The
Ontario Weekly Notes

VOL. X. TORONTO, APRIL 14, 1916. No. 5

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 29TH, 1916.

EVANS v. EVANS.

Husband and Wife—Alimony—Evidence—Finding of Fact of Trial Judge—Dismissal of Action—Rule 388*—Costs—Disbursements—Appeal.*

Appeal by the plaintiff from the judgment of BRITTON, J., 9 O.W.N. 493.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. E. Kelly, K.C., for the appellant.

C. J. Holman, K.C., and S. E. Lindsay, for the defendant, respondent.

THE COURT dismissed the appeal without costs.

SECOND DIVISIONAL COURT. MARCH 31ST, 1916.

*JEFFREY v. ALYEA.

Contract—Evidence—Husband and Wife—Promise of Wife to Pay Debt of Husband—Oral Guaranty—Statute of Frauds—Finding of Primary Liability of Wife—Reversal by Appellate Court.

Appeal by the defendant Florence Alyea from the judgment of the Judge of the County Court of the County of Hastings in favour of the plaintiff in an action against the appellant and her husband for a balance of the price of apples sold to the defendants.

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

The question on the appeal was whether the appellant was liable, her co-defendant being undoubtedly liable, and judgment having been recovered against him.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

F. E. O'Flynn, for the appellant.

E. G. Porter, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the appellant's husband bought the apples from the plaintiff, as the trial Judge found. As to the appellant's share in the transaction, the plaintiff's story, given effect to, with some doubt, by the trial Judge, was, that she (the plaintiff) was unwilling to deliver the last 293 barrels of the apples under her contract with Alyea until she was paid the amount that would be then due to her from him, and that the appellant promised (not in writing) to pay the amount; and, on getting this oral guaranty, the plaintiff delivered the apples to the husband. Two witnesses called by the plaintiff testified that the appellant "guaranteed" payment.

It was quite obvious that the appellant's promise could have been only to pay the debt of another, and, not being in writing, could not be enforced in this action.

The appeal should be allowed with costs, and the action, as against the appellant, dismissed with costs.

LENNOX, J., concurred.

RIDDELL, J., read a judgment in which he said that this case was wholly covered by Beard v. Hardy (1901), 17 Times L.R. 633, and like cases. He referred also to Chater v. Beckett (1797), 7 T.R. 201, Young v. Milne (1910), 20 O.L.R. 366, and other cases; and quoted from the judgment of Vaughan Williams, L.J., in Davys v. Buswell, [1913] 2 K.B. 47, 53, 54, this passage: "The question whether each particular case comes within . . . the statute or not depends . . . on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

While there was an agreement between the plaintiff and the appellant, it was not binding on the appellant without a writing to satisfy the Statute of Frauds.

MASTEN, J., concurred.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 31ST, 1916.

IMPERIAL BANK OF CANADA v. KEAM.

Promissory Notes — Actions against Makers — Notes Made for Accommodation of Customer of Bank and Discounted by Bank—Holder in Due Course—Defence—Release by Dealings of Bank with Customer—Onus—Security—Entry in Pass-book—Mistake—Estoppel.

Appeals by the defendant in this action and each of the defendants in two other actions brought by the same plaintiffs from the judgment of COATSWORTH, Jun. Co. C.J., who tried the three actions together, in the County Court of the County of York, in favour of the plaintiffs in each case, without costs.

The actions were brought upon promissory notes made by the defendants respectively; the defence was, that the notes were made for the accommodation of the payee, a customer of the plaintiffs, who had become insolvent, and that the defendants were released by the plaintiffs' course of dealing.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. H. Shaver, for the appellants.

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

MEREDITH, C.J.C.P., read a judgment in which he said that the plaintiffs were holders in due course of all the promissory notes which constituted the subject-matter of these actions, and so were primâ facie entitled to the judgment pronounced in their favour at the trial; the onus was upon the defendants to free themselves from that liability.

That the defendants never had any value for the making of the notes, and that they were made solely for the accommodation of the payee, did not help them. The notes were given for the purpose of being negotiated by the payee with the plaintiffs, and were so negotiated.

One of the defendants testified that, when he gave his note, there was an agreement by the plaintiffs with him that he was not to pay it. But, if such obligations could be got rid of by such evidence, what transaction of the kind could stand?

Then it was said that, in consideration of some security being given by the payee of the notes to the plaintiffs, and of the sale of that security with the assent of the payee, the plaintiffs pro-

mised to discharge the liability to them of these defendants upon the notes. The onus of proof of that was upon the defendants. They attempted to prove it by the testimony of the payee, and by an entry made in his bank pass-book by, or authorised by, their agent at their country agency where this business was carried on. The entry was said by the plaintiffs to have been a mistake. When the security was given, the agreement upon which it was given was put in writing, and that writing shewed that the security was for the whole indebtedness of the customer. The customer swore that that was not the true agreement, and that the security was to be applied for the relief of the defendants; but that testimony was not to be credited in face of the writing and all the circumstances and probabilities. The defence on this ground entirely failed.

It was said that, having made the entry in the customer's pass-book, the plaintiffs were estopped from now contending that in truth that was a mere mistake arising from a misunderstanding. But no representation was made or intended to be made to the defendants; they sought nothing and had no communication with the plaintiffs on the subject; and, if some representation had been made, it could be withdrawn if made in error. In the circumstances, it was absurd to suggest an estoppel.

The appeals should be dismissed with costs.

RIDDELL, LENNOX, and MASTEN, JJ., concurred; LENNOX and MASTEN, JJ., each giving reasons in writing.

Appeals dismissed.

SECOND DIVISIONAL COURT. MARCH 31ST, 1916.

*BRAZEAU v. WILSON.

Contract—Installation of Heating System in House—Failure to Heat House as Agreed—Action for Balance of Price—Counterclaim for Moneys Paid on Account—Return of Heating Fixtures Put in—Use of Fixtures—Compensation for Breach of Contract—Costs.

Appeal by the plaintiff from the judgment of the Judge of the District Court of Temiskaming dismissing an action to enforce a mechanic's lien for $396.33 and awarding the defendant Wilson $200 on his counterclaim for moneys paid on account of the contract price.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. M. Ferguson, for the appellant.

E. B. Ryckman, K.C., for the defendant Wilson, respondent.

J. Y. Murdoch jun., for the defendant company.

MEREDITH, C.J.C.P., in a written opinion, said that it was plain upon the evidence that the plaintiff was to put into the defendant's house a heating system that would properly heat it; and there was some evidence upon which it might be found, as the trial Judge had found, that that had not been done.

The plaintiff's attempt to put the blame on the defendant for not building a better chimney was not given effect to at the trial, and could not be here: the plaintiff knew the condition of the chimney, and should not have contracted as he did without the condition that better draught should be supplied by the defendant, if the plaintiff then really thought the flue insufficient.

The result was that the plaintiff had not substantially fulfilled his contract, and was not entitled to the price that was to be paid to him under the contract, and to that extent the judgment was right. But the defendant was not entitled to retain the boiler, radiators, pipes, etc., put in by the plaintiff. The defendant recovered according to his defence, on which the judgment in appeal was based, on the ground that the whole work was useless, and must be "scrapped," which means necessarily taking out and discarding the articles mentioned. When so taken out, they must be the property of the plaintiff. The principle of Oldershaw v. Garner (1876), 38 U.C.R. 37, and Munro v. Butt (1858), 8 E. & B. 738, is not applicable to fixtures which are to be unfixed and taken out, or to be utilised for the defendant's benefit under a new contract for the heating.

The judgment should be varied so as to give the plaintiff the right to remove the boiler and the other articles, doing no unnecessary damage, during the month of June next, upon paying to the defendant the amount of his judgment and costs.

The plaintiff thus recovers his goods, and the defendant his money. In addition, the defendant has had two seasons' use of the heating system, such as it was, which is sufficient to compensate him for the plaintiff's breach of the contract.

There should be no order as to the costs of the appeal.

LENNOX and MASTEN, JJ., concurred.

