The
Ontario Weekly Notes

VOL. VII. TORONTO, SEPTEMBER 18, 1914. No. 2

APPELLATE DIVISION.

MEREDITH, C.J.O. JULY 24TH, 1914.

RE EAST LAMBTON PROVINCIAL ELECTION.

MARTYN v. McCORMICK.

Parliamentary Elections—Ballots—Counterfoils with Numbers Attached—Mistake of Deputy Returning Officer—Ontario Election Act, sec. 108—Construction—Saving Validity of Ballots—Ballots Improperly Marked by Voters.

An appeal by John B. Martyn, one of the candidates at the election, from the decision of the Judge of the County Court of the County of Lambton, upon a recount of the ballots cast at the election, the effect of which was, that Robert John McCormick, the other candidate, had the majority of votes.

The learned County Court Judge rejected three ballots marked for the appellant with a single line, one ballot marked with a cross low down, one with two words upon it, and certain ballots cast at the Thedford polling subdivision where the deputy returning officer had given out the ballots with the counterfoils attached and numbers on the counterfoils, and had deposited them in the ballot box in that condition.

E. Bristol, K.C., W. H. Price, and F. W. Willson, for the appellant.

R. I. Towers, for the respondent.

MEREDITH, C.J.O.:—I do not think anything would be gained by further consideration of this case. Mr. Towers has very ably argued it, and it is to be borne in mind that a decision here against the respondent will not prevent the question of the validity of these ballots being raised on an election trial.

The policy of the Provincial Legislature for forty years has been to prevent the vote of a voter, who has done all that the law requires him to do to entitle him to exercise his franchise, from being lost by the mistake or misconduct of a deputy returning officer. The qualification of sec. 108 of the Ontario Election Act was intended to prevent any act of a returning officer from invalidating the vote by an omission to do something that he ought to have done, or doing something that he ought not to have done, and this legislation is to be construed liberally; and, in my view, it was not so construed by the learned Judge of the County Court.

As I said during the argument, the respondent is upon the horns of a dilemma. If, as Mr. Justice Osler says in Re Stormont Provincial Election (1908), 17 O.L.R. 171, the counterfoil is not a part of the ballot paper, then there is no mark of identification upon it, and therefore no right to reject it. If the counterfoil is a part of the ballot paper, then the numbers are upon the ballot papers, and the case is brought plainly within the section.

It is either one of two things. If these numbers were not put there by the returning officer, the consecutive numbers would afford no means of identifying the voter. If they were put there by the deputy returning officer, they are marks upon the ballot papers by which it is probable that the voter can be identified, and the saving clause says that any mark which the deputy returning officer puts on the ballot paper, which but for the saving clause would vitiate the vote, is not to do so.

It seems to me that, looking at it in either way, the decision must be in favour of the appellant. I thoroughly agree with what Mr. Justice Osler says in the Stormont case, 17 O.L.R. at p. 174: "No doubt the whole question may be reconsidered upon a petition, and it is possible that a different view may prevail, but if there be a doubt, though I do not wish to be considered as intimating that I have a doubt, it should be resolved in favour of the view which gives effect to the intention of the electors rather than in support of one which would disfranchise so large a body of them by reason of the carelessness of an official."

As I have said, I entirely agree with that; and, if I were in doubt about the result, I would act on that view and hold for the purpose of this inquiry that the ballots are not to be rejected.

I have already said, with regard to the ballot in No. 3 Bosanquet, that I think the Judge properly rejected it. The ballots marked with a single line were properly rejected, and also the one on which was written the words "my vote."

I think, as I have already intimated, that the ballot in No. 7 Euphemia, which was rejected because the cross was held not to be within the space opposite the appellant's name, was improperly rejected, as there was a clear indication that the voter intended to cast his vote for the appellant.

The result is, that there is a majority of four for the appellant. There will be a majority for him at all events.

I do not think it is a case in which there should be costs to either party, because the fault is that of the deputy returning officer; and there will, therefore, be no costs of appeal to either party.

HIGH COURT DIVISION.

BRITTON, J. AUGUST 31ST, 1914.

LADUC v. TINKESS.

