forgery, that it should have been ruled that the plaintiff had failed to establish want of reasonable and probable cause.

Though Stanton's opinion was that neither the order nor the receipt had been forged by the plaintiff, there was the evidence of Mackenzie and Noble that the plaintiff was the person who presented the forged order and received the book; and it is impossible, in my opinion, to say that Mitchell, acting after this identification . . . and in accordance with the advice, if not the direction, of the Crown Attorney, acted without reasonable and probable cause in laying the information for theft.

Appeal allowed with costs and action dismissed with costs.

SUTHERLAND, J. JULY 27TH, 1910.

HANLEY v. TOWNSHIP OF BRANTFORD.

Highway—Closing of Portion — By-law of Township — Original Road Allowance—Necessity for Confirmation by County Council—Highway Running along Bank of River—Necessity for Approval of Lieutenant-Governor in Council—Municipal Act, 1903, secs. 629, 632, 637, 660—Agreement—Right of Way over Portion of Road Closed—Deprivation of Access to Highway—Existence of Another Convenient Way—Damages—Compensation—Remedy by Arbitration.

Action by Daniel Hanley and Hannah B. Hanley (his wife), owners of lands in the township of Brantford said to be affected as the result of the passing of a by-law by the defendants providing that a portion of a public highway in the township, known as the Onondaga road, should be closed as a public highway, and another highway opened up in lieu thereof, to have the by-law declared invalid and for damages, and in the alternative to have it declared that the plaintiff Daniel Hanley was entitled to a right of way over the northerly half of that part of the Onondaga road which the by-law purported to close.

W. T. Henderson, for the plaintiffs.

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

SUTHERLAND, J., after stating the effect of the pleadings and setting out the facts, referred to secs. 629, 632, 637, and 660 of the Municipal Act, 1903, and proceeded:—

While it is not specially pleaded in the statement of claim, evidence was offered at the trial on behalf of the plaintiffs, and admitted under sec. 629, for the purpose of shewing that the by-law in question had taken away from the plaintiff Hannah B. Hanley the access to the rear portion of lot 19 owned by her.

At the trial a number of plans were offered in evidence on behalf of the plaintiffs and defendants respectively for the purpose of shewing the origin of the Onondaga road, and whether it was or was not an original allowance for road. The plaintiffs also called a couple of witnesses, one of whom swore that he had known the road for upwards of 60 years, and it was always an open highway until part of it was recently closed by the by-law in question. He further stated that he did not know the exact origin of

the road, but at the commencement most of the roads were Indian trails, and this was one of them. The other witness said that he had known the road in question for over 50 years, and it was always a travelled highway until closed as above. He could not say whether it was an old Indian trail or not.

I think the evidence offered on behalf of the plaintiffs is inadequate to establish the highway in question as an original allowance for road. . . .

[Reference to the plans put in at the trial.]

It seems that the Corporation of the City of Brantford secured a grant of lot A., comprising territory which included the portion of the Onondaga road in question. Subsequently they laid out on a plan the Onondaga road as a highway or road. The city corporation could not lay it out as an original road allowance; they would have no power to do so.

Counsel for the plaintiffs said that nowhere in the Act could he find any definition of an original allowance for road. I think what is meant by an original allowance for road is one based on a government survey. No proof was offered before me that the Onondaga road is based on such a survey.

I have come to the conclusion, therefore, that this is not an original allowance for road, and that, therefore, sec. 660, sub-sec. 2, does not apply; and no confirmation by a by-law of the county council is necessary.

I cannot see either, upon the evidence here, that sec. 32, sub-sec. 2, has any application. The Onondaga road does not run along the bank of the Grand river. . . . I cannot, upon the evidence, hold that this road runs along the bank of a river or stream. No approval of the Lieutenant-Governor in council was, therefore, requisite.

Exhibit No. 3 is a plan of the locality in question. It shews a road known as the London and Hamilton stone road, lying to the north of all the properties in question, namely, lots 18, 19, 20, and 21, which lots, before the passing of the by-law, extended from north to south between the London and Hamilton stone road and the Onondaga road. . . . The Campbells were the owners of lots 18 and 20 before the passing of the by-law; the plaintiff Daniel Hanley, the owner of lot 21 and part of lot 35 adjoining to the east; and the plaintiff Hannah B. Hanley, the owner of lot 19. Upon lot 18 were a hotel and barns, and it was important in connection therewith to continue to have access to the latter from the Onondaga road.

It appears that the southerly bank of the Onondaga road had been crumbling away, was difficult to maintain, and expen-

sive to repair, and had become in such a condition as that complaints had been made to the defendants. In fact, they had been indicted in connection with the matter, and convicted for non-repair. It was in consequence of this that necessity arose for taking some action, either in the way of expensive repairs to this portion of the road, or by closing it up and providing another. The municipal council determined to take the latter course. . .