RIDDELL, J., read a judgment in which he said that he considered the case entirely governed by Forman & Co. v. The Ship "Liddesdale," [1900] A.C. 190: the plaintiff had not completed

his contract, and the defendant had not acquiesced in or ratified what the plaintiff had done.

The learned Judge agreed in the result of the Chief Justice's judgment.

Appeal allowed in part.

SECOND DIVISIONAL COURT. MARCH 31ST, 1916.

LEMON v. YOUNG.

Mechanics' Liens—Action to Realise Lien—Statement of Claim—Invalidity — Ineffective Affidavit — Dismissal of Action — Powers of Referee at Trial—Mechanics and Wage-Earners Lien Act, secs. 31, 33, 34—*Form* 5—*Practice.*

Appeal by the plaintiff from the judgment of an Official Referee dismissing an action to enforce a mechanic's lien, on the ground that no affidavit in support of the statement of claim, such as is prescribed by sub-sec. 2 of sec. 2 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, was filed.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. H. Shaver, for the appellant.

T. Hislop, for the defendants, respondents.

MASTEN, J., read a judgment in which he said that the appellant contended: (1) that the Referee had no jurisdiction to make the order, (a) because the matter was res adjudicata under an order of the Master in Chambers, and (b) because it was outside of the scope of the Referee's jurisdiction to deal with such a question, his only authority being to try the action; (2) that, on the merits, the judgment of the Referee was wrong because the affidavit complained of was a substantial compliance with the requirements of the Act, and mere matters of form are not to be regarded in proceedings under the Act.

As to (1) (a), it appeared that the order of the Master was not an adjudication on the merits, but an award of the costs of an abandoned motion.

In regard to (1) (b), the jurisdiction of the Referee appeared from secs. 33 and 34 of the Act. It is part of the authority of any tribunal authorised to try an action to examine the record and to determine whether there is any proceeding so launched and brought before it as to enable it to hear the parties and determine their rights. The Referee had jurisdiction to examine

the record and to determine that the proceeding, as it stood, was not effectively brought, and there was no case for him to try.

Turning to the second objection, the learned Judge said that, in his opinion, the provision of sec. 19 of the Act was, by its terms, confined to the registration of the lien itself, and was not applicable to a proceeding such as this—a proceeding in Court to enforce a lien. Then again, the purpose of the affidavit required to be attached to the statement of claim was not to enable a certificate of lis pendens to be issued and registered.

The statute peremptorily requires that an action be brought within 90 days. An action in this form can be brought only by complying specifically with the directions contained in the statute.

The affidavit was made by a clerk in the office of the plaintiff's solicitor, who swore that he was "the agent of the plaintiff and have been informed that the foregoing statement, which I have read over, is true." The affidavit did not state that the claim was true, and it omitted all reference to the state of the account. To institute the action, there must be "filed in the proper office a statement of claim verified by affidavit, Form 5." An affidavit was filed, but the statement of claim was not verified, and the form of the affidavit was not Form 5, nor in "substantial compliance" therewith.

If the provisions of the statute are not observed, no action is begun, and the lien lapses: secs. 23, 24, 25; Canada Sand Lime and Brick Co. v. Poole (1907), 10 O.W.R. 1041; Bruce v. National Trust Co. (1913), 4 O.W.N. 1372. The 90 days since completion of the work having elapsed, the Court cannot assist the lien-holder by permission to file an affidavit nunc pro tunc.

The appeal should be dismissed.

RIDDELL, J., was of the same opinion, for reasons stated in writing, in which he referred to Leushner v. Linden (1914), 33 O.L.R. 153; Crerar v. Canadian Pacific R.W. Co. (1903), 5 O.L.R. 383; and various provisions of the statute.

MEREDITH, C.J.C.P., read a judgment in which he said that, in his opinion, the Referee erred in two radical respects; (1) in assuming a power he had not; (2) in erroneously exercising the power.

The Referee who is to try an action to enforce a lien has not the power of the Master in Chambers or a Judge at Chambers, and yet such a power was assumed by him, although he knew that a motion had been made at Chambers, which was

either pending or had been dismissed, to set aside the statement of claim upon the very ground upon which, at what should have been the trial, he dismissed the action. On this ground, it seemed plain that the appeal should be allowed, and the case go back to the Referee to be tried by him.

The learned Chief Justice also considered that the affidavit verifying the statement of claim was sufficient, and that the action should not have been dismissed, even if the Referee had the power to dismiss it on the ground upon which he acted. Reference was made to secs. 17, 19, 23, 24, 25, and 31 of the Act; and to Form 5.

LENNOX, J., agreed with the Chief Justice.

The Court being equally divided, the appeal was dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 31ST, 1916.

*MORRISON v. MORROW.

Sale of Goods — Refusal to Accept — Action for Damages for Breach of Contract—Right of Inspection—Tender—Waiver —Guaranty.

Appeal by the plaintiff from the judgment of COATSWORTH, Jun. Co. C.J., dismissing, after trial without a jury, an action, brought in the County Court of the County of York, to recover damages for non-acceptance of two car-loads of flour sold by the plaintiffs to the defendant.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

M. C. McLean, for the appellant.

James Haverson, K.C., for the defendant, respondent.

RIDDELL, J., read a judgment in which he said that the defendant, trading under a firm name and carrying on business in Toronto and Montreal, sent to the plaintiff, carrying on business in Ingersoll, an order, dated the 16th February, 1915, for two car-loads of flour to be shipped to Montreal at $6.60 per barrel, f.o.b. Montreal. The order was accepted, and one car went forward on the 17th and another on the 20th February. After certain communications between the parties, the defendant refused to accept; the plaintiff resold at a loss, and brought this action for damages.

The County Court Judge held that the plaintiff refused the defendant the right to inspect the flour; that the defendant was entitled to inspect; that there was no sufficient tender; and that the defendant was justified in refusing to accept.

"Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract:" Sale of Goods Act, 1893, sec. 34 (2). The common law is the same: Isherwood v. Whitmore (1843), 11 M. & W. 347; Startup v. Macdonald (1843), 6 M. & G. 593, at p. 610; Benjamin on Sale, 5th ed., p. 740; Halsbury's Laws of England, vol. 25, p. 229.

The case of Biddell Brothers v. E. Clemens Horst Co., [1911] 1 K.B. 214, 934, and in appeal E. Clemens Horst Co. v. Biddell Brothers, [1912] A.C. 18, has no bearing upon the question.

It was impossible to hold that the common law right to inspect was wanting.

On the evidence, there was a refusal of the right to inspect, and the plaintiff made no tender.

The defendant, however, not having cancelled the contract specifically on the ground of the refusal to permit inspection, must be considered as having waived the right to inspect.

Reference to Leake on Contracts, 4th ed., p. 617; Ripley v. McClure (1849), 4 Ex. 345.

The defendant could not be allowed to change his position and set up that the cancellation was due to the failure to permit inspection, and not to the refusal to comply with a request for a guaranty, which the plaintiff had a right to refuse.

The appeal should be allowed with costs, and judgment should be entered for the plaintiff for the amount claimed with costs.

MEREDITH, C.J.C.P., and LENNOX, J., were also of opinion that the appeal should be allowed, for reasons stated by each in writing.

MASTEN, J., dissenting, was of opinion, for reasons stated in writing, that the judgment of the learned County Court Judge was right, and should be affirmed.

Appeal allowed; MASTEN, J., *dissenting.*

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*McLEOD v. SAULT STE. MARIE PUBLIC SCHOOL BOARD.

Contract—Erection of Building—Right of Contractor to Remove Stone Taken out in Excavation for Foundations—Conversion—Tort—Counterclaim — Costs — Absence of Concrete Footings—Allowance against Contract Price—Findings of Fact of Trial Judge—Appeals—Costs.

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of BRITTON, J., 8 O.W.N. 569.

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

H. S. White, for the defendants.

A. W. Anglin, K.C., for the plaintiffs.

HODGINS, J.A., read a judgment in which he said that the appeals were on various items, and all were disposed of at the hearing adversely to the party appealing, except three.

