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C.A.

REX v. MARTIN.

Criminal Law—Joint Indictment of Husband and Wife for Murder — Evidence — Admission or Confession of Wife Implicating Husband—Admissibility in Whole—Caution to Jury—No Evidence against Husband—Counsel Representing Attorney-General—Right of Reply where Prisoners Adduce no Evidence.

The prisoner Alexander Martin, and his wife Ethel Martin, were tried before FALCONBRIDGE, C.J., presiding at the sittings of oyer and terminer and general gaol delivery for the county of York, on a joint indictment wherein they were charged with the murder of their infant son.

The prisoners were defended by different counsel, but did not otherwise separate in their defence.

In the course of the trial Agnes Whidden, police matron at the Court street station, Toronto, was called as a witness for the Crown, and testified that the female prisoner, after being cautioned by the witness, had made a statement to her. She proceeded to testify that the prisoner stated that the police said that she killed her baby, and then said, "I did not kill it, but I saw it killed." She went on to say that she and her husband went out one afternoon in a boat together with the baby. At this point counsel for the female prisoner, stating that counsel for the male prisoner joined with him, objected to the reception of the evidence. He admitted that anything the female prisoner said, after proper caution, would be evidence against herself, but he submitted that any thing stated by her in the absence of her husband could not be used as evidence against him. The Chief Justice ruled

that he could not exclude the evidence, because the statements were receivable against the person who made them. He then informed the jury that he could not exclude the evidence, but that it was not evidence against the male prisoner, and said he would again refer to the matter in his charge. The witness then gave the whole statement made to her. In substance it tended to shew that the male prisoner killed the child by striking him with something, she was not sure what, and then throwing him into the water, and that she took no part in the crime.

Subsequently, in his charge, the Chief Justice repeated to the jury several times that the testimony of Whidden was not evidence against the male prisoner, and must not be considered by the jury in weighing the evidence against him.

No witnesses were examined for the defence, and counsel for the prisoners claimed the privilege of addressing the jury last, and contended that the counsel for the Crown was not entitled to reply. W. Proudfoot, K.C., who appeared for the Crown, representing the Attorney-General, claimed the right to reply, and the Chief Justice ruled in his favour.

The jury found the prisoner Alexander Martin guilty, and acquitted the female prisoner.

At the request of counsel for Alexander Martin, the Chief Justice reserved a case for the opinion of the Court of Appeal upon the following questions:

1. Whether or not the alleged statement of the female prisoner to the witness Whidden was properly admitted as evidence, when the prisoners were tried together.

2. Whether or not, no evidence being adduced by either of the prisoners, counsel for the defence had the right of reply, my ruling being that counsel for the Crown, who claimed to be acting on behalf of the Attorney-General, had the right of reply.

The case was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.

A. R. Hassard, for the prisoner Alexander Martin.

J. R. Cartwright, K.C., for the Crown.

Moss, C.J.O.—The questions raised were fully and ably argued from the prisoner's point of view by Mr. Hassard. But a review of the authorities leads me clearly to the conclusion that the Chief Justice's rulings were right.

No objection was made to the reception of Ethel Martin's statement, on the ground that it was not properly made to

and received by the witness Whidden. But it was argued that it was not a confession in law, i.e., that it was not a voluntary statement or admission of participation in a crime, so as to entitle the Crown to give it in evidence, even as against the person making it. This point was not expressly taken before the Chief Justice. The objection, as stated by counsel at the trial, was as follows: "Just at this stage will come up the objection Mr. Hassard and I take to this evidence going in. I am quite prepared to admit that anything she said after proper caution would be evidence against herself, but certain things may be said by Mrs. Martin in the absence of her husband which I submit can hardly be used as evidence against him." And the form of the question submitted shews that what is sought from this Court is an opinion as to the validity of the objection raised to the admissibility of the statement when the prisoners were tried together. It was assumed that if Ethel Martin was being tried alone the statement was receivable, but it was sought to exclude it because it might contain something prejudicial to her husband, who was being tried with her on the same indictment.

Assuming, however, in favour of the prisoner, that the point is open, it cannot prevail. The question must be considered in the light of sec. 592 of the Criminal Code, which enables the prosecutor to give in evidence any admission or confession or any other statement of the accused. It can serve no useful purpose to enter upon an inquiry as to the exact signification of the different words of the section, or to undertake to say whether the words spoken by the female prisoner are to be termed an admission or a confession or a statement. Any of these is permitted to be given in evidence by the prosecutor. And, in order to the admissibility of a statement made by an accused person, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession. It is for the jury or other tribunal to judge of its weight and to deal with it as with any other piece of evidence, having regard to the other circumstances of the case as given in evidence: Rex v. Clewes, 4 C. & P. 221, at p. 226; Rex v. Steptoe, ib. 397.

In the present case, it having been shewn that the statement was made under conditions that rendered it in law clearly admissible against the female prisoner, the Chief Justice could not have declined to permit it to be given in evidence.

That being the case, it was the right of the female prisoner to insist that the statement should be presented as a whole. The words with which the prisoner had opened, "They say I killed my baby, I did not kill it but I saw it killed," which had been allowed to be given in evidence before the objection was taken, if left unexplained, would manifestly have been prejudicial to her, and she was entitled to have all that followed presented to the jury. The confession or statement, if sought to be proved at all, must be proved as made. Eminent Judges have not considered the apparent hardship of this rule, where the confession or statement in its terms affects other prisoners and implicates them by name, a sufficient reason for omitting their names or any other part of the confession or statement. In Barstow's Case, 1 Lewin 110, Parke, J., did direct the omission of the names of other prisoners implicated by a statement proved to have been made by one, observing that he knew that Littledale, J., was of the contrary opinion, but he did not like it; he did not think it was fair. But he appears to have been singular in this respect.

In Rex v. Fletcher and others, 4 C. & P. 250, 1 Lewin 107, which was the case to which Parke, J., referred in Barstow's Case, two persons were indicted. A letter was tendered in evidence written by one of them, but it immediately implicated the other. It was objected by the prisoner's counsel that on reading the letter the names of all persons except the prisoner's own should be omitted. But Littledale, J., declined to so direct, and said: "There has been much doubt upon this point, and in one of the Courts the contrary was the practice. I have, however, considered it a good deal, and, though my opinion was once different, I am now satisfied that to make it evidence the whole of the letter must be read. But I shall take care to make such observations to the jury as to prevent its having any injurious effect against the other prisoner, and I shall tell the jury that they ought not to pay the slightest attention to this letter, except so far as it goes to affect the person who wrote it."

In Hall and Ritson's Case, 1 Lewin 110, the two prisoners were tried together before Alderson, J. A question similar to that in the two previous cases having arisen, the learned Judge's attention was called to the differing opinions. He adopted that of Littledale, J., and ordered the whole of the examination of one of the prisoners to be read, though it directly implicated the other.

A similar ruling was made by Denman, C.J., in Foster's Case, 1 Lewin 110. And the present rule may be stated as in Phipson on Evidence, p. 231: "As in the case of admis-

sions, the whole confession must be taken, even though containing matter favourable to the prisoner; but the jury may attach different degrees of credit to the different parts. So, if the confession implicate other prisoners, it will still be receivable, though the Judge should warn the jury that it is only evidence against the maker."

This rule, which was implicitly observed by the Chief Justice, must now be taken to be too firmly established to be disturbed.

In my opinion, the first question should be answered in the affirmative.

The solution of the second question depends upon the proper construction to be given to sec. 661 (2) of the Criminal Code, read in connection with sec. 3 (b), which declares that the expression "Attorney-General" means the Attorney-General or Solicitor-General for any province of Canada in which any proceedings are taken under the Code.

In England the Attorney-General's right of reply was never seriously questioned: Kyshe on the Law and Privileges relating to the Attorney-General and Solicitor-General of England, p. 123. That was because, as was said by Baron Channell, the right is in the nature of a prerogative right, a right on the part of the Crown exercised by the officer of the Crown, the Attorney-General: Rex v. Deblanc, 2 State Trials, N.S., p. 1021. The right of the Solicitor-General was not so freely conceded. However, by resolutions of the Judges adopted prior to the spring circuits of 1837, it was declared that in cases of public prosecutions for felony instituted by the Crown, the law officers of the Crown and those who represent them are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner: 7 C. & P. 676, 677, 2 State Trials, N.S., p. 1020. A consideration of the numerous cases which are to be found in the reports shews that the Crown's right of reply was not in question. The dispute was as to the persons by whom the right was exercisable. Lord Chief Baron Kelly in Rex v. Waters, noted in 2 State Trials, N.S., at p. 1021, explained the matter as follows: "The true ground is this, that the Crown by its prerogative from time immemorial has claimed the right, and whether the Attorney-General appears in person, or by reason of accident or other cause does not appear, and is personally represented by some other gentleman (whether the Solicitor-General, a Queen's Counsel, a Serjeant, or an ordinary barrister, is immaterial), the Crown does possess the right, and counsel is entitled to exercise it if he thinks fit." He added: "No Judge who has ever filled the office of Attorney-General has ever doubted it; having had occasion

to look into precedents and to consider the principles upon which the right really rests, no one who has for any length of time filled either of the chief offices of the Crown has ever entertained a doubt upon it." The controversy may be said to have turned altogether upon whether the exercise of the Crown's right should be allowed to others than the Attorney-General. In 1884 the Judges of England resolved that the right should be confined to the Attorney-General and Solicitor-General when personally present: 5 State Trials, N.S., 3 (note).