I have come to the conclusion that the true agreement between the Campbells and the defendants was that the right of way to be reserved to the Campbells had reference only to lot 18 and a right of way from the London and Hamilton stone road to the rear portion of that lot. I find that the plaintiff Daniel Hanley had notice of this, and took the deed of the 11th January, 1910, with knowledge of the fact. Upon the evidence before me, I could not find that the plaintiff Daniel Hanley has been injured with reference to lot 21. But that is a subject for arbitration. I think it is probably the fact, as alleged by the plaintiffs, that they commenced arbitration proceedings by notices which are put in as exhibits on the trial merely for the purpose of preserving their rights under an arbitration, and that these rights should be still preserved to them, if they wish to proceed.

There remains the question about the rights of Hannah B. Hanley. . . . She is the owner of lot 19. This lot has two buildings on it. . . . Both . . lie near to the east line of lot 19, and there is a considerable space between the buildings and the west limit of the lot. Hannah B. Hanley contends, under sec 629, that the defendants, by the by-law, have excluded her from ingress and egress to her building or dwelling at the rear of lot 19, in so far as the Onondaga road is concerned, without providing another convenient road or way of access thereto, and in consequence of this that the by-law is invalid.

The defendants shew, however, that the London and Hamilton stone road is available, and is an existing convenient road or way of access to the whole of lot 19; that, in consequence of it being already in existence, it was not obligatory on the defendants to provide another way; and that, in any event, the matter is one for compensation, if any, by arbitration.

I have been referred . . . to . . . In re Thurston and Township of Verulam, 25 C. P. 593; In re McArthur and Township of Southwold, 3 A. R. 295; and Re Adams and Township of East Whitby, 2 O. R. 473.

I do not think it can be effectually contended here that the plaintiff Hannah B. Hanley, being the owner of the whole of lot 19, and having the London and Hamilton stone road in front

thereof, on the north side, can be said to be without another convenient road to her lands. . . .

[Reference to the Thurston case, per Wilson, J.]

I have come to the conclusion that, in the circumstances . . the plaintiffs must be left to their remedy . . . under the arbitration proceedings which each of them has initiated.

Action dismissed with costs.

DIVISIONAL COURT. JULY 28TH, 1910.

*HAIGH v. TORONTO R. W. CO.

Street Railways—Injury to Passenger Alighting from Car—Car Starting too soon—Unauthorised Signal to Start—Negligence—Undisputed Facts—Inference to be Drawn by Jury—Defective System—Pleading—Amendment—New Trial.

Appeal by the plaintiff from the judgment of the County Court of York, pronounced by MORGAN, JUN. Co.C.J., dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff by reason, as alleged, of the negligence of the defendants' servants operating a car of the defendants on the 25th June, 1909.

The plaintiff was on that day a passenger on a car travelling east upon King street; she desired to get off at Niagara street; as the car approached that street, the conductor gave a signal to stop; the car did stop, and the plaintiff proceeded to alight; whilst she was on the step of the car, a signal was given for the car to proceed, and it started before she had alighted or had time to alight; she was thrown down and injured.

The negligence alleged was: (a) that the conductor gave the signal to start the car before the plaintiff had alighted and while she was ready to alight; (b) in causing the car to proceed without fully ascertaining whether the plaintiff was properly clear of the car or not; (c) in allowing the car to become so crowded as to render it impossible for the conductor properly to perform the duties intrusted to him, and this negligence contributed to the accident to the plaintiff.

At the trial these facts appeared: the car was crowded; its capacity was 70 passengers, and it had on board about 100; al-

* This case will be reported in the Ontario Law Reports.

though the conductor gave the signal to stop at Niagara street, the signal to start the car after that stop, was given by a passenger without any authority from the conductor; prior to starting the car at Niagara street, on the same trip, the same car had stopped at Shaw street, and had been started by a passenger giving the signal from the rear platform; the conductor knew this, and took no steps to prevent its repetition.

A jury was sworn for the trial and heard the evidence, but the trial Judge submitted nothing to the jury but the question of damages, which they assessed at $250.

The Judge then gave judgment dismissing the action.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. T. J. Lee, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

FALCONBRIDGE, C.J.:—The facts are . . . not in dispute. The only question for us is whether this state of facts is competent to be considered by the jury on the question of negligence, or whether the learned Judge was right in withdrawing the case from the jury and entering judgment for the defendants.

The circumstance that there are no facts in dispute does not necessarily involve the proposition that the matter to be decided is a pure question of law, and therefore one to be determined by the Judge alone. It may be for the jury to say what they find to be the true inference from these facts, e.g., whether there was negligence causing the accident.

The facts in Nichols v. Lynn and Boston R. R. Co., 168 Mass. 528, are almost identical. The opinion of the Supreme Judicial Court of Massachusetts—a strong Court—while it does not bind me judicially, commends itself to my personal and individual judgment.