The first was (plaintiffs' appeal) $172, the value of stone removed by the plaintiffs, but allowed to the defendants as belonging to them, though taken out by plaintiffs when they were excavating the foundation and sold as being their own property. No custom or usage was proved. By the specifications, the plaintiffs were to keep trimmed up in piles "all refuse, rubbish, and other materials not removed." The earth from all excavations was to "be roughly levelled where directed over school property." The earth was certainly intended to remain the defendants' property, and the provision as to "other materials not removed" was ambiguous.

"The builder, in the absence of express stipulation to the contrary, has a general right to dig the foundation of the building and to convert to his own use the materials dug out:" Halsbury's Laws of England, vol. 3, p. 187. "A contract to excavate land for the erection of a building thereon does not imply that the title to valuable material removed . . . is transferred to the builder:" 6 Cyc. 53.

Reference to Robinson v. Milne (1884), 53 L.J. Ch. 1070; Elwes v. Brigg Gas Co. (1886), 33 Ch.D. 562; Long Island Contracting and Supply Co. v. City of New York (1912), 204 N.Y. 73; Jones v. Wick (1894), 62 N.Y. St. Repr. 526.

There was no express permission or direction to the plaintiffs to remove what they excavated, and the two provisions

quoted looked rather the other way. There was nothing in the circumstances which would reasonably warrant an implication that conversion of the stone was authorised, and that was sufficient to defeat the plaintiffs' claim.

The plaintiffs' appeal on this ground should be dismissed.

The second item (defendants' appeal)was $600 claimed by the defendants as an allowance against the contract price due to the absence of concrete footings. These footings were not put in; a firm bottom of rock was struck, and that was levelled instead. The appeal on this ground failed on the facts.

The third item (defendants' appeal, by leave) was the costs of the defendants' counterclaim, which were not allowed, their demand being treated as a matter of set-off. The defendants should have been allowed these costs, on the District Court scale, as the conversion of the stone was a tort, and the defendants do not waive it by adopting as the measure of their damages the amount for which it was sold. The price was good evidence of their damage.

The judgment should stand, except as to the costs of the counterclaim, and the plaintiffs and defendants should each bear their own costs of the appeals.

MACLAREN, J.A., concurred.

MAGEE, J.A., agreed in the result, for reasons to be given later.

MEREDITH, C.J.O., read a judgment in which he stated his agreement with the conclusions of HODGINS, J.A., except as to the removal of the stone. As to that he thought the appeal of the plaintiffs should be allowed, adopting the view of the English Courts and the statement of the law above quoted from Halsbury's Laws of England.

Judgment below varied.

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

PEPPIATT v. PEPPIATT.

Constitutional Law—Marriage Act, R.S.O. 1914 *ch.* 148, *sec.* 36 *—Ultra Vires—British North America Act,* 1867, *secs.* 91 (26), 92 (12)*—Jurisdiction of Supreme Court of Ontario —Action for Declaration of Invalidity of Marriage—Construction of sec.* 15 *of Marriage Act—Consent—Prerequisite of Valid Marriage—"Solemnisation of Marriage."*

Action for a declaration that a valid marriage was not effected or entered into between the parties, the plaintiff, Ruth M. Peppiatt, being, at the time she went through a form of marriage with the defendant, under the age of 18 years, and not having the consent required by the Marriage Act, R.S.O. 1914 ch. 148, sec. 15.

Section 36 of the Act provides that the Supreme Court of Ontario shall have power, in certain circumstances, to declare and adjudge that a valid marriage was not effected or entered into between persons who have gone through a form of marriage.

The trial Judge was of opinion that sec. 36 was ultra vires of the Ontario Legislature, but referred the action to a Divisional Court: 34 O.L.R. 121, 8 O.W.N. 447.

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

G. S. Kerr, K.C., for the plaintiff.

The defendant was not represented.

Edward Bayly, K.C., for the Attorney-General for Ontario.

The Attorney-General for Canada was not represented.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts, and referring to the provisions of sec. 36 of the Marriage Act and secs. 91 (26) and 92 (12) of the British North America Act, 1867, he said that it was finally settled by the decision of the Judicial Committee in the Marriage Case, [1912] A.C. 880, that everything which is included in the solemnisation of marriage is excepted from the exclusive jurisdiction to legislate as to marriage which is vested in the Parliament of Canada. In view of this decision, two questions only had to be considered in order to determine whether or not sec. 36 was ultra vires: (1) Does the Marriage Act make the consent required by sec. 15 a condition precedent to the formation of a valid marriage? (2) If it does, are the provisions of sec. 15 intra vires as being part of what is comprehended in the words "solemnisation of marriage," as those words have been interpreted in the Marriage Case?

The Chief Justice said that the answer to the first question must be in the negative. What sec. 15 provides for is in the nature of a direction to the issuer of marriage licenses. Reading sec. 15 in the light of the provisions of secs. 19 and 21, the words "shall be required before" in sec. 15 mean, "shall be required by the person who issues the license."

If it were intended that compliance with the requirements of the marriage law as to matters prior to the performance of the marriage ceremony should be essential to the formation of a valid marriage, it was incumbent on the Legislature to say so in plain and unequivocal language, which it had not done.

Reference to Rex v. Inhabitants of Birmingham (1829), 8 B. & C. 29.

The answer to the first question being in the negative, it became unnecessary to answer the second question; but the Chief Justice said that he would, apart from authority, have thought that the provision requiring consent was beyond the powers of a Provincial Legislature; the Court might, however, be bound by authority to hold otherwise.

Action dismissed without costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*REX v. BAUGH.

Criminal Law — Conspiracy — Evidence — Inadmissibility — Opinion of Judge in Civil Action as to Veracity of Accused —Reasons for Judgment Given in Presence of Accused— Cross-examination of Accused—Hearsay Evidence—Opinion Evidence — Substantial Wrong or Miscarriage — Criminal Code, sec. 1019*—New Trial.*

Case stated by the Senior Judge of the County Court of the County of York, before whom and a jury, at the General Sessions of the Peace for the County of York, the defendant was tried and convicted on a charge of conspiracy. The conspiracy charged was that the defendant did unlawfully conspire wih G. and other persons to prosecute S. for an alleged offence, knowing S. to be innocent thereof, contrary to the Criminal Code..

The questions argued before the Court were two: (1) Was the trial Judge right in referring to the judgment of MIDDLETON, J., in a civil action to which the present defendant was a party, in which that learned Judge expressed an opinion as to the veracity of the accused? (2) Was the passage from the reasons for judgment of MIDDLETON, J., which was given in evidence, and to which the first question related, admissible in evidence.

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

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

J. R. Cartwright, K.C., and J. B. Clarke, K.C., for the Attorney-General.

MEREDITH, C.J.O., read a judgment in which, after stating the facts, he said that the Court was not referred to any case, nor had he found one, in which the questions now before the Court had arisen. He referred to and distinguished Henman v. Lester (1862), 12 C.B.N.S. 776, and Houstoun v. Marquis of Sligo (1885), 29 Ch.D. 448, in which somewhat similar questions were decided.

What was done in this case was, in substance and effect, to put in evidence the reasons for judgment of Middleton, J., so far as they dealt with the credibility of the defendant. The defendant was bound to submit to having his credibility attacked by eliciting from him the fact of the previous trial having taken place, what the issues in the action were, the fact that he and S. had been examined as witnesses at the trial, and the result of the trial—but not the views expressed by the trial Judge as to his credibility.

What was said by Middleton, J., in delivering judgment, was not said in the presence of the defendant—judgment having been reserved and delivered later—and the effect of allowing evidence of it to be given was to admit hearsay evidence. What was done was in substance to admit as evidence the report of the reasons for judgment of Middleton, J.; and it was not admissible even on the cross-examination of the defendant.

The fact that Middleton, J., had discarded the testimony of the defendant in the civil action was emphasised by the trial Judge, as was also the weight that should be attached to the finding of so eminent a Judge; and it could not be said that no substantial wrong or miscarriage was occasioned: Criminal Code, sec. 1019.

Both questions should be answered in the negative, and a new trial should be directed.

GARROW, J.A., concurred.