By 32 & 33 Vict. ch. 29 (D.), relating to procedure in criminal cases, sec. 45 (2), providing for the manner in which addresses to the jury should be regulated, it was amongst other things, enacted that "the right of reply shall be according to the practice of the Courts in England, provided always that the right of reply shall be always allowed to the Attorney or Solicitor-General or to any Queen's Counsel acting on behalf of the Crown." Unquestionably by the right of reply thus accorded was meant the Crown's right of reply, which had always been exercisable in Crown cases by the Attorney-General for England. The right or privilege thus conferred upon the Attorney-General or Solicitor-General or any Queen's Counsel acting on behalf of the Crown, was the right to reply after all addresses had been delivered on behalf of the accused.

All question as to the effect of the accused having adduced no evidence was excluded by the distinct and imperative language of the proviso. And so by sec. 661 (2) of the Code it is provided that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them. Here, as in the preceding Act, there is no uncertainty as to the right of reply that is to be allowed. Nor is there any doubt as to the persons by whom it may be exercised. Instead of being restricted to the law officers of the Crown and Queen's (or King's) Counsel acting on behalf of the Crown, it is now extended to any counsel representing either of these law officers. In effect the provision establishes a rule identical with the resolution of the Judges of England adopted in 1837, to which reference has already been made. It is true that the preceding portions of the enactment appear to be pointed at giving to counsel for an accused person on whose behalf no witnesses are examined, the privilege of addressing the jury last. Yet this must be considered in the light of the long well-understood meaning of the Crown's right of reply. As before pointed out, there never was any question as to the Crown's right of reply. The only question was as to the

persons by whom it might be exercised on behalf of the Crown. And sec. 661 (2) settles that by designating those to whom it shall be accorded.

The right exists if insisted on. Until Parliament sees fit to withdraw it, the Crown through its representative can assert the privilege. And it must be left to counsel, in the judicious exercise of his discretion, to decide whether he will claim it.

In my opinion the second question should also be answered in the affirmative.

OSLER and MACLAREN, JJ.A., gave written reasons for the same conclusions.

MACLENNAN and GARROW, JJ.A., also concurred.

FALCONBRIDGE, C.J. FEBRUARY 16TH, 1905.

WEEKLY COURT.

RE ROONEY.

Will—Construction—Devise—Estate in Fee—Condition.

Motion by Sarah Jane Laing and others, children and some of the heirs-at-law of Thomas Rooney, deceased, under R. S. O. 1897 ch. 129, sec. 39, and Rules 938 et seq., for the opinion, advice, and direction of the Court and the determination of a question respecting the will of the deceased, viz., what estate and of what nature did the widow of the deceased take under his will in the lands therein mentioned?

The will was as follows:—

I give, devise, and bequeath to my wife, Ann Jane Rooney, 50 acres of land, being composed of north quarter of lot 15, concession 8, township of Arthur, as long as she remains unmarried. To my daughter Sarah Jane Laing the sum of $1. To my daughter Mary Ann Rooney the sum of $100, to be paid by my wife, Ann Jane Rooney, at the time she gets married. To my daughter Rachael the sum of $100, to be paid by my wife, Ann Jane Rooney, at the time she gets married. To my daughter Matilda Rooney the sum of $100, to be paid by my wife, Ann Jane Rooney, at the time she gets married. To my adopted daughter Sarah Morrison the sum of $100, to be paid by my wife, Ann Jane Rooney, at the time she gets married. To my son Arthur Rooney the sum of $100, to be paid by my wife, Ann Jane Rooney, when he becomes of age. To my son Thomas John Rooney the sum of $1. And to my son Robert Rooney the

sum of $1. I give, devise, and bequeath all my messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, securities for money, money secured by life insurance, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my heirs, executors, administrators, and assigns to and for them and their own absolute use and benefit according to the nature and quality thereof respectively, subject only to the payment of my just debts, funeral and testamentary expenses, and the charges of proving and registering this my will. And I appoint John S. Allen and William Morrison executors of this my will, and hereby revoke all other wills.

W. Kingston, K.C., for all the children of the testator except Thomas John Rooney.

C. Swabey, for Thomas John Rooney.

FALCONBRIDGE, C.J.—Upon consideration of the whole will, I am of the opinion that the widow of the testator took an estate in fee in the north quarter of lot 15 in the 8th concession of Arthur, subject to be divested on her marriage, which event never took place, and at the time of her death her estate was absolute.

I do not see how otherwise she was to pay the 4 legacies of $100 each which she was directed to pay at the time of the marriage of daughters who were at the death of the testator aged respectively 20, 17, and 14, and of an adopted daughter whose age is not stated.

The general devise and bequest at the end of the will is not expressed to be a gift over.

Costs of all parties out of estate.

I have referred to Re Deller, 6 O. L. R. 718, 2 O. W. R. 1150; Re Mumby, 8 O. L. R. 283, 4 O. W. R. 10; Theobald, 5th ed., p. 327; Richton v. Cobb, 5 My. & Cr. 145; Re Beddington, 25 Ch. D. 685; Re Howard, [1901] 1 Ch. 418; Sherratt v. Bentley, 2 My. & K. 149.

CARTWRIGHT, MASTER. FEBRUARY 20TH, 1905.

CHAMBERS.

MUIR v. GUINANE.

Dismissal of Action—Default of Plaintiff—Application by Plaintiff for Relief — Service on Defendant's Solicitor —Duration of Retainer—Absent Defendant.

On 20th December, 1904, the usual præcipe order for security for costs was taken out and served.

Owing to a change in the firm of plaintiffs' solicitors, the order was not complied with; and on 18th January, 1905, an order issued under Rule 1203 dismissing the action with costs; but no judgment was entered or costs taxed.

On 23rd January this order came to the knowledge of plaintiffs' solicitors; they at once moved under Rule 358 to be allowed to put in security and proceed with the action.

Notice of this motion was served on defendant's solicitor (as appeared by admission indorsed thereon). But on the return of the motion on 28th January, he stated that defendant had been informed by him that the action had been dismissed, and that defendant had left the province, without giving any address; and that the solicitor did not consider himself any longer entitled to act.

The motion thereupon stood sine die to consider what was the proper course under these facts.

Further argument was heard on 16th February.

A. R. Clute, for plaintiffs.

S. B. Woods, for defendant's solicitor.

THE MASTER:—The whole matter was discussed in De la Pole v. Dick, 29 Ch. D. 351. It was there thought to be doubtful how long the solicitor on the record continued to represent the client under the English Rule corresponding to our Rule 335.

In 1893 the point again came up in Regina v. Justices of Oxfordshire, [1893] 2 Q. B. 149, in which, as in De la Pole v. Dick (supra), Lord Bowen took part. It was there held unanimously that the retainer did not continue after the order had been made in that case. The decision seems to have been based on the ground that it was not a matter in the High Court, and therefore even the English Rule, as it then stood, did not apply. This had been amended in 1885 by the addition of the words "until the final conclusion of the cause or matter, whether in the High Court or in the Court of Appeal." But no such amendment has been made to our Rule.

The point so far as can be ascertained is new. No authority was cited on either side beyond what is said in Holmested & Langton in the notes on Rule 335 (see pp. 513-516).

It was argued that the application under Rule 358 is really an appeal. This seems to be correct. So that the point for decision is just what was raised in De la Pole v. Dick, where the head-note reads: "Whether the solicitors on the record do not continue to represent their client until the expiration of the time allowed for appealing, quære."

On this Lord Bowen said (p. 357): "It is not necessary in the present case to decide that point."

The inclination was apparently to answer the query affirmatively, and I think it may be said that wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358; and that, so long as that Rule can be invoked, the action is still pending. In all such cases the motion has to be made in the action, which must therefore be viewed as still pending—otherwise no motion could be made—and the only remedy would be by petition, if any remedy existed.

Then it follows that if the action is pending, the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The motion will therefore now be heard on the merits, as soon as the defendant can be heard from by his solicitor.

[See Newcombe v. McLuhan, 11 P. R. 461.—ED.]

ANGLIN, J. FEBRUARY 20TH, 1905.

WEEKLY COURT.

LYE v. McCONNELL.

Discontinuance of Action—Right of Defendant to Prevent — Specific Performance — Payment of Purchase Money into Court by Defendant—Right to Judgment.

Motion by defendant to set aside a notice of discontinuance of the action served by plaintiff.

J. Lorn McDougall, Ottawa, for defendant.

A. F. May, Ottawa, for plaintiff.

ANGLIN, J.—This action was brought on 7th June, 1904, for the specific performance of an alleged contract for the sale by plaintiff to defendant of certain mining lands. . . . Defendant's appearance was entered on 14th June. On 5th August defendant paid into Court $3,619.48, purchase money and interest, in satisfaction of plaintiff's claim, and duly notified plaintiff's solicitors of such payment. Defendant's solicitors, by letter, asked for proof of title. In moving to set aside a præcipe order for security for costs, plaintiff, on 23rd June, made affidavit that he owned the lands in question.