Fraud and Misrepresentation—Sale of Farm—Inducement to Purchase—False Representation as to Amount of Drainage Taxes Charged on Land—Evidence—Finding of Fact of Trial Judge—Damages, Measure of—Compensation for Existing Loss—Anticipated Relief from Taxes by Crown or Municipality—Provision for Benefit of Vendor.

Action for damages for false and fraudulent representations alleged to have been made by the defendant whereby the plaintiff was induced to purchase the defendant's farm and certain chattels.

The action was tried at Cornwall and Toronto without a jury.

G. I. Gogo, for the plaintiff.

D. B. Maclennan, K.C., for the defendant.

BRITTON, J.:—The defendant was the owner of the east half of lot 14 in the 1st concession of the Township of Roxborough, and he sold it, with the crop and certain named chattels, to the plaintiff, the price for all being $4,700. The price asked by the defendant was $4,800, but during the negotiation it was reduced to $4,700, and the bargain was closed at that sum. The price or selling value of the farm alone as between the parties was fixed at $3,500, that sum being mentioned in the deed.

The plaintiff charges that the defendant falsely and fraudulently represented to the plaintiff that all the drainage taxes the plaintiff would be obliged to pay on this farm were $100 a year, and were only for 3 years from the date of the plaintiff's purchase. It appears that this land was specially assessed for drainage work, and there was and is now a liability of this land for $145.52 a year for 14 years for that amount, and for a lesser amount for 4 additional years.

The defendant pleads a general denial of making any such representation, and he denies that he at any time made any statement false to his knowledge or fraudulent. It is a little more difficult in this case than in the ordinary case to dispose of the issues of fact, for here the negotiations were carried on through interpreters.

The plaintiff speaks only the French language and does not understand the English language, whilst the defendant speaks only the English language and does not understand the French.

In my opinion, a true interpretation was given to the plaintiff of what the defendant said; and what the plaintiff understood and relied upon, and what the defendant represented, depends upon the evidence of Napoleon Proulx and Frank Delorme on the one side, and the defendant himself on the other.

The bargain for this land was not closed or completed until after the 12th July, 1913. John Kennedy was the defendant's agent to sell, and he brought the plaintiff and defendant together, but was not present when the last word was spoken. On the 12th July, the plaintiff was taken by Kennedy to see the property, and negotiations for its purchase were on, but not closed that day. Napoleon Proulx was present when the plaintiff and defendant were together, and Proulx fixes the time as the 12th July. Some of the witnesses say that Proulx was not present at the interview on the 12th July. I am satisfied that Proulx's evidence is correct as to the conversation, even if by any possibility he is in error as to the date, and I am satisfied that the conversation took place before negotiations were completed. The plaintiff asked the witness to ask the defendant what drainage taxes he (the defendant) was paying upon the land in question. The witness did ask the question, and the defendant replied $100 a year for three years. The witness Proulx, as interpreter, told this to the plaintiff. I am of opinion that this occurred on the 12th July.

The witness Frank Delorme strongly corroborates Proulx in determining what the defendant intended to give the plaintiff

to understand. The interview spoken of by Delorme took place on the 26th September. That date was subsequent to the date of the deed to the plaintiff, but it was prior to the delivery of the deed, and prior to the delivery of the mortgage to the defendant. Delorme is a son-in-law of the plaintiff, but he appeared to be a fair and truthful witness, and it is clear to me that the defendant then represented that the drainage taxes were only $100 a year, and were for only 3 years. This representation was not true in fact. I am clearly of opinion that the defendant knew, when he made the representation as alleged, that this representation was not true. He must have known that the drainage taxes were more than $100 a year, and for a longer period than 3 years. The defendant had the means of knowing all about these drainage taxes. His land was being assessed under by-laws regularly passed; and, the statement of the defendant being made as a statement on which the plaintiff had a right to rely, and did rely, it must be held, at least, that the defendant made the statement recklessly, not caring whether it was true or false—and so it was fraudulently made.

As to damages. The proper measure of damages is the difference between the value of the farm at the time of the purchase, taking the farm charged with the drainage tax, and its value if charged only to the extent of $100 a year for 3 years. The plaintiff bought supposing it to be charged for only $100 a year for 3 years. The price paid was $3,500—that amount was fixed between the parties.