MACLAREN, J.A., also concurred, giving written reasons. He did not place his judgment on the objection that the evidence was hearsay. It was opinion evidence, on a point on which opinion evidence was not admissible; and was also evidence as to moral character and unveracity, based upon a single incident. The learned Judge had some doubt whether substantial

wrong was occasioned to the defendant; but, with some hesitation, agreed that there should be a new trial.

HODGINS, J.A., also concurred, for reasons stated in writing. He was of opinion that the evidence was hearsay, and that a substantial wrong had been done.

MAGEE, J.A., for reasons stated in writing, dissented, being of opinion that the evidence was admissible; and, even if inadmissible, that no substantial wrong or miscarriage was occasioned.

New trial ordered; MAGEE, J.A., *dissenting.*

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*WILL P. WHITE LIMITED v. T. EATON CO. LIMITED.

Trading with the Enemy—Action for Money Admittedly Owing —Suspicion that Money Intended to be Paid by Plaintiff to Alien Enemy—Evidence—Application for Stay of Proceedings.

Appeal by the plaintiff company from an order of FALCONBRIDGE, C.J.K.B., in Chambers, made on the application of the defendant company, staying all proceedings in this action until the termination of the war.

The action was brought to recover the price of goods sold and delivered by Dickerhoff Raffloer & Company of Canada Limited to the defendant company, and the plaintiff company claimed to recover as assignee of the Dickerhoff company, which was a company incorporated under the laws of Ontario and carrying on business and having its head office in Ontario. The plaintiff company was also an Ontario company.

The defendant company admittedly owed the money sued for.

The order appealed from was made on the ground that the money sued for was, if recovered, to be paid to alien enemies.

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

I. F. Hellmuth, K.C., and A. C. McNaughton, for the appellant company.

H. S. White, for the defendant company, respondent.

MEREDITH, C.J.O., read a judgment in which he dealt with the facts and the relations between the appellant company and

the Dickerhoff company, and said that the order ought not to have been made, because there was no evidence to warrant the conclusion that the money sued for, if recovered, would be paid, or that the appellant company intended to pay it, to an alien enemy. If it had been shewn that the appellant company was merely agent for, and that the money owed by the respondent company was really owed to, a German or Austrian person, firm, or corporation, it would have been proper to have stayed the action during the war; the contrary, however, was proved.

Even if all the shareholders in an English company and some of its directors are German or Austrian subjects, that affords no ground for staying an action brought by the company: Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited, [1915] 1 K.B. 893.

The appeal should be allowed without costs and the motion below dismissed without costs.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

HODGINS, J.A., read a dissenting judgment. He referred to Rex v. Kupfer, [1915] 2 K.B. 321; His Majesty's Advocate v. Innis, [1915] S.C. (J.) 40, 42; Moss v. Donohoe (1916), 32 Times L.R. 343 (P.C.); His Majesty's Advocate v. Hetherington, [1915] S.C. (J.) 79; and Rex v. Oppenheimer and Colbeck, [1915] 2 K.B. 755 (C.A.); and said that in these cases the Courts treated the prohibition in the orders in council (as to trading with the enemy) as absolute, universal, and subject to no exception whatsoever arising from considerations usually applied in mercantile law.

The evidence that the money would not find its way into the hands of the enemy was not satisfactory; but the order appealed against was not the appropriate one in the circumstances. The appellant company was in strict law entitled to judgment for the claim, unless that judgment would have the effect of bringing about a payment in contravention of the Proclamation. On the material before the Court, it could not be said that it must have that result. There is no provision in our law for the intervention of a public custodian, but there is jurisdiction to stay execution until fulfilment of any condition (Rule 537) or to direct the money to be paid into Court (Rule 534), with leave to the appellant company to apply to issue execution or for payment out on satisfying a Judge that no breach of the Proclamation is intended or will occur: Schmitz v. Van der Veen and Co. (1915), 112 L.T.R. 991.

Appeal allowed; HODGINS, J.A., *dissenting.*

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*PEARSON v. CALDER.

Married Woman—Action against, for Money Demand—County Court—Coverture not Pleaded—Personal Judgment against Defendant—Affirmance by Appellate Court — Subsequent Order of County Court Judge Discharging Judgment with Leave to Enter Proprietary Judgment—Jurisdiction.

Appeal by the defendant from an order of the Judge of the County Court of the County of Wentworth, in an action in that Court, made upon the application of the plaintiff, ordering that the judgment entered against the defendant should be discharged, with leave to the plaintiff to enter the proper judgment against a married woman.

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

W. S. MacBrayne, for the appellant.

M. Malone, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the defendant was alleged to have been, at the time of entering into the contract sued on, and when the action was brought, and to be now, a married woman; but nothing appeared on the face of the proceedings or in the evidence to shew that she was a married woman. She did not plead coverture. Judgment passed against her at the trial, and was entered in the usual form, as if she were a feme sole; an appeal was taken to a Divisional Court and the judgment was affirmed (9 O.W.N. 424). After the result of the appeal had been certified to the County Court, the plaintiff applied for leave to amend the judgment, and upon that application the order now appealed against was made.

Before the passing of the Married Women's Acts, if a married woman was sued as a feme sole and failed to plead or prove coverture, she was estopped by the judgment from setting up that she was a married woman: Beynon v. Jones (1846), 15 M. & W. 566; Newton v. Boodle (1847), 9 Q.B. 948; Scott v. Morley (1887), 20 Q.B.D. 120; and there was no reason for thinking that the Married Women's Acts had made a change in the law in that regard.

Oxley v. Link, [1914] 2 K.B. 734, a case of a default judgment, distinguished.

Even if a County Court has the same inherent power as to correcting judgments as is possessed by the Supreme Court, and even if there had not been an appeal to a Divisional Court, there would have been no jurisdiction to make the order; a fortiori where the judgment of the County Court has been affirmed by an appellate Court.

Bedard v. Prevost (1915), 51 S.C.R. 629, 631, distinguished.

The appeal should be allowed and the order discharged, with costs here and below.

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*LINSTEAD v. TOWNSHIP OF WHITCHURCH.

Highway—Nonrepair of Bridge — Collapse under Weight of Traction Engine — Death of Person Seated on Engine — Liability of Township Corporation—Traction Engine Act, R.S.O. 1914 *ch.* 212, *sec.* 5—*Construction of—Duty to Lay down Planks.*

Appeal by the defendants from the judgment of MASTEN, J., 35 O.L.R. 1, 9 O.W.N. 220.

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

W. N. Tilley, K.C., and James McCullough, for the appellants.

T. H. Lennox, K.C., and C. W. Plaxton, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he first stated the facts and then referred to the contention of the appellants that the effect of sec. 5, sub-sec. 4, of the Traction Engine Act, R.S.O. 1914 ch. 212, is to make the laying down of planks a condition precedent to the exercise of the right to cross a bridge with a traction engine, and that, as the direction of the statute was not complied with, the deceased was not lawfully on the bridge, and no duty towards him in respect of it rested upon the appellants.

The learned Chief Justice then made an analysis of the case of Goodison Thresher Co. v. Township of McNab (1908-10), 19 O.L.R. 188, 44 S.C.R. 187, and said that, in view of the conflict of judicial opinion in that case, the question presented for decision on this appeal should be dealt with as res integra.

After a discussion of the provisions of the enactment in force when the Goodison case was decided, R.S.O. 1897 ch. 242,

sec. 10, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60, the Chief Justice stated his conclusion that failure to fulfil the duty which sub-sec. 3 of sec. 10 imposed did not prevent the owner of a traction engine weighing less than 8 tons, "used for threshing purposes or for machinery in construction of roadways," who suffered damage owing to a bridge over which the engine was being run not being of sufficient strength to bear the weight of it, from recovering for the loss; but, if that view was wrong, he was of opinion that the duty imposed was not an absolute duty, and that, where it was not, in the circumstances of the particular case, necessary to lay down planks in order to protect the surface of the bridge from injury from contact with the wheels of the engine, there was no duty to lay down planks; and, if this view as to the construction to be placed upon the enactment which was under consideration in the Goodison case was right, a fortiori the same construction should be placed upon the enactment in force when the accident in question occurred—the provision as to laying down planks, which was in the former legislation a proviso to the sub-section which provided that sub-secs. 1 and 2 should not apply to engines used for threshing purposes or for machinery in construction of roadways of less than 8 tons in weight, being no longer, in form at all events, a proviso.