Plaintiff now alleges that, towards the end of June, having an opportunity to sell the lands in question to an-

other purchaser, one Jones, and believing that defendant had taken and adhered to the position that there was no enforceable contract between himself and plaintiff, he (plaintiff) entered into an agreement to sell these lands to Jones Plaintiff's solicitor swears that this new contract was brought to the knowledge of defendant's solicitors, with an intimation that the pending action would be discontinued, and he adds that, until notified on 5th August of the payment into Court, plaintiff and his solicitors were not aware that defendant desired to carry out the contract upon which the action had been brought. Defendant's solicitor denies that he was advised before paying the purchase money into Court that the action would be discontinued. He also swears that he was informed by plaintiff's solicitor that Jones had full notice of this action before entering into the agreement which he made with plaintiff, and that this agreement contains a clause that if registered it should become null and void.

On 8th September defendant registered a certificate of lis pendens against the lands. After the receipt of the notice of payment into Court plaintiff's solicitors took some steps towards establishing a title satisfactory to defendant, but it is not clear that these steps were not taken subject to the condition that plaintiff should be able to free himself from any claim of the Wileys, who had become assignees of Jones's interest, and appear to have also begun an action against Lye. . . . Finally, on 23rd January, 1905, plaintiff's solicitors wrote that they would do nothing towards closing with defendant until the Wileys' claim should be disposed of. Defendant's solicitors replied on 1st February by demanding delivery of deeds and an agreement that the purchase money paid in should remain in Court until the Jones agreement should have been removed from the register. On 7th February defendant's solicitors wrote again, demanding that the title be cleared immediately. On the same day they served a formal notice demanding delivery of abstracts of title.

On 8th February plaintiff's solicitor served a notice of discontinuance of this action.

Defendant now moves to set aside this notice of discontinuance, on the ground that, by paying the purchase money into Court and giving notice thereof, and by the subsequent steps taken, as detailed above, he has acquired a right to have judgment pronounced in this action on his admission of plaintiff's claim, and that plaintiff should not be permitted by discontinuance to deprive him of such right: Daniel's Chy. Pr., 6th ed., pp. 565-6; Robertson v. Laird, 8 C. L. T. Occ. N. 124. . . .

[Reference to Rule 430, as to discontinuance.]

This rule entirely supersedes the former right of a plaintiff at common law to claim a nonsuit, and of a plaintiff in equity to dismiss his bill at his own option: Fox v. Star Newspaper Co., [1900] A. C. 19. It is intended to form a complete code of procedure, upon this portion of our practice. Under it the right of a plaintiff to discontinue up to a certain stage is practically absolute. He would not be permitted to do so in fraud of a compromise or other agreement with defendant in regard to the disposition of the action: Betts v. Barton, 3 Jur. N. S. 154. He would not thus be permitted to deprive a defendant of such a right as that of enforcing his claim for damages upon an undertaking in an interlocutory injunction: Newcomen v. Coulson, 7 Ch. D. 764. Nor could he by this method prevent a defendant seeking, by appeal in due course, relief from an onerous interlocutory order pronounced against him: Robertson v. Laird, supra.

But, assuming that, if plaintiff had not discontinued, defendant could successfully, in the then state of the litigation, have moved for judgment of specific performance under Rule 616. . . . —I strongly incline to think he could not succeed upon such a motion if opposed (see McLeod v. Sexsmith, 12 P. R. 606)—I would not on that account deem plaintiff deprived of the right to discontinue, conferred in such explicit terms by Rule 430. Nor is defendant by this discontinuance denied any substantial right or remedy to which he may be entitled. He is given his costs of the discontinued action, and he is at liberty immediately to begin an action for specific performance upon his own account.

The motion must be dismissed with costs, which may be set off pro tanto against the costs to which defendant may be entitled upon the discontinuance.

STREET, J. FEBRUARY 20TH, 1905.

TRIAL.

AMES v. SUTHERLAND.

Pledge—Shares—Advances by Brokers—Margins—Speculative Shares—Fall in Price—Sale without Notice to Customer—Damages—Measure of—Intention of Customer to Retain Shares — Price at Time of Trial — Unreasonable Delay in Objecting to Sale.

Action for moneys advanced by plaintiffs as defendant's brokers to protect shares bought by plaintiffs for defendant on margin.

On 3rd March, 1902, defendant (living in Winnipeg) employed plaintiffs (carrying on business at Toronto as

brokers) to buy for him 400 shares of Dominion Coal Co. stock upon a margin of $20 per share, and he paid them $8,000 for this margin. Plaintiffs thereupon purchased and paid for the stock, rendering accounts to defendant from time to time, in which he was charged with the cost of the stock, less the amount paid by him, and with interest upon the balance. The stock was bought at 90¼ and a commission of ¼ was added, making the total cost to plaintiff $36,200, and leaving a balance due on it of $28,200.

The bought note delivered by plaintiffs to defendant at the time of the purchase contained the following stipulation: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

In January, 1903, the price of the stock having advanced to 130 or thereabouts, plaintiffs repaid to defendant the $8,000 margin, and advanced to him an additional $4,000 upon the stock. During March, April, and May, 1903, the price fell rapidly, with occasional advances. On 27th May, 1903, plaintiffs sold 125 of defendant's shares at 95, charging him ¼ commission. The sale produced $11,843.75
On 29th May, 1903, they sold 25 shares at 94 net. 2,350.00
On 3rd June they sold 150 shares at 76¾ net..... 11,512.50
And on the same day they sold the remaining 100 shares at 74¾ net 7,475.00

The 400 shares producing $33.181.25
Or an average of $82.95 per share.

These sums were credited to defendant in plaintiffs' books, leaving a balance at his debit, after crediting dividends and charging interest, of $6,425.91 on 15th June, 1903, upon which date a statement shewing all this was sent by plaintiffs to defendant, and received by him two or three days later. He was aware of the fact that the sales had been made shortly after 9th June, 1903.

On 8th August, 1903, plaintiffs again wrote to defendant, enclosing a statement of their account in detail, and asking for immediate payment of the balance. No notice having been taken of either of these communications, plaintiffs' solicitors wrote to defendant on 23rd September, 1903, claiming the balance with interest; and again on 6th October, 1903, they wrote that an action would be begun unless a reply were received by return mail. Finally, on 12th October, 1903, defendant wrote that he had referred the matter to his solicitor in Toronto.

This action was brought on 7th December, 1903, to recover the balance due upon the footing of the detailed account

rendered, in which defendant was charged with the advances and interest, and credited with the dividends and proceeds of the sales.

Defendant set up in his defence that plaintiffs bought the stock as his brokers, and held it as a pledge or security for the amounts advanced, with interest at 6 per cent.; that they had sold without notice to him and in violation of his rights; and that, having done so, they were not entitled to call upon him for payment of any balance.

It was admitted by plaintiffs that the sales made by them were without notice to defendant, and that they were not entitled to sell without notice, but they contended that defendant should have repudiated the sales when he was informed of them, and was not justified in remaining silent and taking his chances of a rise or fall in the price of stock of this speculative character.

It was also admitted that plaintiffs had closed their doors on 2nd June, 1903, although they had continued the business for the purpose of liquidation; and it was sworn that they were in a position to have delivered to defendant his stock at any time down to the time they sold it.

D. E. Thomson, K.C., and W. N. Tilley, for plaintiffs.

S. C. Biggs, K.C., for defendant.

STREET, J. (after setting out the facts)—The prices of Dominion Coal stock upon the Toronto Stock Exchange upon the dates which seem material to this question were proved to be as follows:

27th May, 1903 .....94 to 95½.
29th May, 1903 .....91½ to 93½.
2nd June, 1903 .....78 to 84.
3rd June, 1903 .....82 to 83.

The lowest price reached in June, 1903, was 75 on 16th June; the highest was 97½, which was after 15th June.

In July, 1903, the highest price was 108, and the lowest 88½.

In August, highest 89¼, lowest 79¾.

In September, highest 85, lowest 68¾.

In October, highest 73½, lowest 60.

In November, highest 75½, lowest 70⅜.

In December, highest 78, lowest 72¾.

At the time of the trial (8th February, 1905), the price was admitted to be under 70.

The precise character in which plaintiffs held the 400 shares of stock was that of pledgees to secure the amount of

their advance to defendant; holding that character, they were not entitled to sell the shares without notice; and the sales they made were, therefore, a breach of their contract with defendant. This is admitted by plaintiffs, and the question before me is reduced to an inquiry as to the effect of the sales upon the rights of the parties.

Defendant contends, upon the authority of the reasoning in Knickerbocker v. Gould, 115 N. Y. 538, and Gillett v. Whiting, 120 N. Y. 402, that an unauthorized sale of the pledge by the pledgee puts an end to the pledgee's special property in it, and entitles the pledgor, at once and without payment or tender of the advance, to recover the pledge, or its full value without deduction, from the pledgee.