Counsel for the defendant contended that, as the land was improved and would year by year increase in productiveness by reason of the drainage work, that should be taken into consideration in reduction of damages. I am not of that opinion. The plaintiff had a right to the land as it was, and as it would be in the natural course, and charged only to the extent represented by the defendant. It appears that the Province of Ontario came to the relief of land-owners, including the owner of the land in question, and made a grant to compensate in part. The Government may again make a grant—that need not be considered by me. The plaintiff consents that, if such is made by either the Province of Ontario or the municipality, the defendant must get the benefit of it.

I am assisted in ascertaining the amount of the damages by finding the present value of the excess payments over the $300 for the three years, and by finding the present value of all the drainage taxes existing at the time of the purchase and payable

year by year after three years. The present value depends upon the rate of interest allowed in the computation. The larger the rate the smaller the present value. The plaintiff's computation is based upon the rate of 4, 4½, and 5 per cent., arriving at the conclusion that the present value of future payments is $1,585.73, from which he is willing to deduct $300, being $100 each year for three years, leaving $1,283.73. The defendant did not object to the correctness of this computation, but he contended that, if he is liable at all, he is liable only for the difference in value, and the farm is worth all the plaintiff paid for it.

I am of opinion that the farm, charged as it was at the time of purchase, was not worth what the plaintiff agreed to pay.

I do not wholly agree with the plaintiff's computation as to the present value of the future payments of drainage taxes; but the plaintiff, upon the whole case, is entitled to recover as damages the sum of $950.

The defendant's further contention was that the plaintiff, not having yet paid any of these drainage taxes, is not now entitled to recover. This contention is not entitled to prevail: see Mayne on Damages, 8th ed., p. 261. The damages are not given in reference to a future contingent loss, but they are the proper compensation for an actual and existing loss. "The question is, how much is the value of the estate diminished at the moment by the existence of the incumbrance?" And I regard this tax as an incumbrance. Further, as to liability, see Sugden on Vendors, 14th ed., vol. 2, p. 202, para. 27.

There will be judgment for the plaintiff for $950 with costs; and, the plaintiff consenting thereto, this sum may be set off against the amount of the plaintiff's debt to the defendant, secured by chattel mortgages. The plaintiff consenting, it will also be a term of the judgment that, if at any time after the expiry of 3 years from the date of the purchase, and before the expiration of 18 years from that date, the Province of Ontario shall pay any sum of money in relief of the existing drainage tax upon the land in question, or if the Corporation of the Township of Roxborough shall, after the 3 years and before the 18 years, make any reduction in the now existing drainage taxes upon the said land, the defendant, if he has paid the amount of this judgment and costs, shall be entitled to the benefit of such payment or reduction.

LENNOX, J. SEPTEMBER 11TH, 1914.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Separate Schools—Qualifications of Teachers—Illegal Action of Trustees—Mala Fides—Interim Injunction—Interim Order for Opening of Schools—Adjournment of Trial.

Motion by the plaintiffs for an injunction and other relief as set forth below.

J. F. Orde, K.C., W. N. Tilley, and J. J. O'Meara, for the plaintiffs.

McGregor Young, K.C., for the Minister of Education.

N. A. Belcourt, K.C., and A. C. McMaster, for the defendants.

LENNOX, J.:—The plaintiffs are a minority of the School Board. It will be sufficiently accurate to say that this action is brought to compel the Board, represented for the most part by Chairman Genest, to conduct the schools according to the departmental regulations, to engage and employ a teaching staff composed exclusively of legally qualified persons, to prevent the payment of school moneys to unqualified teachers, and the sale or disposal of certain debentures.

The Court has so far recognised the plaintiffs' status, the importance of the issues raised, and the plaintiffs' *prima facie* right to relief, by enjoining the defendants until the trial. The bulk of the evidence on both sides was put in on the 25th June last, when an adjournment was asked for and obtained by the defendants to enable them to make further searches in the records of the Education Department, and, though strenuously opposed, the injunction was continued. The adjournment was decidedly an indulgence to the defendants, as, so far as I am aware, no intimation of the application was given until the evidence for the defence was well advanced. The object of the action, the terms and aim of the injunction, and the conditions necessarily implied upon an adjournment, should without more have been a sufficient guarantee that the efficiency of the schools would be preserved, and the status quo honourably maintained pending the delay; but, had I known then that Mr. Genest contemplated what he has since consummated, namely, the turning out of the whole teaching staff, there would have been no ad-

journment without such additional guarantees as would have rendered the present disgraceful and disastrous conditions impossible.