On the findings of fact of the trial Judge, which were fully supported by the evidence, judgment was properly entered for the respondent.

There was no finding by the trial Judge as to the necessity for laying down the planking in order to protect the flooring or surface of the bridge from injury from the contact of the wheels of the engine; but, upon the evidence, the conclusion should be that no such necessity existed.

The appeal should be dismissed with costs.

HODGINS, J.A., concurred.

GARROW and MACLAREN, JJ.A., agreed in the result, for reasons stated in writing by GARROW, J.A.

MAGEE, J.A., also agreed in the result.

Appeal dismissed.

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*QUILLINAN v. STUART.

Libel—Opprobrious Epithets Applied to Woman—Defamatory Meaning—Imputation of Unchastity—Functions of Judge and Jury—Misdirection—Excessive Damages—New Trial.

Appeal by the defendant from the judgment of MASTEN, J., at the trial, upon the verdict of a jury, in favour of the plaintiff, for the recovery of $15,000 damages in an action for libel.

The alleged libel was contained in three letters written by the defendant, two of them to one Masters, the plaintiff's employer, and the third to the plaintiff herself.

Masters being absent, the defendant had transacted business with the plaintiff, acting for Masters. The defendant felt aggrieved at the way in which he was being treated by the plaintiff, and in writing a letter of complaint to Masters used the expressions, "Call off your slut!" "Call off your carrion!" "Call off your dogs!" "If this woman controls you, body and soul, it's time I knew it." The other letters contained strong language about the plaintiff.

The trial Judge withdrew from the consideration of the jury the letter to the plaintiff, except as evidence of malice. He also in effect ruled and directed the jury that the other letters might be read as imputing unchastity and immoral relations to the plaintiff, and that it was for them to say whether or not that was the meaning to be given to the letters.

The appeal was on the ground that the trial Judge should have ruled that the letters were not defamatory, and should have dismissed the action, and that the damages were excessive.

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

I. F. Hellmuth, K.C., for the appellant.

Wallace Nesbitt, K.C., and J. M. Godfrey, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which, after stating the facts, he referred to Halsbury's Laws of England, vol. 18, pp. 652-655, paras. 1211-1215, for a correct statement of the respective functions of Judge and jury in libel actions. He also referred to Capital and Counties Bank v. Henty (1880-82), 5 C.P.D. 514, 542, 7 App. Cas. 741, 744; Nevill v. Fine Art and General Insurance Co., [1897] A.C. 68, 79; Shore v. Wilson (1842), 9 Cl. & F. 355, 527.

There were three questions which fell to be determined by the trial Judge: (1) whether, in their plain and popular meaning, the statements complained of, as a whole, were capable of a defamatory meaning; (2) whether, if capable of a defamatory meaning, they were capable of being understood as imputing unchastity or immoral conduct to the plaintiff; (3) whether, if these two questions were answered in the negative, the words were, in the light of the circumstances of the case, capable of any of the defamatory meanings ascribed to them by the innuendoes, and, if so, of which of them they were so capable.

The first question should be answered in the affirmative: the application to the plaintiff of the epithets "slut" and "carrion" was calculated to expose her to hatred, contempt, or ridicule: Bell v. Stone (1798), 1 B. & P. 331, 332.

The case, therefore, could not have been withdrawn from the jury.

Fairly read, and having regard to the circumstances in which the letters were written, the request or demand to call off the plaintiff, though couched in vulgar and abusive language, meant no more than this: "I am being hounded by your agent, call her off." The expression "If this woman controls you, body and soul, it's time I knew it," plainly meant, "If this woman so entirely controls your actions that you are unable to deal with me directly, I want to know it." It did not suggest immoral relations between the plaintiff and her employer. The use of the word "slut" as implying lewdness is obsolete. The words complained of were not capable of meaning that the plaintiff was an unchaste or immoral woman, and the learned trial Judge misdirected the jury in telling them, as he in effect did, that the words were capable of that meaning.

St. Denis v. Shoultz (1898), 25 A.R. 131, is a clear authority against the contention that, as no objection was taken to the charge to the jury, it was not open to the defendant to object to it on the ground of this misdirection.

The damages, also, were so excessive as to warrant interference with the finding as to them: they were so manifestly unreasonable, that the jury must have been influenced by views and considerations to which they should not have given effect.

The appeal should be allowed with costs, the verdict and judgment should be set aside, and there should be a new trial; no costs of the former trial.

GARROW, MACLAREN, and HODGINS, JJ.A., concurred.

MAGEE, J.A., agreed that there should be a new trial on the ground that the damages were excessive; but, for reasons stated in writing, did not agree with the interpretation which the other members of the Court gave to the opprobrious epithets applied to the plaintiff.

New trial ordered.

FIRST DIVISIONAL COURT. APRIL 3RD, 1916.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Constitutional Law—5 Geo. V. ch. 45 (O.)—Roman Catholic Separate Schools — Suspension of Powers of Trustees — Conferring Powers upon Commission—Intra Vires—British North America Act, 1867, sec. 93 (1)—"Right or Privilege with Respect to Denominational Schools"—Legislation Prejudicially Affecting—Rights of Minority of Separate School Supporters—Remedy under sec. 93 (3), (4).

Appeals by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624.

The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. C. McMaster, for the appellants.

W. N. Tilley, K.C., for the defendant the Ottawa Separate Schools Commission, respondent.

A. R. Clute, for the defendant the Corporation of the City of Ottawa, respondent.

J. D. Bissett, for the defendant the Quebec Bank, respondent.

J. A. McEvoy, for the Attorney-General for Ontario.

MEREDITH, C.J.O., read a judgment in which he reviewed the history of and legislation respecting separate schools in the Province of Upper Canada (Ontario). He said that the sole question for decision was as to the validity of an Act of the Legislature of Ontario passed on the 8th April, 1915, intituled "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45.

In the opinion of the Chief Justice, the Act 5 Geo. V. ch. 45 did not, within the meaning of sec. 93 (1) of the British North America Act, prejudicially affect any right or privilege with respect to denominational schools which the class of persons called Roman Catholics had by law at the Union. The right or privilege which that class, as a class, had at the Union was not prejudicially affected by the legislation or even interfered with. All that was done was to suspend the right of a particular body of persons of the class to manage its schools because it persistently refused to obey the law and insisted upon managing them contrary to law and in open defiance of it. The proposition that the effect of sec. 93 (1) is that the State, whose creature the appellants and the schools under their charge are, is powerless to act where a body it has created flouts its authority, is a monstrous one, in the opinion of the Chief Justice.

It is not only the members of the Board or a majority of them who defy the law; they are supported in their action by a majority of their constituents, and to remove them from office (without more) would result only in the election of another set of men who would follow the same course.

The contention of the appellants' counsel ignored the fact that the minority of the Board and of the ratepayers was desirous of obeying the law and conducting the schools in accordance with it, and the further fact that the minority of the supporters of the schools, owing to the action of the appellants, were deprived of the privilege the enjoyment of which was guaranteed to them by sec. 93 (1), and that one of the purposes and the effect of the legislation in question was to enable them to enjoy that privilege.

The appeals should be dismissed with costs.

GARROW, MACLAREN, and HODGINS, JJ.A., concurred.

MAGEE, J.A., in a written opinion, stated his concurrence in the reasons and conclusion of the Chief Justice and in the dismissal of the appeals; and also discussed the provisions of sec. 93 of the British North America Act contained in the 3rd and 4th clauses, suggesting that the only relief against a Provincial law prejudicially affecting rights or privileges as to denominational schools was intended to come from the Provincial Legislature itself, or, failing that, from the Parliament of Canada, and that the remedy by action in a Provincial Court is not open.

Appeals dismissed with costs.

HIGH COURT DIVISION.

SUTHERLAND, J., IN CHAMBERS. MARCH 27TH, 1916.

CARROLL v. PATTERSON.