The New York cases are not uniform upon the question, and a contrary view was taken in Baker v. Drake, 53 N. Y. 211, and in Gruman v. Smith, 81 N. Y. 25. The settled rule in England, moreover, is directly opposed to defendant's contention. The leading case of Donald v. Suckling, L. R. 1 Q. B. 585, determined that a pledgee did not, by an unauthorized dealing with the pledge, put an end to the contract of pledge and to the pledgee's interest in it. This case was followed in Halliday v. Holgate, L. R. 3 Ex. 299, and by the Court of Appeal in Yungmann v. Briesemann, 67 L. T. N. S. 642, decided in 1893.

Defendant had rights which he might have enforced upon becoming aware of the fact that plaintiffs had sold his stock; he might have tendered plaintiffs the amount due upon their advance and demanded the shares, and, if plaintiffs did not deliver them, he might bring an action for their value, deducting the amount due to plaintiffs. Or he might have brought an action against plaintiffs for the breach of contract of pledge for the loss he had really sustained by their wrongful act: Johnston v. Stear, 15 C. B. N. S. 330; Yungmann v. Briesemann, 67 L. T. N. S. 642; Ashburner on Mortgages (1897), p. 192.

Defendant took neither of these courses during the 6 months which elapsed from the time he became aware of the sale until he was sued for the balance of their advances by plaintiffs. He has, however, set up the facts of the unauthorized sale in his defence, and his pleading should be treated as a claim to reduce plaintiffs' debt by the damages which he has sustained by their action: Lacey v. Hill, L. R. 8 Ch. 921, 926; Duncan v. Hill, L. R. 8 Ex. 242; Ellis v. Pond, 78 L. T. N. S. 125.

The next question is as to the measure of damages. . . . Much authority is to be found precisely in point in the American Courts, and nothing precisely in point, so far as

I have been able to discover, in England. . . . The English practice of periodical settling days for stock exchange transactions has no counterpart upon this side of the Atlantic; these stocks are carried as a rule by brokers from one settling day to another, instead of, as here, for indefinite periods.

The contract of plaintiffs with defendant in the present case was one which did not oblige them to carry the stock to a particular date, nor did it oblige defendant to pay for it at a particular date; but it did not permit plaintiffs to sell without giving notice to defendant. They sold without giving notice, and informed defendant that they had done so, and defendant made no protest, or demand upon them for the stock, or request that they should replace it. His first objection seems to have been taken when he set up in his statement of claim that plaintiffs had acted wrongfully in selling his stock without notice.

The rule known as "the New York rule," which was adopted as the correct one by the United States Supreme Court in Galigher v. Jones, 129 U. S. 200, is, that the proper measure of damages is "the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock:" see Baker v. Drake, 53 N. Y. 211, and Wright v. Bank of the Metropolis, 110 N. Y. 237, where the reasoning upon which this rule is adopted appears.

No such rule has been adopted in England, and I think its adoption would be inconsistent with the reasoning upon which the Court proceeded in Williams v. Peel River Land and Mineral Co., 55 L. T. N. S. 689, and which was adopted in Little v. London Joint Stock Bank, [1891] 1 Ch. 283, by the Court of Appeal. The Court there refused to adopt a rule in fixing damages for a wrongful refusal to deliver bonds of fluctuating value, which assumed that the owner, had he obtained the bonds, would have sold them at the highest price between two dates. To the same effect is Mansel v. British Linen Co. Bank, [1892] 3 Ch. 159, 163. . . .

[Reference to McArthur v. Lord Seaforth, 2 Taunt. 257; Owen v. Routh, 14 C. B. 327; Forrest v. Elwes, 4 Ves. 492.]

Damages are not assessed as a penalty upon a person who has improperly dealt with the property of another, but only for the purpose of making good the loss which that other has sustained by the improper action taken, and if, in the result, the evidence shews that he has sustained no loss, he is not entitled to recover damages. In the present case defendant . . . stated that at the time when plaintiffs

sold the 400 shares . . . without notice to him, he held 2,500 shares of the same stock in the hands of other brokers in England, which he still held at the time of the trial, and he said that if plaintiffs had not sold the 400 shares he would still have held them. That this evidence is very material upon the question of damages, is, I think, plain. . . . [Reference on this point to Williams v. Peel River Land and Mineral Co., 55 L. T. N. S. at p. 692.] If we take the statement of defendant in the present case as to what his course would have been with regard to this stock—and I see no reason for not doing so—it seems to me he has concluded himself upon the question of damages, for the admission made was, that the stock at the time of the trial could have been bought very much below the price at which plaintiffs sold it. And it is not a case in which defendant can say that plaintiffs had his money, and that therefore he could not buy stock to replace what they had sold, for the evidence shews that they had not only repaid to him the $8,000 deposited as margin, but that they had actually advanced him a further sum of $4,000 upon the stock.

In my opinion, therefore, defendant has failed to shew that he is entitled to recover damages from plaintiffs, because he has shewn that their action has, in the event, been a benefit to him instead of an injury.

I am of opinion also that defendant, by his unreasonable delay in objecting to the sales, disentitled himself to recover, and must be treated as having adopted and ratified the sales. . . . The sales were notified to defendant by plaintiffs not later than 19th June, and no objection was made until after the present action was brought, in the following December. Considering the fluctuating nature of the stock in question, this was an unreasonable time. Plaintiffs were entitled to an early objection from defendant to the course they had taken, so that they might have an opportunity of buying back the stock to protect themselves; and defendant was not entitled to lie dormant and object or approve according as the fluctuations of the market might suit him best: Haywood v. National Bank, 96 U. S. 611; Colbet v. Ellis, 10 Phila. (Pa.) 375.

Plaintiffs are, therefore, entitled to judgment for the amount of their advances, with interest on them at the rates shewn in the accounts rendered, deducting the dividends received and the proceeds of the sale of stock, and defendant must pay the costs.

FEBRUARY 20TH, 1905.

DIVISIONAL COURT.

ARTHUR v. FAWCETT.

Trial — Adding Parties — Amendment — Trial Proceeding without Adjournment — Witness for Defendant not Present—Refusal to Adjourn—New Trial.

Appeal by defendant from judgment of MEREDITH, C.J., at North Bay, in favour of plaintiffs, in an action on behalf of themselves and others, in which they alleged that they had been fraudulently induced to sign a paper which they never supposed was a promissory note, but which turned out to be a promissory note for $1,500, signed by them and 12 others, and made payable to defendant, who had indorsed it to the Traders Bank of Canada at North Bay, and claimed delivery up and cancellation of the note.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., IDINGTON, J.

E. F. B. Johnston, K.C., for defendant.

W. M. Boultbee, for plaintiffs.

BRITTON, J.—It may be that any further litigation in this case will not only be of no advantage to defendant, but will be to his positive loss in the added costs. I do not go into any careful analysis of the evidence given by defendant himself, to see if, upon his own shewing, he must necessarily fail, and that not only the original plaintiffs, but the added plaintiffs, including one Drion, are entitled to succeed, for I am of opinion that, by reason of what took place at the trial, defendant is, ex debito justitiæ, entitled to a new trial, or is at least entitled to an opportunity to produce Drion and have his evidence heard. . . .

Defendant pleaded that 11 others besides plaintiffs had signed the note, and that they had not consented to the bringing of this action. This plea may not have been good, but plaintiffs made no application to strike it out, and made no objection to it before or at the trial.

The trial Judge thought the others necessary parties to the action, and made an order that they be joined as plaintiffs upon their written consent being first obtained to be so joined.

[The judgment then set forth what took place at the trial. It appeared that counsel for plaintiffs produced the consent

of 7 of the 11 co-makers to be joined as plaintiffs, and undertook to procure the consent of the other 4 within 2 weeks, and upon that the trial proceeded as if the amendment had been made, the trial Judge saying that, as the case was being tried without a jury, if there was any witness for the defence not present, arrangements could be made for the taking of his evidence before the case should be finally dealt with. Defendant was called as a witness. He connected Drion with the whole transaction and shewed that if there was any possible defence as to the other plaintiffs, Drion could prove it. At the close of the evidence for the defence, counsel for defendant told the Court that he wished to have the opportunity of calling Drion, but the trial Judge said that defendant should have had Drion there, and declined to adjourn the case for his evidence. Judgment was given for plaintiffs requiring defendant to pay off and indemnify plaintiffs against the note.]

If Drion's admission is to be taken for any purpose in favour of the other plaintiffs, it should be only what he says as a witness—not what others may say that Drion said.

Drion is now made a party plaintiff, and even as a "stool pigeon" for defendant—if the evidence goes so far as to shew that—he is not necessarily upon the evidence entitled to succeed against defendant—yet he is made to succeed, equally with the other plaintiffs.

It is not, as it appears to me at this stage of the case, a question of whether defendant was negligent or not in not being ready for any such amendment as was made at the trial, and in not having Drion at the trial as a witness. It is that Drion was a necessary and material witness for the proper trial of this action; that counsel were told in the early stage of the trial that if there was any witness for the defence not present, arrangements could afterwards be made for the taking of that evidence before the case should be finally dealt with; and it was upon that understanding by counsel for defendant that he called defendant and the one witness he had present.

I think there should be a new trial with costs to abide the event. Plaintiffs should be at liberty to add the holders of the note as parties defendants.

FALCONBRIDGE, C.J.—I concur.