Every separate school in Ottawa is closed, 7,000 or 8,000 boys and girls are without the means of obtaining an education, and the vicious and perhaps criminal habits which some of them will inevitably acquire in a life of idleness will probably never be shaken off. The teachers were discharged, if they were discharged at all, by Mr. Genest. This was done pursuant to a resolution of the Board, opposed by the plaintiffs, purporting to delegate to him the entire question of the discharge and engagement of teachers. Mr. Genest is a keen, intelligent gentleman, of excellent address, and in giving evidence argued the case from his standpoint with singular ability, but I failed to glean from his statements that he has actually a single teacher immediately available of the qualified class, and he frankly disclosed that one chief object of his action was to create a condition of things which would compel the Department to consent to the employment of some twenty-three Christian Brothers who are without professional qualification.

I am asked to continue the injunction, and the injunction will be continued until I have given judgment in the action, and it will be continued with the addition that, if the plaintiffs desire it, it will be so amended as in words to apply to the servants, agents, employees, and representatives of the defendants, as well as to the defendants; and, on the other hand, I reserve the right to the defendants to apply for leave meantime to dispose of some of the debentures should an actual emergency arise.

I am asked, too, to make an interim order directing that the schools shall be opened forthwith, and that the former teachers shall be restored to the positions they occupied in the schools prior to and at the end of the last half year. It is argued for the defendants that for me to do this would be to usurp the functions and duties of the trustees. That, of course, I cannot do, however deplorable the conditions are now or however intolerable they are likely to become during the many months—probably years—that must elapse before the issues in this action are finally determined. There is no use in saying that it is easy; it is a difficult question to deal with. It was argued at great length that the remedy does not arise in the action and that the rules of procedure bar the way. Rules of procedure are for the convenience of litigants and the Court, and the advancement of justice, and should not be invoked to perpetuate a wrong. If

the relief asked is incidental to the action, I can grant it if it would be granted upon substantive motion. But the more important point is to draw the line correctly between the jurisdiction of the Court and the exclusive functions of the trustees. If amendments of the pleadings are necessary to meet the evidence and define the issues as they have developed, and there is no answer of surprise, the pleadings can be, and in this instance they may be, amended.

As to the dividing line then? In matters relating to the schools under their control, the defendants are clothed with wide discretionary and quasi-judicial powers. Assembled at a properly constituted meeting of the Board, regularly conducted, dealing with matters within their jurisdiction, and acting in the bonâ fide discharge of their duties and in harmony with the laws of the Province, the regulations of the Department, and any existing judgment or order of the Court affecting them, the conclusions they reach, whether thought to be wise or unwise, cannot be interfered with by a Court. They are the judges in such a case. The salaries they will pay, the engagement and discharge of teachers, and the selection or rejection of duly qualified teachers, from time to time as these questions arise, but not in advance, are all matters within their jurisdiction.

But to shut out judicial actions where error or misdoing exists and a remedy is invoked, there must be the act of the Board *as a Board*, and not merely the act of its individual members. In all matters involving discretion or judgment, the whole question *must be* presented to the Board, *should be* weighed and considered by the Board, and *must be* determined upon by the Board.

What was done here was the act of Chairman Genest alone. The Board had not the power to delegate their duties or functions to him. They have not discharged the old teachers, and they have not entertained or deliberated or determined upon the selection or engagement of any teacher or teachers to take their place; and, speaking of the majority—for the plaintiffs are powerless—the Board, by their flagrant neglect to discharge the duties imposed upon them by law, have not only opened the way but have unintentionally invoked the action of the Court. More than this, not only was there no power to delegate, but the resolution purporting to appoint Mr. Genest was vicious and unlawful per se, for its exercise was intended, upon the face of it, to contravene and override the injunction order of the Court should it be issued. The omission of this provision from a subsequent resolution does not change the character of the act.