Parties—Action to Declare Devise and Bequest in Will Void—Plaintiff Suing on Behalf of herself and all other Heirs at Law and the Next of Kin of Testator—Rule 75—Order Requiring Heirs at Law and Next of Kin to be Added.

Appeal by the defendant the Corporation of the Town of Ingersoll from an order of the Master in Chambers refusing an application by the appellant corporation for an order directing the plaintiff to amend the proceedings by adding the heirs and heiresses at law and next of kin of Daniel Welcome Carroll as parties to the action.

The plaintiff sued on behalf of herself and all others the heirs and heiresses at law of the testator, who devised and bequeathed all his real and personal estate to his wife for her life. He died on the 25th April, 1912, and she on the 4th August, 1915. The testator, by his will, directed that, after the death of his wife, his surviving executor should convey to the defendant corporation his dwelling-house and the land used in connection therewith for the purposes of a hospital, and that the residue of his estate, after paying certain legacies, should be converted into cash to form a fund to be used for the maintenance of the hospital.

The plaintiff asked for a declaration that the devise and bequest in favour of the town corporation were illegal and ineffectual, and that the deceased died intestate as to all the property therein comprised.

The defendants were the town corporation and the surviving executor.

E. C. Cattanach, for the appellant corporation.

Christopher C. Robinson, for the plaintiff.

SUTHERLAND, J., read a judgment in which, after setting out the facts, he said that the general practice in actions with respect to wills had been that the next of kin and heirs and heiresses at law should be made parties. The Master was of opinion that the case came within Rule 75, so that no order to amend was necessary.

The learned Judge referred to Cornell v. Smith (1890), 14 P.R. 275; Reeves v. Reeves (1908), 16 O.L.R. 588, 589; Bea-

ment v. Foster (1916), 9 O.W.N. 413, 414, 35 O.L.R. 365; and said that the order of the Master should be set aside and an order made directing the plaintiff to amend the proceedings by adding the heirs and heiresses at law and next of kin of the deceased as parties to the action. Costs in the cause.

MULOCK, C.J.Ex., IN CHAMBERS. MARCH 27TH, 1916.

FOSTER v. MACLEAN.

Libel—Newspaper—Defence—Payment into Court—Libel and Slander Act, R.S.O. 1914 *ch.* 71, *secs.* 7, 8, 9.

An appeal by the plaintiff from an order of the Master in Chambers dismissing the application of the plaintiff to strike out certain of the defences of the defendant Smythe in an action for libel brought against several defendants, in respect of articles or statements printed in a newspaper called the "Toronto World."

Paragraph 8 was as follows: "This defendant, by way of alternative defence as to the whole action, and while denying any liability, joins with his co-defendants in bringing into Court the sum of $5, and says that that sum is enough to satisfy the plaintiff's claim against all the defendants."

E. F. Raney, for the plaintiff, contended that Rule 307 did not apply to payment into Court in an action for libel published in a newspaper, and that a defendant, by secs. 7, 8, and 9 of the Libel and Slander Act, R.S.O. 1914 ch. 71, was entitled to pay money into Court with his defence only in a case where he pleads in mitigation of damages that the libel was inserted in a newspaper without actual malice and without gross negligence, and that before the commencement of the action, etc., "he inserted in such newspaper a full apology for the libel," etc.

K. F. Mackenzie, for the defendants.

MULOCK, C.J.Ex., said that sec. 9 of the Act entitled the defendant to pay money into Court with his defence by way of amends for the injury sustained by the publication of any libel to which secs. 7 and 8 applied. Each of those sections applied to an action for libel contained in a newspaper. The present was an action of that kind; and, therefore, the defendant Smythe, as authorised by sec. 9, was entitled with his defence to pay money into Court by way of amends.

The appeal substantially failed; and the costs should be costs in the cause to the defendants in any event.

SUTHERLAND, J., IN CHAMBERS. MARCH 27TH, 1916.

*REX v. BENDER.

Criminal Law—Search-warrant—Information—Failure to Disclose Facts Shewing Causes of Suspicion—Order Quashing Warrant—Condition as to Bringing Action.

Motion by the defendant to quash an information and search-warrant.

The information was sworn by a License Inspector for the county of Huron, before the Police Magistrate for the town of Clinton, in that county, stating that the informant "hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale in violation" of the Liquor License Act, etc.; and the search-warrant, reciting the information, authorised the constables to search the defendant's premises.

L. E. Dancey, for the defendant.

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

SUTHERLAND, J., referred to Regina v. Doyle (1886), 12 O.R. 347; Regina v. Walker (1887), 13 O.R. 83; Rex v. Kehr (1906), 11 O.L.R. 517; Ex p. Coffon (1905), 11 Can. Crim. Cas. 48; Rex v. Townsend (1906-7), 11 Can. Crim. Cas. 115, 12 Can. Crim. Cas. 509.

The learned Judge said that the License Inspector made an affidavit, upon which he was cross-examined, and from the affidavit and cross-examination it appeared that certain information had been communicated to him, which, if set out in the information, might have been held to be, to some extent at least, a setting out of the "causes of suspicion." The Police Magistrate was also examined, and said upon his examination that certain letters were shewn to him by the License Inspector, and certain information communicated, which he could not very well recall or swear to, but which was of such a kind that he was satisfied that there was just ground for issuing the warrant. This would not assist very much, if it could be considered at all.

As the information did not disclose "facts and circumstances shewing the causes of suspicion," the warrant must be deemed to have been improperly issued and must be quashed: Rex v. Kehr, supra.

The order should contain a condition similar to that in Rex v. Kehr, that no action shall be brought against the Police Magistrate or against any officer acting on the search-warrant to enforce the same.

MIDDLETON, J., IN CHAMBERS. MARCH 30TH, 1916.

*RE GEORGE AND LANG.

Mortgage—Order under Mortgagors and Purchasers Relief Act, 1915—"Absolute Discretion"—Right of Appeal—Rule 507.

Application by John K. George, mortgagee, under Rule 507, for leave to appeal to a Divisional Court of the Appellate Division from an order of MULOCK, C.J.Ex., in Chambers, dated the 28th March, 1915, dismissing a motion by the applicant, under the Mortgagors and Purchasers Relief Act, 1915, for leave to bring an action upon a mortgage made by Herman H. Lang, John C. Stevenson, and William Meen, in favour of the applicant, for $3,000 principal money past due upon the mortgage and a larger sum due by acceleration. (See George v. Lang, ante 17.)

F. Arnoldi, K.C., for the applicant.

R. H. Parmenter, for the respondents.

MIDDLETON, J., said that he was of opinion that the statute did not contemplate any appeal, and his view was confirmed by several of the judges to whom he had spoken.

The scheme of the Act was to intrust to a Judge the power to interfere with the contractual rights of the parties and to give him an "absolute discretion" (sec. 5(1)) in so doing; and, in the absence of any provision in the Act itself giving the right of appeal, there was no warrant for importing the provisions of Rule 507.

Even if there was the right of appeal, the appellate Court would probably not interfere, thereby undertaking to review an absolute discretion.

If Rule 507(2) applied, however, there did not appear to be anything in the case to bring it within the provisions of that Rule.

Motion refused; no costs.

MIDDLETON, J. MARCH 30TH, 1916.

DRAIN v. CATHOLIC MUTUAL BENEFIT ASSOCIATION OF CANADA.

Insurance—Life Insurance—Benefit Society—Assessment Rates—Power of Trustees—4 & 5 Geo. V. ch. 136 (D.)—Increased Rates—Paid-up Policies—Cash Surrender Value Scheme.

Action by a member of the association, on behalf of himself and all members other than those over 65 years of age, for an injunction restraining the association and Grand Council thereof from increasing the assessment rate according to a scheme adopted.

The plaintiff moved for an interim injunction.

The motion came on in the Weekly Court at Toronto, and was turned into a motion for judgment, and so heard.

Daniel O'Connell, for the plaintiff.