IDINGTON, J., dissented, giving reasons in writing.

FEBRUARY 20TH, 1905.

DIVISIONAL COURT.

MIDDLETON v. COFFEY.

Liquor License Act — Delivery of Intoxicating Liquor to Person after Notice—Licensed Seller—Service of Notice on Barman—Notice Coming to Knowledge of Seller—Evidence.

Appeal by defendant from judgment of MEREDITH, J., ante 18, in favour of plaintiff for $100 without costs in an action under sec. 125 of the Liquor License Act to recover from defendant, a licensed seller of intoxicating liquors, damages for selling to the husband of plaintiff, after notice under the statute. MEREDITH, J., held that service of the notice on defendant's bar-tender was equivalent to service upon defendant, and also found that defendant had knowledge of the service of the notice.

J. Haverson, K.C., for defendant, contended that the statute should be construed strictly, and that personal service on the defendant was necessary, or, if there could be service on an agent at all, that the bar-tender was not an agent upon whom service could be validly made.

J. M. Ferguson, for plaintiff, contended that the service was good, and that the finding of the trial Judge that the notice reached defendant, should not be interfered with.

The judgment of the Court (MEREDITH, C.J., FALCONBRIDGE, C.J., STREET, J.), was delivered by

MEREDITH, C.J.—The action was brought by a married woman, under the provisions of sec. 125 of the Liquor License Act, to recover damages on account of defendant having, after notice had been given forbidding him to sell liquor to her husband, done so.

On the argument of the appeal before the Divisional Court, only one ground was urged for reversing the judgment, and that was that under the statute the notice which is required to be given must be served personally, and that there was no evidence from which personal service could be properly found to have been effected.

We think it is unnecessary to determine the question as to whether service upon the bar-tender, which was the method adopted in this case, was sufficient or not, but, assuming that personal service was necessary, we are of opinion that there

was ample evidence to support the finding that the notice which was given came to defendant's knowledge before the acts complained of, and this, upon the authorities, is equivalent to personal service upon him.

In addition to the cases referred to in the judgment of the learned trial Judge, Macgregor v. Keily, 3 Ex. 794, may be referred to. That was an action on an attorney's bill; according to the pleading, plaintiff had rested his case upon personal service of the bill upon defendant; and it was held that proof of the delivery of the bill to a servant at defendant's residence was prima facie evidence of delivery to defendant.

In this case the learned Judge was not satisfied with the denial of defendant that the notice had come to his knowledge. The evidence shews that it was delivered to the bar-tender, and was placed upon the file in the bar, and remained there until, as defendant deposed at the trial, after he had received the writ he obtained it from the bar-tender.

The appeal is dismissed with costs.

STREET, J. FEBRUARY 21ST, 1905.

CHAMBERS.

NISBET v. HILL.

Interpleader—Seizure by Sheriff—Inconsistent Claims to Goods Seized—Form of Order—Separate Issues.

Appeal by claimants Green and Smale from interpleader order made by Master in Chambers, ante 293.

W. J. Tremeear, for appellants.

F. Arnoldi, K.C., for execution creditor.

W. H. Blake, K.C., for the sheriff.

STREET, J., dismissed the appeal with costs.

FALCONBRIDGE, C.J. FEBRUARY 21ST, 1905.

WEEKLY COURT.

RE VAIR AND WINTERS.

Will — Construction — Devise — Misdescription of Lots — Reference to Buildings on Lots—Title to Land—Vendor and Purchaser.

Petition by George Vair, surviving executor of the will of Ann Dunn, vendor, under the Vendors and Purchasers Act,

for an order declaring that an objection to the title to lands contracted to be sold to George A. Winters, viz., that by the will of Ann Dunn the lands were so insufficiently described as not to vest the same, and the whole thereof, in the devisees therein named, had been satisfactorily answered by the vendor, and was not a valid objection.

In the contract the lands were described as "the premises situate on the east side of Yonge street, in the city of Toronto, known as street No. 1101, having a frontage of about 24½ feet more or less by a depth of about 100 feet more or less."

By the will of Ann Dunn she devised to her executors "lots Nos. 47 and 48 on the east side of Yonge street . . . to have and to hold the said lands and premises, together with the houses and buildings upon them, upon the following trusts, that is to say: (1) Upon trust to sell the northern half of said lands together with the house and buildings upon the same. . . . (2) Upon trust to let the remaining house from year to year . . . until the death of my husband John Dunn. (3) Upon trust, so soon after the death of my husband John Dunn as they may see fit, to sell the lands and premises aforesaid, namely, the northern half of the property hereinbefore described. . . ."

The affidavit of the petitioner stated that the only lands owned by Ann Dunn at the time of her death were the two houses on the east side of Yonge street, Nos. 1101 and 1103; that the property described in the 2nd and 3rd trusts of the will was house No. 1101; that since the death of the testatrix (in 1888) the petitioner and his co-executor had been in constant possession of houses 1101 and 1103; that house No. 1101 was, in fact, built partly upon the northerly 10 feet of lot 49, and partly upon lot 48; that lots 47 and 48 were conveyed to the testatrix on 23rd December, 1869, and the northerly 10 feet of lot 49 were conveyed to her on 11th May, 1877; that the petitioner's co-executor died more than 10 years before this application, and that John Dunn was dead also.

Casey Wood, for petitioner.

J. T. Loftus, for purchaser.

FALCONBRIDGE, C.J.—The will operates as a devise of the two houses, and, as the southerly house is partly erected on lot 49, it involves a devise of the portion of lot 49 included in the premises 1101 Yonge street.

Roe v. Lidwell, 11 Ir. C. L. R. (cited in Elphinstone, Bl. ed., p. 160), deals with a deed of conveyance, and does not furnish a rule applicable to the construction or scope of a will.

I find therefore, that this objection to the title has been satisfactorily answered by the vendor, and that the same does not constitute a valid objection.

I have also looked at Holtby v. Wilkinson, 28 Gr. 550; Hickey v. Hickey, 20 O. R. 371; Re Shaver, 6 O. R. 312; Re MacNabb, 1 O. R. 94; Hickey v. Stover, 11 O. R. 110; Re Bain and Leslie, 25 O. R. 136.

It is not a case for any order as to costs.

MACMAHON, J. FEBRUARY 21ST, 1905.

TRIAL.

GREER v. FITZGERALD.

Fraudulent Conveyance—Action to Set aside—Absence of Collusion and Fraud—Sale at Fair Value—Chattel Mortgage—Estoppel—Change of Position.

Action by an execution creditor of defendant F. A. Fitzgerald to set aside, as fraudulent and void against plaintiff, a certain sale and conveyance of land mortgaged by F. A. Fitzgerald to defendants the Independent Order of Foresters, by those defendants, under the power of sale in their mortgage, to defendant Mary E. Fitzgerald, wife of defendant F. A. Fitzgerald, made purusant to an alleged agreement entered into by the three defendants.

Plaintiff charged that there was no bona fide sale by the Foresters of the land, but that defendant Mary E. Fitzgerald, with the connivance of her husband, approached the Foresters to purchase it at the amount of their claim, and an agreement, dated 24th September, 1901, was entered into, which was part of a scheme to defraud plaintiff of his rights as a creditor of defendant F. A. Fitzgerald, who was instrumental in procuring the same, the object being to put forward his wife in order to shelter the land from the attack of plaintiff as a creditor of F. A. Fitzgerald.

The agreement referred to recited the terms of the mortgage from Fitzgerald to the Foresters, the default in payment, an attempted sale by auction under the power; that the Foresters held an insurance policy on the life of F. A. Fitzgerald; that taxes amounting to $870 were due; and that

repairs were needed which would cost more than $400. The agreement was that the Foresters should sell to Mary E. Fitzgerald, upon her executing jointly with her husband a mortgage for $38,000 (the amount of the Foresters' claim), plus $1,250, which the Foresters agreed to advance to pay off the taxes and make the repairs, on condition that Mary E. Fitzgerald would give them a chattel mortgage on the household furniture then in her house at London. This agreement was carried out by the execution of the instruments and the advance of the $1,250.

J. A. Paterson, K.C., for plaintiff.

G. F. Shepley, K.C., for defendant Mary E. Fitzgerald.

W. R. Meredith jun., for defendant F. A. Fitzgerald.

J. A. McGillivray, K.C., for defendants the Independent Order of Foresters.

MacMahon, J. (after setting out the facts and referring to portions of the evidence):—This is not a case in which it has been shewn that there was any contrivance, fraud, or collusion between the mortgagees and Mrs. Fitzgerald whereby the latter was to become a purchaser for an inadequate consideration so as to defeat the rights of creditors: Bump on Fraudulent Conveyances, 4th ed., sec. 235: but is a case where every precaution was taken by the mortgagees to prevent the property being sold at an undervalue. Being sold, as I find, at its fair value, the action of the Foresters in making the sale cannot be successfully attacked, and, if so, it is impossible to see how the position of Mrs. Fitzgerald as purchaser of the property can be successfully assailed. . . .