There is a palpable absence of good faith in the whole transaction; it is contrary to the spirit and intent of the injunction order; it is contrary to what was necessarily implied upon the adjournment; and it has created an intolerable state of things which I feel I have power to and *ought* to remedy. There will be an order directing the trustees to open the schools not later than Wednesday next, and to maintain and keep them open and properly equipped with properly qualified teachers and in all other ways until argument and judgment in this action; to suffer, permit, and facilitate the return of the ousted teachers to their former positions as teachers; and restraining the Board from interfering with or molesting these teachers in the discharge of their duties as such during the time aforesaid. The order will include the servants, agents, and employees of the defendants, and may contain provisions for notices being sent out by the secretary to the teachers concerned. If the parties cannot agree as to the terms of the order to be issued, I will settle them in the jury-room of the court-house (city-hall), in the city of Toronto, on Monday next, the 14th instant, at 10 a.m., and I will then consider any argument addressed to me as to teachers said to have been engaged before the 5th day of this month. I shall also be prepared to hear argument as to whether the Board should be restained from giving notice terminating the engagements pending the judgment, except upon leave of the Court.

HODGINS, J.A. SEPTEMBER 11TH, 1914.

BASSI v. SULLIVAN.

Alien Enemy—Right of Action in Time of War—Resident Alien "in Protection"—Qualifications—Royal Proclamation—Inquiry as to Conduct and Status of Plaintiff—Stay of Proceedings pending Inquiry—Interim Injunction Restraining Sale under Chattel Mortgage—Qui tam Action—Simple Contract Creditor of Mortgagor—Dissolution of Injunction.

Motion by the plaintnff to continue an interim injunction.

W. R. Smyth, K.C., for the plaintiff.
R. McKay, K.C., for the defendants.

HODGINS, J.A.:—The plaintiff, who holds an unregistered chattel mortgage, dated the 18th May, 1914, on the stock in trade

of Wiwcaruk & Bassi, in the town of Cobalt, brings this action to set aside the defendants' registered chattel mortgage upon the same goods, dated the 29th May, 1914. He has obtained from the Local Judge at Haileybury an injunction restraining their sale. The present motion is to continue that injunction. The plaintiff claims to sue on behalf of himself and all other creditors of the firm already named, and grounds his action upon the fact that the seizure and sale will, in his belief, "create an unjust preference."

The plaintiff by so suing must be taken to have abandoned his rights as a secured creditor. Insolvency is not suggested except inferentially, and apparently will only arise after the defendants have realised upon their security.

I do not understand upon what principle a simple contract creditor, even suing in a class action, can restrain a chattel mortgagee from realising upon his security, unless he in the first place alleges more than this plaintiff does, and in the second place satisfies the Court that the circumstances under which the mortgage was given indicate some infraction of the statutes relating to preferences. This the plaintiff does not attempt to do.

So far as the amount due upon the mortgage is concerned, the Court will not, upon this application, take the account, nor, as I understand the practice, will it restrain realisation by a solvent creditor under his mortgage, except upon at all events primâ facie proof of invalidity.

I am, therefore, unable to continue the injunction.

The defendants, however, contended that the action is not maintainable and that I should dismiss it, because the plaintiff is an alien enemy, being an Austrian and not naturalised. The plaintiff does not deny that he is a native of Austria, and by his counsel admits that he is not naturalised. The writ was issued on the 27th August, 1914, which was after the date at which a state of war existed between his Britannic Majesty and the Emperor of Austro-Hungary, viz., the 12th August, 1914.

This raises a most important point, of which the Court is bound to take notice: per Lord Davey in Janson v. Dreifontein Consolidated Mines Limited, [1902] A.C. 484, at p. 499. The position of an alien enemy has not, except in a few isolated cases, been dealt with in the Courts since the Napoleonic and Crimean wars. The doctrines then established have not, in consequence, undergone much, if any, modification. But, if not altered in substance, the extreme rights arising thereout are rarely—according to Lord Loreburn in De Jager v. Attorney-General for Natal, [1907] A.C. 326—put into actual practice.

An alien enemy is one whose Sovereign is at enmity with the Crown of England, and one of his disabilities which has always been strongly insisted upon is that he cannot sue in a British Court during war. But this rule is always stated with an exception. In Wells v. Williams, 1 Ld. Raym. 282, 1 Salk. 46, Sir George Treby, Chief Justice of the Common Pleas (temp. Wm. III.) said: "An alien enemy who is here in protection may sue his bond or contract." And in the oft-quoted case of The Hoop (1799), 1 C. Rob. 196, Sir William Scott laid it down that, even in British Courts, by the law of nations, "no man can sue therein who is a subject of the enemy unless under particular circumstances, that, pro hac vice, discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice. But otherwise he is totally ex lex."