G. Lynch-Staunton, K.C., for the defendants.

MIDDLETON, J., dealt with the history of the association in a written opinion, in which he referred to the Act 4 & 5 Geo. V. ch. 136 (D.) The contention of the plaintiff was, that a level tariff for those members who had attained the age of 65 gave to them as a body an advantage over the other members, and that this was illegal. In the learned Judge's view, Parliament gave to the Grand Trustees the right to make such increase in the amount of assessment as they, in their good judgment, might think necessary to bring about the solvency of the association, subject to the one limitation, that the increased rate should not exceed the attained age premium of the National Fraternal Congress table. Anything not found in the statute could not be imported into the plenary authority given to this body. The responsibility for devising a tariff was placed upon their shoulders; they and they alone must determine, in all the circumstances, what was wise and what was just. On this main branch of the case, the plaintiff's action failed.

As a subsidiary branch of the case, it was argued that the power to issue paid-up policies had not been conferred upon the trustees, and with that the learned Judge agreed. A paid-up policy, he said, is predicated upon the existence of a reserve fund equivalent to the present liability on the policy issued. In this case there was practically no reserve; and the paid-up policy would, therefore, amount to a gift. The power to make a gift

was not conferred by Parliament. It was said that this power might be found in the power given to reduce the amount payable on a certificate of insurance; but the learned Judge did not agree with that.

Judgment declaring, first, that the increased rates are within the power of the trustees; secondly, that it is not competent for the trustees to issue paid-up policies based on table 5; thirdly, based on an admission of the invalidity of a proposed cash surrender value scheme, that the entire option No. 3 was invalid.

No order as to costs, success being divided.

RIDDELL, J., IN CHAMBERS. MARCH 31ST, 1916.

*RE REX EX REL. STEPHENSON v. HUNT.

Municipal Elections—Alderman—Disqualification—Application to Unseat—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 162(1) *—Application Made after Expiry of six Weeks from Date of Election—Right to Apply within six Weeks after Facts Came to Knowledge of Relator — Additional Evidentiary Facts.*

Motion by the relator for a mandatory order directing the Senior Judge of the County Court of the County of York to grant a fiat under sec. 162 of the Municipal Act, R.S.O. 1914 ch. 192, for the service of a notice of motion for an order declaring that the respondent "hath unjustly usurped and still doth usurp the office of Alderman for the City of London."

The County Court Judge granted a fiat when first applied to by the same relator; but, by reason of a mistake, the notice of motion was not served in time, and, when the motion came on before the County Court Judge, it was dismissed.

The relator made a second application for a fiat, upon grounds similar, if not the same, as those upon which the first fiat had been granted; this second application was refused; whereupon the application for a mandatory order was made.

The application was heard at London and Toronto.

J. M. McEvoy, for the relator.

G. S. Gibbons, for the respondent.

RIDDELL, J., read a judgment, in which, after stating the facts, he said that the grounds of the application were that the respondent was secretary of the Western Fair Association, and

the Corporation of the City of London had such relations with that association, helping it with money, making contracts with it, etc., as to make it unlawful for the servants of the association to be members of the city council.

It was not denied that the respondent was the secretary of the association; and much colour was given to the relator's contention by such cases as Greville-Smith v. Tomlin, [1911] 2 K.B. 9, read in connection with the association's Act of incorporation, 50 Viet. ch. 89 (O.), and the by-laws of the city, No. 2439 and others.

The relator must make his application "within six weeks after an election or one month after the acceptance of office," unless the facts upon which he relies did not come to his knowledge until after the election, in which case he has six weeks after the facts came to his knowledge: sec. 162(1) of the Municipal Act.

The only new "facts" alleged upon the second application were: (1) that the respondent had frequently appeared before the London City Council to solicit aid for the association; and (2) that the city council proposed to give the association $10,000 in the course of the year, 1916.

The "facts" are the "ground" for the application, and the two "facts" stated were merely evidence of the ground or grounds alleged on both applications—evidentiary facts of no significance except as helping to prove the primary facts.

It would appear to be improper that the secretary of the association should occupy a seat in the city council; but the relator was not rectus in curia.

The dismissal of the relator's motion will not stand in the way of an application by another relator.

Motion dismissed without costs.

CLUTE, J. MARCH 31ST, 1916.

CLAYTON v. RAMSDEN.

Principal and Agent—Agent's Commission on Sale of Land—Contract—Construction—Share of Profits on Sale—Quantum Meruit—Damages.

Action to recover from the executors of John A. Ramsden, deceased, the sum of $1,000, under a writing signed by the deceased.

The action was tried without a jury at Toronto.

D. O. Cameron, for the plaintiff.

S. H. Bradford, K.C., for the defendants.

CLUTE, J., read a judgment in which he set forth the facts of the case at length. The agreement signed by the deceased Ramsden, dated the 29th September, 1911, he said, was, first, an absolute agreement to sell a parcel of land to the plaintiff for $9,000; and then an agreement that, if the plaintiff purchased or found a purchaser, at that price, the plaintiff was to be allowed a commission of $1,000. The plaintiff had before that procured a prospective purchaser, one Slater, at $10,000. The plaintiff had been associated with Ramsden in the purchase of the lands, and it was in the first instance agreed that he was to share equally in the profits to be made upon a resale; but afterwards a lump sum of $1,000 was substituted as the plaintiff's share. The first part of the agreement was intended to be a provision to secure the plaintiff $1,000 for the work that he had done. It was an inapt way of shewing that the plaintiff was entitled to $1,000 out of the transaction. After the death of Ramsden, the defendants sold the property for $12,000. The agreement was not formally accepted by the plaintiff, and was not intended to be accepted. Formal notice of withdrawal was not necessary—a subsequent sale of the property would be sufficient: Dart on Vendors and Purchasers, 7th ed., p. 264; Dickinson v. Dodds (1876), 2 Ch. D. 463.

The defence was, that, the sale to Slater not having been completed, and nothing having been paid thereon except a deposit of $150, the plaintiff was not entitled to recover under the terms of the agreement.

The defendants relied on Fletcher v. Campbell (1913), 29 O.L.R. 501; but there the sale went off by default of the purchaser—here, by the fault of the vendor.

Reference to Mackenzie v. Champion (1885), 12 S.C.R. 649; Marriott v. Brennan (1907), 14 O.L.R. 508, 509; Adamson v. Yeager (1884), 10 A.R. 477; Halsbury's Laws of England, vol. 1, pp. 194, 195; Roberts v. Barnard (1884), Cab. & El. 336; Prickett v. Badger (1856), 1 C.B.N.S. 296, 26 L.J.C.P. 33; Lockwood v. Levick (1860), 8 C.B.N.S. 603; Bowstead's Law of Agency, 5th ed., pp. 201, 202, 205; Vickers v. Church Extension Association (1888), 4 Times L.R. 674.

The plaintiff was not entitled to recover under the agreement for commission, for the sale to Slater was not carried out; but, having regard to all the facts of the case, he was entitled to re-

cover $1,000 in lieu of his half interest in the purchase, or upon a quantum meruit, and in the latter case the reasonable and just amount of damages was that which was agreed to by both parties, namely, $1,000.

Judgment for the plaintiff for $1,000 with costs of action. Leave to amend the pleadings to meet the evidence.

LATCHFORD, J. APRIL 1ST, 1916.

SHARKEY v. YORKSHIRE INSURANCE CO.

Insurance—Live Stock Insurance—Construction of Policy—Exclusion of Application—Insurance Act, R.S.O. 1914 *ch.* 183, *secs.* 154-158, 193, 235—*Commencement of Period of Liability—Death Occurring after Delivery of Policy and Payment of Premium — Disease Contracted Earlier on same Day.*

Action to recover $1,000 upon a policy of insurance issued by the defendants upon the plaintiff's stallion.

The action was tried without a jury at London.

Sir George C. Gibbons, K.C., and F. W. Wilson, for the plaintiff.

Oscar H. King, for the defendants.