The household furniture being regarded, as I think it must be, as the property of F. A. Fitzgerald, the question is, can that make any difference in the rights of the mortgagees in this litigation? They assumed, when the chattel mortgage on the furniture was offered as security for the additional advance of $1,250, that it was the property of Mrs. Fitzgerald, and plaintiff, before the agreement was executed, became aware of all the terms of the agreement, which provided for the giving of the chattel mortgage, and, with the knowledge so acquired, presented the agreement to Mrs. Fitzgerald and acquiesced in its execution by her. The Foresters, on the strength of the execution of the agreement, changed their position by advancing the $1,250, and Mrs. Fitzgerald changed her position, covenanting to pay the amount of the mortgage debt, $38,000, besides the $1,250, which by the chattel mortgage she covenanted to pay.

If plaintiff had any rights, he has acted in such a way as to make it fraudulent for him to set them up now: see Willmott v. Benber, 15 Ch. D. 96, 105; Olliver v. King, 8 De G. M. & G. 110.

Should the Foresters at any time discharge the chattel mortgage, plaintiff may be in a different position from that which he now occupies in regard to the enforcement of his claim.

Action dismissed with costs.

CARTWRIGHT, MASTER. FEBRUARY 22ND, 1905.

CHAMBERS.

BLUMENSTIEL v. EDWARDS.

Discovery—Examination of Party—Scope of—Production of Books—Relevancy—Damages.

Motion by plaintiffs for order requiring defendant to attend for re-examination for discovery and to answer questions and produce books.

G. M. Clark, for plaintiffs.

R. McKay, for defendant.

THE MASTER.—Defendant, who is plaintiff by counterclaim, alleges loss to his business arising from the prosecution which is the subject of the counterclaim. These damages are alleged to have been suffered in his tobacco business, and are so serious that he was obliged to abandon it and become an agent for other commodities.

Plaintiffs desire to shew that it was chiefly owing to this new business that the tobacco business fell off. For this purpose they asked for the production of the books, which defendant refused because he said they had nothing to do with the action.

In Bray's Digest of the Law of Discovery (1904), art. 10, p. 4, it is said that "discovery is relevant or material not only if it is directed to the facts directly in issue, but also if it is directed to . . . damages."

I rule, therefore, that the books asked for should be produced so that plaintiffs can satisfy themselves on the point at issue.

The other branches of the motion fail. . . .

Articles 16 and 17 (p. 5) of Bray (supra) lay down what a party is obliged to disclose, and do not carry the obligation to the length to which it was sought to be carried in this case. A party is not bound to answer such questions as, e.g., No. 60, "Will you shew us how much better off you were in January, 1903, than you were in June?" It is sufficient for him to say that he himself does not know, but that the books are there, and can be examined by plaintiffs, who can make up any statements they think useful.

As the examination has already extended to 1582 questions, it would seem to have been exhaustive.

Costs of motion will be in the cause, as success has been divided, and the motion was proper.

MEREDITH, J. FEBRUARY 22ND, 1905.

RE NORTH AMERICAN LIFE ASSURANCE CO. v. COLLINS.

Division Court—Clerical Error in Judgment—Jurisdiction to Correct—Prohibition—New Trial—Consent.

Motion by defendant for prohibition to 1st Division Court in county of Kent.

W. H. Blake, K.C., for defendant.

C. A. Moss, for plaintiffs.

MEREDITH, J.—Defendant was sued upon his promissory note for $70. The claim was one in all respects within the jurisdiction of the Court; and there is nothing on the face of the proceedings indicating any want or excess of jurisdiction whatsoever, nor indeed any irregularity; so that in any case the granting or refusing of prohibition would rest in the discretion of this Court.

Upon affidavit it is made to appear that, through some misunderstanding between defendant and his solicitors, or through some mistake of one or the other of them, the trial of the case took place in defendant's absence, but at a regular sitting of the Court, to which the trial had been regularly postponed, and one of the sittings mentioned in the summons served upon defendant, and at which his solicitors appeared for him and defended the case as well as they could in the absence of him and his witnesses, and judgment was

thereupon given for plaintiffs with costs. . . . By a mere slip, the Judge in making his minute of the judgment wrote "judgment for deft.," instead of "judgment for plffs." The mistake was so obvious that no one at the trial could pretend to be misled by it. That slip and the correction which was subsequently made of it are all upon which this application is based: matters of practice, not matters of jurisdiction. Some time afterwards—about 3 weeks—the Judge's attention was called to the mistake in the presence of the solicitors who had appeared for the parties at the trial, and it was corrected by him, the solicitors consenting. Immediately after the trial defendant was notified by his solicitors by letter of the result, and about a week after that he called at their office, and the matter was discussed, and he was told that there was not much use in applying for a new trial. A few days afterwards he sought advice of and retained a new solicitor, whom he informed of the fact that judgment had gone against him in his absence; and thereupon they went together and saw the mistaken entry of judgment for defendant, and, apparently without any communication with the former solicitors, or any effort whatever to ascertain how the mistake . . . had occurred, abstained from making an application for a new trial or for any other relief, though defendant's whole purpose in seeking a new solicitor was to have the case re-opened. . . . The very least inquiry would have made plain the clerical error. Inquiry of every sort seems to have been avoided. . . . Almost immediately after the correction of the error by the Judge, the new solicitor was informed of it, and he at once by letter informed defendant. . . . Plaintiffs, before the discovery of the error, were willing to consent to defendant having a new trial, as judgment had been obtained in his absence, and they are yet willing that there should be a new trial; but defendant is not willing to take a new trial. . . .

I have no manner of doubt of the Judge's power, nor indeed of his duty, to correct the mere slip which he had made, and he having done so, it was the clerk's duty, under the Rules, to make the like corrections in the proceedings in his office. Altogether apart from any Rules upon the subject, that must be an inherent power of every Court such as that or this. It was done in the presence of and with the consent of the solicitors on both sides who had appeared at the trial, and without any notice or knowledge of any change or desired change of solicitor.

It was open to defendant to move to set aside the amendment, and, if he had done so, that would have resulted, doubtless, in a new trial; at all events it was the subject of a motion before the Judge who made the amendment, not of a motion for prohibition. Dealt with strictly, the judgment pronounced at the trial was regular and binding.

All that the applicant complains of, all that he can feel aggrieved about, is that he has not had opportunity, or rather the kind of opportunity he now thinks he should have had, for applying for a new trial; that . . . is his own and his new solicitor's fault more than the fault of any one else; and, besides that, a new trial is now offered to him, and at the first a new trial was offered his solicitors, but with great inconsistency the offer was rejected.

The motion must be dismissed, and dismissed with costs payable forthwith after taxation, if plaintiffs remain willing to have a new trial; otherwise without costs.

STREET, J. FEBRUARY 22ND, 1905.

TRIAL.

LOUNT v. LONDON MUTUAL FIRE INS. CO.

Fire Insurance—Statutory Conditions—Variations — Printing of — Conspicuous Type—Compliance with Statute—Existence of Incumbrance — Failure to Disclose — Materiality—Unjust and Unreasonable Variation—Alteration in Risk — Notice to Local Agent — Variation Requiring Notice to Company—Just and Reasonable Variation—Policy Avoided.

Action upon an insurance policy upon the "machinery, belting, gearing, and shafting, all owned by the assured and contained in a 3-storey stone and frame shingle-roofed building, used as a brush handle factory, water power only."

Plaintiff, Abbie E. Lount, was the assured, and the loss, if any, was made payable to defendant Elizabeth Lount, mortgagee, as interest may appear.

Plaintiff's husband and one Taylor formerly owned the property, and on 24th May, 1890, made a chattel mortgage of the machinery to defendant Elizabeth Lount. Later in the same year they became insolvent, and plaintiff became the owner, by purchase from their assignee for the benefit of

creditors, of the building and machinery, subject to the chattel mortgage. On 1st April, 1892, plaintiff and her husband mortgaged the property to one Harriet White for $2,500; that mortgage was still unpaid to the extent of $600, and had been assigned to one Britton. On 24th May, 1898, plaintiff and her husband made a mortgage of the real estate to defendant Elizabeth Lount as collateral security to the chattel mortgage for $600, which was still unpaid.

Plaintiff on 1st June, 1901, applied to W. H. Johnston, defendants' local agent at Whitby, for an insurance of $600 upon the machinery, belting, gearing, and shafting contained in the mill. In the written application there were the following questions and answers:—

"13. Is applicant owner, mortgagee, or lessee? A. Owner.

"(a) If mortgagee, to what amount? A. $600.

"14. If incumbered, state how and to what amount. A. Mortgaged to Mrs. E. Lount."

Then followed a warranty that the answers were correct, so far as known to the applicant.

The application was forwarded by the local agent to the head office of the company. It was approved, and a policy, dated 18th June, 1901, issued to plaintiff, the loss being made payable to Mrs. E. Lount as her interest might appear.

Indorsed upon the policy were the statutory conditions, with certain variations printed below in red ink.

One of the variations was as follows: "Any incumbrance by way of mortgage . . . shall be deemed 'material to be made known to the company,' within the provisions of the first statutory condition."

By another variation it was provided that "the words 'or its local agent' in the 3rd statutory condition are struck out, and whenever the words 'agent' or 'authorized agent' occur elsewhere in the said statutory conditions, such agent or authorized agent shall be held to mean the company's secretary only."