This exception is recognised in more modern time by Sir Alexander Cockburn, L.C.J., in his work on Nationality (1869), p. 150: "An alien enemy has no civil rights in this country, unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war, the Sovereign usually, in the proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends."

But to the enjoyment of this privilege important qualifications are annexed. One is that the alien enemy must shew himself possessed of what amounts to such a license: Esposito v. Bowden (1857), 7 E. & B. 762, 793. And, further, if the license be a general one, the alien enemy may be prevented from asserting it. In Sparenburg v. Bannatyne (1797), 1 B. & P. 163, at p. 170, Eyre, C.J., says: "I take the true ground upon which a plea of alien enemy has been allowed is that a man professing himself hostile to this country and in a state of war with it cannot be heard if he sue for the benefit and protection of our laws in the Courts of this country."

The Crown has, by Royal Proclamation dated on the 15th August, 1914, directed: "That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained, or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or

engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation."

In the present case the Court has no means of knowing whether this Proclamation, the terms of which are relied on as giving a right to maintain this action, covers this particular plaintiff. He may or may not be quietly pursuing his ordinary avocation, or he may be, for all that is before me, one of the class excluded by its subsequent provisions, or otherwise disentitled to take advantage of provisions intended for those who have resided here and engaged in business for some length of time. Nor am I at all sure that the Proclamation has the effect contended for. It appears to have been issued under sec. 6, sub-sec. (b), rather than under sub-secs. (e) and (f) of the War Measures Act, 1914, and may well refer only to police protection. It is not incumbent on the Court to make, still less to act upon, any presumption in favour of natives of either of the two nations now at war with the British Crown; and I think that every facility should be afforded for local inquiry, so that the Court should be fully informed as to whether or not the plaintiff is in fact entitled to set up the protection extended by the Crown under the wording of the Proclamation. Such an inquiry may properly be made at or before the trial, and may be called for at any time on motion; but, if pleadings had been delivered in this case, I should prefer to leave the questions both of fact and law to be determined when the case came up for trial, especially as recent English statutes and proclamations have not yet reached this country. But, as attention is pointedly called to it on this motion, and as the Crown has drawn a distinction between peaceable alien enemies and those who may be otherwise engaged, I think, at this early stage of the war, it will be proper to stay the action until the plaintiff satisfies the Court that it ought to allow him to proceed to trial, and there urge the contention that he is here under what amounts to a license sufficient to enable him to sue on such a cause of action as he is setting up.

Reference to recent discussions in the English law periodicals and to the report of an expert committee of the London Chamber of Commerce in August may be of use in finally determining the extent of the Proclamation and the scope of its provisions.

The injunction will be dissolved and the action stayed meantime, with leave to apply on notice to a Judge of the High Court Division to permit the action to proceed after time has been given

to make the inquiries I have indicated. Two weeks will be sufficient. If the action proceeds, the costs of this motion will be to the defendants in the cause, unless the trial Judge otherwise orders. If no further proceedings are taken, the costs will be paid by the plaintiff to the defendants after taxation.

ANGLISCHICK v. ROM—BRITTON, J.—AUGUST 31.

Landlord and Tenant—Lease—Claim for Forfeiture—Surrender—Possession—Counterclaim—Return of Deposit—Deduction of Rent—Money Lent.]—Action against four defendants, Rom, Bernstein, Cohen, and Gang, for a declaration that a certain lease of premises for occupation and use as a moving picture theatre, and the term thereby created, were forfeited, and for possession and mesne profits. The learned Judge finds, upon the evidence, that there was, before action, a surrender of the lease by operation of law; that at the time of the commencement of the action the plaintiff was in possession of the premises; that the plaintiff did not give any notice to the defendants Rom and Bernstein of his intention to exercise his right of re-entry, nor did he enter in any hostile way as against the defendants Gang and Cohen, but by agreement with them, they being in possession under Rom and Bernstein with the plaintiff's consent; and that there was no arrangement in terms made between Gang and Cohen and the plaintiff for the payment or return to any one of a sum of $1,000 deposited with the plaintiff as security when the lease was made. The defendants Gang and Cohen did not defend. Judgment for the defendants Rom and Bernstein dismissing the action as against them with costs, and for the recovery of $725 on their counterclaim, being the $1,000 deposit, less rent due on the 14th October, 1913, $275, and also for money lent, $275, with interest at 5 per cent. from the 14th October, 1913, and costs of action and counterclaim. McGregor Young, K.C., and L. Davis, for the plaintiff. M. Wilkins, for the defendants.