There is no suggestion that the plaintiff was not exercising due care, and I am of opinion that there was at least one question which ought to have been submitted to the jury on the evidence, viz., whether there was any negligence of the conductor in failing to hear or to countermand the unauthorised signal for starting the car, in time to have prevented injury to the plaintiff, particularly in view of what had already taken place at Shaw street.

See also the judgment of the Supreme Court of Illinois in North Chicago Street R. R. Co. v. Cook, 145 Ill. 551.

It may be that there is at least one other question which might be submitted to the jury, viz., whether the defendants failed in their duty in not taking due precautions to prevent the starting of the car through the unauthorised act of a passenger in ringing the bell. This may involve the question of whether the system adopted by the defendants was proper or was defective. Counsel for the defendants stated that he was ready at the trial with evidence as to the propriety of the system if it had been attacked. But, as there must, in the view that the majority of the Court takes on the other question, be a new trial, the plaintiff has leave to amend the pleadings as she may be advised—the defendants, of course, having the same liberty.

There will be a new trial. Costs of the former trial and of this appeal to be costs in the cause to the successful party. On the general question as to the opportunity to be given to a passenger of leaving a car in safety, I refer to Booth on Street Railways, secs. 349 and 350.

BRITTON, J., in a written opinion, stated the facts at length, and reached the same conclusion as the Chief Justice.

RIDDELL, J., dissented, for reasons stated in writing. His conclusion was this:—

There can, I think, be no question that the plaintiff has completely failed to establish a case as charged. Whether she could succeed if she were to plead defective system, I do not consider. The present action is upon other grounds, and any dismissal of it should be without prejudice to any action to be brought based upon a negligent or defective system. With such reservation, the appeal should be dismissed with costs. If the plaintiff, for any reason, desires to avail herself of the present action, she may, instead of having the appeal dismissed, have, upon paying the costs of the former trial and of this appeal, leave to amend the record by alleging defective system, and have the new claim tried. The present record, of course, remains disposed of in favour of the defendants. She should have ten days in which to elect.

CRISTEA v. CROWN RESERVE MINING CO.—SUTHERLAND, J.—JULY 27.

Fatal Accidents Act—Apportionment of Amount of Judgment—Persons Entitled to Share—Workmen's Compensation Act—Payment into Court.]—Motion by the plaintiff, the administrator of

the estate of Iromin Christea, deceased, for judgment for the amount agreed upon between the parties, namely, $600. The circumstances under which the deceased came to his death were not set forth in the material filed upon the application. The plaintiff asked that an order be made directing that the amount to be paid should be apportioned between Trifan Christea, the father of the deceased, and Maria Christea, his step-mother, to the exclusion of certain half-brothers and half-sisters. The Official Guardian objected to this mode of apportionment, contending that the action was under the Workmen's Compensation Act, as well as under the Fatal Accidents Act; while the plaintiff stated that the action was brought solely under the latter Act. The learned Judge said that, not having before him all the facts relating to the cause of the plaintiff's death, the only proper order to make was that the money should be paid into Court to abide further order. J. A. Ogilvie, for the plaintiff. G. M. Clark, for the defendants. J. R. Meredith, for the Official Guardian.

DURYEA v. KAUFMAN—SUTHERLAND, J.—JULY 27.

Patents for Invention—Infringement — Interim Injunction.]—Motion by the plaintiff for an interim injunction restraining the defendants from infringing the plaintiff's patents for certain inventions relating to the manufacture of glucose, maltose, modified starch, etc. The evidence being conflicting and of a technical character, the learned Judge was of opinion that the plaintiff's case was not so plain a one for the issuing of an interim injunction as to warrant him in granting it. Motion enlarged before the trial Judge, who will also dispose of the costs of it. N. W. Rowell, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendants.

HENNESSEY DRUG STORES LIMITED v. IMPERIAL DRUG CO.—SUTHERLAND, J.—JULY 27.

Contract—Sale of Patent Medicine — Untrue Representations by Vendor—Reliance on by Purchaser—Rescission of Contract—Return of Moneys Paid—Interest.]—Action to set aside a contract made by the plaintiffs with the defendant Kahle (carrying on

business in the name of the Imperial Drug Company), on the 10th March, 1909, for the sale by the defendant to the plaintiffs of a large quantity of a patent medicine called "Ponso," for which the plaintiffs were to have the exclusive sale agency in Toronto, Hamilton, and Welland. The terms of payment were mentioned in the contract. The learned Judge finds, upon the evidence, that certain representations as to the quality of the medicine were made by the defendant, which were untrue to the knowledge of the defendant, that the plaintiffs relied upon them, and that they were the basis of the contract. Judgment for the plaintiffs declaring the contract void and for the return of $1,078 81 paid by the plaintiffs, without interest, the plaintiffs returning all unsold stock and giving credit for stock sold. The plaintiffs to have their costs of action against the defendant. G. Lynch-Staunton, K.C., for the plaintiffs. W. M. German, K.C., for the defendants.