At the end of June, 1901, the dam from which the power was obtained gave way, and plaintiff put in a boiler and engine, and began to run the mill by steam power on 1st August, having previously notified the local agent, by post card, of her intention in that regard. The agent did not

forward the post card to the company or in any way notify them of the change.

A fire occurred on 29th September, 1901.

A. E. H. Creswicke, Barrie, for plaintiff.

J. C. Judd, London, and W. R. Meredith jun., London, for defendants.

STREET, J. (after setting out the facts):—Defendants set up various defences, all of which I disposed of at the trial, excepting the following:—

1. That plaintiff did not disclose to the company, in her application or otherwise, the existence of the mortgage for $1,200 held by Britton, but disclosed only the $600 mortgage to defendant Elizabeth Lount.

They rely upon the first statutory condition, which avoids the policy if the assured omits to communicate to the company any circumstance which is material to be made known in order to enable the company to judge of the risk . . .; and they further rely upon the variation of this condition which explicitly declares that any incumbrance by way of mortgage shall be deemed material to be made known to the company. . . .

I think the variations are printed in a manner complying with the Act. The Act requires that they shall be printed in conspicuous type and in ink of a different colour. The object of this requirement is that the fact that they are variations shall be brought prominently to the notice of the assured. The type used is of the same size and shape as that of the statutory conditions; but the printing of the statutory conditions is in black ink; that of the variations is in a bright scarlet. The Act does not require that the type used in the variations shall be of a different size or shape; it only requires that it shall be in some way "conspicuous," besides being in ink of a different colour. If the statutory conditions were printed in black and the variations in dark blue, the same sized type being used, it might be difficult to say that the type of the variations was sufficiently conspicuous to comply with the statute. Looking, however, at the strong contrast between the black of the statutory conditions and the scarlet of the variations, I find that the Act has been complied with in both its requirements, by the conspicuous contrast between them.

I think the particular variation which declares that the existence of an incumbrance upon the property is a circum-

stance material to be made known to the company, within the provisions of the first statutory condition, is too wide to be treated as a just and reasonable variation of the statutory conditions. The existence of a trifling incumbrance upon a valuable property would probably not, in ordinary circumstances, be a material fact, and yet the proposed variation would invalidate a policy, however trifling the incumbrance might be. The statutory condition is broadly fair to both insurer and insured, for it obliges the latter to disclose all facts material to the risk, and leaves to be tried as a matter of fact whether the undisclosed facts are material. The proposed variation seeks to lay down a hard and fast rule in favour of the insurer, declaring the existence of an undisclosed incumbrance, however small, to be fatal to the validity of the policy.

Under the statutory condition I am to determine whether the non-disclosure of the $600 mortgage held by Britton was a material fact, the onus being upon defendant company, who assert its materiality. No evidence was given of the value of the mill . . . ; no one gave any evidence from which I can judge of the materiality of the circumstance relied on, and I am therefore unable to say that defendant company have made out their defence on this branch of the case.

2. The next ground of defence is, that plaintiff altered the power used in the mill from water to steam, and did not notify the company of the fact.

The 3rd statuory condition indorsed on the policy provides that "any change material to the risk . . . shall avoid the policy . . . unless the change is promptly notified in writing to the company or its local agent; and the company, when so notified, may return the premium for the unexpired period, and cancel the policy," etc.

What happened was that plaintiff notified the local agent in writing of her intention to change the power from water to steam, and that the local agent did not forward the notice to the company . . . so that at the time of the fire the mill was being operated by steam without the knowledge of defendants, though expressly limited in the policy to "water power only."

Evidence was given at the trial that the change from water power to steam power was material to the risk, and that upon a factory operated by steam power the rate was nearly double that upon one operated by water power.

By the 3rd variation, the words "or its local agent" are struck out from the 3rd statutory condition, so as to require notice of the change to be given to the company.

In my opinion, this is a just and reasonable variation. This particular company have between 400 and 500 local agents in all. The only evidence of the power or authority of these agents is derived from the evidence of what this particular agent Johnston did in the present instance. He was at the same time local agent for the Economical Insurance Company, in which plaintiff had been insured before the date of the present policy, and he changed her, he says, from that company to defendant company. He filled up the application, procured her to sign it, and forwarded it to defendants. When the fire occurred, he informed the company of it. He does not appear to have had any powers or authorities of a general character, so as to constitute him a general agent of the company for all purposes. The words "local agent" in the statutory conditions may not improbably have been intended to apply to the provincial agents of companies having their head offices out of Ontario. When, however, a company have their head office in the province, and have no general agents away from their head office, but only local agents having the limited duties which Johnston seems to have performed, I can see nothing unjust or unreasonable in their stipulating that notice of an important change in the character of the risk should be communicated to their head office, particularly as the 23rd statutory condition permits it to be given by the sending of a registered letter to the head office of the company, and the address for the purpose is printed on the back of the policy. Or, to put it in another way, the statutory condition No. 3 assumes the local agent of the company to have authority to receive such notices; the company by their variation inform the assured that the local agent has no authority, and that such notices may be sent to them by registered letter, as provided by the 23rd statutory condition. I can find no hardship in such a stipulation, and I think it just and reasonable.

Therefore I find that plaintiff made a material alteration in the risk by substituting steam for water power; that she did not give notice in writing to defendants; and that she cannot recover upon this policy.

Action dismissed with costs.

STREET, J. FEBRUARY 24TH, 1905.

CHAMBERS.

TORONTO INDUSTRIAL EXHIBITION ASSOCIATION v. HOUSTON.

Evidence—Foreign Commission—Terms—Costs and Expenses.

Appeal by plaintiffs from order of Master in Chambers, ante 303, dismissing plaintiffs' motion for a commission to Great Britain to examine Major Hugh Rose as a witness on behalf of plaintiffs.

F. R. MacKelcan, for plaintiffs.

Grayson Smith, for defendant.

STREET, J., allowed the appeal and made an order for the issue of the commission upon the plaintiffs undertaking to pay all the expenses and to examine on interrogatories. Costs of appeal to be part of the costs of the commission.

FEBRUARY 24TH, 1905.

DIVISIONAL COURT.

ELGIN LOAN AND SAVINGS CO. v. LONDON GUARANTEE AND ACCIDENT CO.

Principal and Surety—Guarantee Policy—Fidelity of Manager of Loan Company — Misappropriation of Moneys — Release of Surety — Untrue Statements — Conditions of Policy — Necessity for Setting forth in Policy — Incorporation by Reference to Application—Insurance Act of Ontario, sec. 144 (1), (2) — Construction — Change in Duties of Manager.

Appeal by plaintiffs from judgment of MACMAHON, J., 4 O. W. R. 99, dismissing action upon a guarantee policy issued by defendants in favour of plaintiff loan company to secure the fidelity of one Rowley, manager of that company.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

W. K. Cameron, St. Thomas, for plaintiffs.

J. B. Clarke, K.C., for defendants.

BOYD, C.—I see no reason to disagree with the conclusions in fact of the trial Judge; he finds that the statements of the employers in answer to the questions were untrue, and that they were material to the contract. But on the question of law he finds that these terms and conditions not being set out in full on the face or back of the sealed written instrument, which embodies the contract of guarantee, there has been a failure to comply with the statutory provisions, and that these terms and conditions thereby became inadmissible in evidence and consequently inoperative.

With this conclusion I am not able to agree. The statute in question is R. S. O. 1897 ch. 203, sec. 144; and the important parts are sub-secs. (1) and (2). The origin of these provisions may be traced back to the enactments of the Dominion of Canada in 1885, found in 48 & 49 Vict. ch. 49, secs. 7 and 8, and are now in R. S. C. 1886 ch. 124, secs. 27 and 28.

The guarantee agreement in this case was issued upon and after the proposal or application of the employee, fortified and accompanied by the answers of the company (the employers) touching the duties of the applicant, which answers it is agreed are to be taken as the basis of the contract between the employers (the plaintiffs) and the defendants, the guarantee company. Upon these papers, statements, and representations, the contract was issued and accepted by plaintiffs. On the face of the sealed contract of insurance or guarantee it is thus recited: "Whereas the employer has delivered to the company certain statements and a declaration setting forth, among other things, the duties and remuneration of the employee, the moneys to be intrusted to him, and the checks to be kept upon his accounts, and has consented that such declaration, and each and every the statements therein referred to or contained, shall form the basis of the contract hereinafter expressed to be made, but this stipulation is hereby limited to such of said statements as are material to this contract." This last clause is apparently the outcome of what was deemed a proper form of expression to comply with sub-sec. (2) of sec. 144: see Village of London West v. London Guarantee and Accident Co., 26 O. R. 520, in which the defendants were the company now defendants.

The effect of this method of drafting is to embody or incorporate the material—i.e., what shall be found to be the material—parts of the preliminary application and declaration, whether by the employee or the employers, into the face of the contract. The cases, which are binding upon us, shew

that it is not needful to set out verbatim what is referred to in order to satisfy the statutory expression "in full." It is enough to unite by express reference, as is here done, the basis of the contract and the actual contract resting thereon. That was held on the Dominion statute by the Supreme Court in Venner v. Sun Life Assurance Co., 17 S. C. R. 394 (1889), followed by the same Court in 1898, and held applicable to the construction of the Ontario statute of 1892, which is in terms the same as the section now under consideration: Jordan v. Provincial Provident Institution, 28 S. C. R. 554.