ROBINSON BROTHERS CORK CO. LIMITED v. PERRIN & CO. LIMITED —HOLMESTED, SENIOR REGISTRAR—AUGUST 31.

Summary Judgment—Motion for——Rule 56—Company-defendant—Affidavit of Principal Officer—Information and Belief—Sufficiency—Cross-examination—Disclosing Defence—Amendment of Writ of Summons.]—Motion by the plaintiff company for summary judgment on a specially endorsed writ of summons. The defendant was a limited company, and the affidavit filed with the appearance was made by the secretary-treasurer of the company. The action was for the price of goods sold and delivered; and the defence set up was, that some of the goods were not according to contract, and that the defendant company had as to part of the claim a set-off. The secretary-treasurer was cross-examined upon his affidavit, and it appeared from his examination that he had not much personal knowledge of the facts on which the alleged defence was based—he spoke from information received from other servants of the company. The learned Registrar (sitting in Chambers for the Master) said that the affidavit was not to be rejected as not being a sufficient compliance with Rule 56. The Rule is sufficiently complied with if one of the principal officers of the company, even though he speaks only from information and belief, makes the affidavit; it is not intended that all the officers of the company who have an actual knowledge of the facts must join in the affidavit. The Judge or officer in Chambers is not called upon to try the action upon an application such as this. The cross-examination in this case did not shew that the defendant company had no defence; it rather shewed that it had a defence. Motion refused, without prejudice to the further prosecution of the action; costs in the cause. The plaintiff company was allowed to amend the writ, and service of the amended writ was dispensed with; the plaintiff company to pay the costs of the amendment. J. I. Grover, for the plaintiff company. H. H. Davis, for the defendant company.

TUCKER v. TITUS—TITUS v. TUCKER—FALCONBRIDGE, C.J.K.B.—SEPT. 1.

Fraud and Misrepresentation — Exchange of Properties — Mortgage—Evidence—Findings of Fact of Trial Judge—Damages.]—These two actions arose out of the same transactions as the former action of Tucker v. Titus (1913), 4 O.W.N. 1402, which was an action for rescission of certain contracts, on the ground that they were induced by the fraud and misrepresentation of the defendant. That action was dismissed, without prejudice to an action for damages for deceit. The new action of Tucker v. Titus was brought for an injunction restraining a sale of the land in question under a mortgage. The action of Titus v. Tucker was to recover possession of the land; and in that action Tucker counterclaimed for $8,000 damages for deceit. The learned Chief Justice said that he had no hesitation in accepting Tucker's version of the transactions as being in the main true, and that he had been made the victim of a gross and cruel fraud whereby he traded his good farm for a property in Trenton of less value and gave a mortgage on the latter for $6,900. Tucker believed the false statements made by Titus, acted on them, and so was led to his destruction. Tucker's damages were assessed at $7,000; and judgment was given for him in both actions with costs. The learned Chief Justice adds that interest would not run on the mortgage; so, in the final result, if Titus discharges the $6,900 mortgage and pays Tucker $100 and the costs of both actions, the parties will be in their proper positions. E. G. Porter, K.C., and F. H. White, for Tucker. I. F. Hellmuth, K.C., and A. Abbott, for Titus.

SHOREY v. POWELL—FALCONBRIDGE, C.J.K.B.—SEPT. 3.

Principal and Agent—Agent's Commission on Sale of Land.]—The plaintiff sued for $1,000 as commission on the sale of lands for the defendant. Upon the weight of evidence, the learned Chief Justice finds that the plaintiff is entitled to a commission of $250, from which is to be deducted $151 collected by him. Judgment for the plaintiff for $99 with County Court costs and no set-off. E. G. Porter, K.C., and F. H. White, for the plaintiff. R. U. McPherson, for the defendant.