I am disposed to think, however, that the proper sub-section which applies to this controversy is sub-sec. (2) rather than (1) of sec. 144, having regard to the difference in the legislative language. Sub-section (1) is addressed to such terms and conditions as modify or impair the contract; whereas (2) provides for statements in the application or inducing the entering into of the contract by the corporation, which, being erroneous or false, and material, avoid the contract ib initio. The language of the statute was used in the original Dominion statute as to contracts of life insurance, and a plain distinction is marked in the books between conditions subsequent affecting the policy prejudicially and those which operate to nullify the contract from the outset. The point I make has been judicially considered by Mr. Justice Gwynne in Fitzrandolph v. Mutual Relief Society of Nova Scotia, 17 S. C. R. at p. 342, where, in view of the like distinction of expression in the Dominion statute, he says that the former (as to modifying or impairing) "has application only to conditions subsequent . . . and not to a warranty of the truth of matters upon the faith of which the contract is based."

If sub-sec. (2) of sec. 144 is alone to be considered, it appears to me to contain in gremio sufficient to indicate that the terms which go to avoid the contract need not be contained in or indorsed upon the contract "in full." It is enough if the contract "be made subject" to any stipulation as to avoiding the contract by reason of any statement inducing the entering into of the contract by the corporation. In this case the contract is made subject to the preliminary statements and declaration, by the words of incorporation in the preamble already set forth in this opinion.

Besides this, I think that there is an express notice given on the face of the agreement (p. 2) that if any suppression or misstatement of any fact affecting the risk of the company be made at the time of the payment of the first or any subse-

quent premium . . . this agreement shall be void and of no effect from the beginning.

The original untrue statements were made contemporaneously with the first payment of premium, and they were unquestionably material and affected the risk.

Taking this view, I have not thought it necessary to deal with the legal effect of the subsequent change of work undertaken by the manager, under directions given by the officers of the company, which they were not authorized to give by the company—and which involved the doing of business which was beyond the corporate powers. No loss arose as a consequence of these ultra vires acts, and I am inclined to think that upon the application of the rule in Exchange Bank v. Springer, 14 S. C. R. 716, the guarantee might hold as to prior defalcations. But upon this I do not pass, but place my judgment on the other ground, in regard to which neither the learned Judge below nor this Divisional Court were referred to the cases in the Supreme Court which appear to govern the construction of the statute: see Hunter on Insurance, p. 230.

I would affirm the result below with costs of appeal.

MEREDITH, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

FEBRUARY 24TH, 1905.

C.A.

REX v. IRVINE.

Criminal Law—Selling Beverage in Bottle with Name of Another on it—Unregistered Name—Criminal Code, sec. 449 (b).

Case stated by police magistrate for city of Ottawa.

Defendant, who elected to be tried summarily, was charged with an offence under sec. 449 (b) of the Criminal Code, which enacts that "Every one is guilty of an indictable offence who (b) being a manufacturer, dealer, or trader, or a

bottler, without the written consent of such person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or traffic."

The case set forth that E. Mireault, a ginger ale and soda water manufacturer in the city of Ottawa, had his name blown, stamped, or permanently affixed on four bottles; that defendant, a ginger ale and soda water manufacturer, dealer, trader, and bottler, in the same place, on 26th July, 1904, at the city of Ottawa, filled the four bottles with beverage, labelled the same with his label, and placed them upon the market for the purpose of sale.

Counsel for the prosecution admitted that Mireault's name was not duly registered.

The magistrate convicted and fined defendant, and reserved the question: "Is the name blown, stamped, or permanently affixed upon a bottle sufficient, or does it require registration as in the case of a trade mark?"

Gordon S. Henderson, Ottawa, for defendant.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.—. . . I am of opinion that it is not necessary that the name should be registered. Assuming that the mere words composing the name of the "other person" may be the subject of registration as a trade mark, then if such name be so registered it is registered as a trade mark, and becomes ipso facto a duly registered trade mark. It cannot be registered otherwise than as such. When, therefore, Parliament made it an offence to trade or traffic in any bottle, etc., which has upon it the duly registered trade mark or name of another person, they must have meant something more than one having a duly registered trade mark upon it, and to forbid also (subject to the provisions of the section) trade or traffic by one person in bottles with the name of another person—which, as I have said, is, as such, or otherwise than as a trade mark, incapable of registration—upon them.

The object of the legislation evidently was to prevent, as far as possible, the easy commission of a fraud of that kind. In the French version of the Code the words . . .

are, "la marque de commerce dûment enregistrée ou le nom d'une autre personne," and indicate more plainly that the words "duly registered" are confined to the trade mark and do not apply to the name.

Sub-section 2 of sec. 449 supports this construction. . . .

I think, therefore, that the question should be answered by saying that it is sufficient if the name of another person is upon the bottle, and that it is not necessary that such name should be registered as a trade mark.

FALCONBRIDGE, C.J., FEBRUARY 25TH, 1905.

WEEKLY COURT.

RE WATSON.

Will — Legacy — Debt Due by Testator to Legatee — Presumption that Legacy Intended as Satisfaction of Debt — Circumstances Rebutting Presumption.

Motion by Henry Richard Watson, executor under the will of Richard Watson, deceased, for an order declaring the rights of the applicant and of Frances Josephine Watson, the two children of testator, under the will.

L. F. Heyd, K.C., for applicant.

F. W. Harcourt and G. C. Campbell, for Frances Josephine Watson.

FALCONBRIDGE, C.J.—Thomas Watson, brother of testator, by his last will and testament, devised and bequeathed to Henry Richard Watson and Frances Josephine Watson all his property, real and personal, to be divided between them in equal shares, and he appointed Richard Watson (the testator in the present case) and another, executors of his will. This will was dated 12th July, 1893, and probate thereof was granted to this testator, Richard Watson, on or about 21st February, 1895.

Richard Watson never divided or paid the money bequeathed to Henry Richard Watson or his sister Frances Josephine, but retained the same, and it formed a part of his, Richard Watson's, estate. The estate of Thomas Watson, after paying expenses, would amount to less than $2,000, so

that the money coming to H. R. Watson and Frances J. Watson would be considerably less than $1,000 each.

Richard Watson died on or about 25th November, 1903, having first made his last will and testament, bearing date 17th February, 1902, probate whereof has been granted to H. R. Watson.

The will is as follows: . . .

[After a bequest of furniture and clothing to Frances Josephine.]

"I hereby give, devise, and bequeath the rest and residue of my estate, both real and personal, to my son Harry Richard Watson for his sole use and benefit, subject to the payment by him to my daughter Frances Josephine Watson of the sum of $1,000 for her sole use and benefit." . . .

It is contended on behalf of the executor Henry Richard Watson that the legacy of $1,000 to his sister, and the residue to himself, constitutes a satisfaction of all claims that his sister would have against Richard Watson's estate for the balance in Richard Watson's hands from the estate of Thomas Watson.

There are several conflicting presumptions which have to be considered in dealing with this matter. There is in this class of cases a leaning against the presumption of satisfaction, and the Court lays hold of minute circumstances to take a case out of the rule: White & Tudor's L. C. in Eq., 2nd ed., vol. 2, p. 393, and cases cited.

The absence from the will of any direction to pay debts and legacies furnishes an argument in favour of the executor's contention: Smith's Principles of Equity, 3rd ed., p. 526.

All the text books state that it appears that a legacy given by the will of a parent to a child is not upon any different footing from that of a legacy by any other person as a satisfaction of a debt, not being a portion. . . .

[Reference to Tolson v. Collins, 4 Ves. 482.]

The testator will have dealt pretty equally with his two children if I hold that Frances Josephine is entitled both to her legacy under this will and to her share of her uncle's estate.

The circumstances which I think will take this bequest out of the general rule are that the present legacy is not payable for a year, but Frances Josephine can, without delay,

commence proceedings for the administration of Thomas Watson's estate with a view to the recovery of what is due to her thereupon: see Re Dowse, Dowse v. Glass, 50 L. J. Ch. 285; also Re Horlock, Calhoun v. Smith, [1895] 1 Ch. 516.

There is nothing to shew that Richard Watson ever assented to the legacy to Frances Josephine, and his assent would be necessary to entitle her to sue, and perhaps, therefore, to constitute the legacy a debt due by him.

The judgment will, therefore, be, as above, in favour of Frances Josephine Watson, with costs to all parties out of the estate.

I have referred also to the following authorities: Story's Eq. Jur., 2nd Eng. ed., sec. 1122; Brett's L. C. in Mod. Eq., p. 322; Plumbett v. Lewis, 3 Hare 316; Crichton v. Crichton, [1896] 1 Ch. 870; Meinertzager v. Walters, L. R. 7 Ch. 670; Deeks v. Strutt, 5 T. R. 690; Matthews v. Matthews, 2 Ves. Sen. 635; Williams on Executors, 9th ed., p. 1162; Cole v. Cole, 5 O. S. 748; Roper on Legacies, 2nd Am. from 4th Eng. ed., p. 1028.