LATCHFORD, J., said that on the 29th May, 1915, the plaintiff applied to the defendants' agents at Petrolia for insurance to the amount of $1,000 upon a stallion, valued at $1,500. An application-form was filled out, the term being 3 months, and the premium being $32.50—the proper premium for that period. The application was forwarded to the defendants' head office at Montreal, and there received on the 3rd June. On the 7th June, the defendants sent the policy sued on, dated on that day, to their agents at Petrolia. It was received there on the 8th June about 2 p.m. Between 4 and 5 on the same afternoon, the defendants delivered the policy to the plaintiff, and were paid the premium. An hour or two later, the horse died. The cause of death was an acute disease, which first manifested itself on the morning of the 8th June.

It was admitted that in all matters relating to the insurance the plaintiff acted in good faith.

The defendants denied their liability, relying upon words appearing in a "note" inserted in the application, read in connection with the terms of the policy itself. The "note" said,

inter alia: "The company's liability commences after payment of the premium and receipt of policy or protection note by the assured." The policy, after reciting the application, and that the assured had agreed that the application should be the basis of the policy and considered as incorporated therein, provided that if after receipt of the policy and payment of the premium, any animal mentioned below should, during the period of the insurance, die from any accident or disease insured against and *occurring or contracted after the commencement of the company's liability,* the company should be liable to pay, etc.

The learned Judge was of opinion, having regard to secs. 154-158 of the Ontario Insurance Act, R.S.O. 1914 ch. 183, that the application, containing no misrepresentation, was not part of the contract, and that the rights of the parties must be determined by the policy itself.

The term of the policy appeared upon its face, as required by sec. 193, made applicable by sec. 235 to live stock insurance contracts. That term, conformably to the application and the date of the policy, coupled with the time and date fixed for the expiry, was three months, ending at noon on the 7th September, and beginning, at the latest, at noon on the 7th June. The death was during the period between the time when the policy was brought into operation as a contract between the insurer and the insured, by the payment of the premium and the contemporaneous delivery of the policy, and the date upon which the insurance was to expire.

If there was an inconsistency between the words italicised above and the words in the definition of "Tables and Risks Covered"—"death from . . . disease during currency of policy"—effect must be given to the later words. The horse dying from disease during the currency of the policy, the defendants were liable.

Judgment for the plaintiff for $1,000, with interest from the 7th August, 1915, and costs.

MIDDLETON, J., IN CHAMBERS. APRIL 4TH, 1916.

*RE CLARKE.

Infants—Custody — Abandonment by Mother — Adoption by Foster-parents—Adoption Agreements Made by Father—Application by Father and Mother to Obtain Custody—Welfare of Infants—Infants Act, R.S.O. 1914 ch. 153, sec. 3—Common Law Right of Father—Conduct Precluding Assertion of.

Motion by Arthur Clarke and his wife, the father and mother of the infants Annie May Clarke, three years old, and Beatrice Catharine Clarke, sixteen months old, for an order for their custody, they being in foster-homes.

A. L. Baird, K.C., for the applicants.

H. J. Scott, K.C., for the foster-parents of each child.

MIDDLETON, J., in a written judgment, stated that in April, 1915, when the younger child was about four months old, the mother left her husband and children—a case of deliberate desertion. The father then placed them in foster-homes, where they are well cared for and happy. The mother returned to her husband in August, 1915. The father has enlisted, and expects to go overseas soon. The father seeks to get the children back in order to leave them with his wife.

The motion was really based, the learned Judge said, on what was supposed to be the father's absolute right to the custody and control of his children. At the time of the adoption, he entered into adoption agreements under seal with the foster-parents respectively.

It was argued for the respondents that sec. 3 of the Infants Act, R.S.O. 1914 ch. 153, is far wider than 12 Car. II. ch. 24, and gives to the father the right by deed to dispose of the custody and education of his child during its minority, even in his lifetime; but the opposite view was taken by Hodgins, J.A., and Riddell, J., in Re Hutchinson (1912-13), 26 O.L.R. 601, 28 O.L.R. 114; and their opinions could not be disregarded.

But, although at law any deed made by the father was void, in equity a principle was established that the father might by his conduct preclude himself from asserting his natural and common law right, where it was detrimental to his children: In re Agar-Ellis (1883), 24 Ch.D. 317, 333; In re Agar-Ellis (1878), 10 Ch.D. 49, 72; In re Scanlan (1888), 40 Ch.D. 200.

It is not necessary, where the father has voluntarily parted with his children, to shew such misconduct on his part as is necessary where the application is to take the child from the parent's custody: Regina v. Gyngall, [1893] 2 Q.B. 232.

The mother having abandoned her children, the father having executed the adoption agreements in good faith, and the foster-parents having had care of the children for a considerable time and having fully lived up to their part of the bargain, and not only incurred expense but nurtured the children at a time of need, at the request of the father, he was precluded now from, capriciously and against the interest of the children, revoking the adoption agreements. It was manifestly in the best interest of the infants that they should be left in the good homes where they now are, rather than be handed over to the mother. If the mother had any right independently of her husband, her abandonment of the children precluded her from asserting it.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. APRIL 4TH, 1916.

*ALDERSON v. WATSON.

Landlord and Tenant—Lease — Acceleration Clause — Chattel Mortgage—Assignment for Benefit of Creditors—Landlord and Tenant Act, R.S.O. 1914 *ch.* 155, *sec.* 38 (1)—*Sale of Goods Distrained—Application of Proceeds.*

Motion by the defendant, the landlord, for an order for payment out of Court of the money paid in under the judgment of a Divisional Court, 9 O.W.N. 435.

G. T. Walsh, for the applicant.

Hughes Cleaver, for the plaintiff, the assignee for the benefit of creditors of the tenant.

J. S. Schelter, for the chattel mortgagee.

MIDDLETON, J., in a written judgment, said that the lease gave the landlord the right, upon the making of an assignment, to distrain for two years' rent. The assignment was made, the distress followed, the assignee contested the validity of the distress, and it was held as against the assignee that the landlord could distrain for one year's rent only. The property was subject to a chattel mortgage, which exceeded the amount realised from the sale. As

against the chattel mortgagee, the landlord had a right to distrain for the whole amount claimed. It was conceded that the landlord was entitled to the first year's rent and to the costs of the distress, and that a sum of $25 should be paid to M., who made the sale. The claim of the landlord to the second year's rent was disputed; the claim, if allowed, would practically exhaust the fund.

The learned Judge was of opinion that the landlord was entitled to be paid, as far as the fund would go, the whole amount which he claimed. The assignee was entitled to nothing; for the amount due upon the chattel mortgage exceeded the amount realised from the goods. As against the chattel mortgagee, who alone was concerned, the landlord could assert his full claim. The limitation imposed by sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, was one which could be invoked only by the assignee for the purpose of protecting his own interest in the chattel distrained upon, and in no way enured to the benefit of the chattel mortgagee; nor could the assignee, by invoking this provision, take from the chattel mortgagee that which would be his were it not that, as against him, the right of the landlord was entitled to prevail: Railton v. Wood (1890), 15 App. Cas. 363; Brocklehurst v. Lawe (1857), 7 E. & B. 176.

Order made for payment out of Court of the amount of the landlord's claim plus M.'s $25 and the landlord's costs of this motion. Any balance then remaining shall be divided between the chattel mortgagee and assignee and be applied upon account of their costs of the motion.

KELLY, J., IN CHAMBERS. APRIL 5TH, 1916.

*RE ARNOLD v. COOK.

Division Courts — Action Dismissed in Absence of Parties — Mistake of Clerk—Judgment of Dismissal Treated as Nullity—Division Courts Act, R.S.O. 1914 ch. 63, secs. 79, 123—Prohibition.

Motion by the defendants for prohibition to the Tenth Division Court in the County of York.

G. T. Walsh, for the defendants.
C. H. Porter, for the plaintiff.

KELLY, J., read a judgment in which he said that the action had been transferred from the Seventh to the Tenth Division Court, and on the 14th May, 1915, the Clerk of the latter Court sent a notice intended to be in compliance with sec. 79 (2) of the Division Courts Act, R.S.O. 1914 ch. 63, to the plaintiff, in which it was stated that the next court-day was the 27th May, 1915. That was sufficient notice, under that section, of the holding of the Court, had the action been put on the list for trial on the 27th; but it was actually put on the list for trial on the 20th May, and came on for trial on that day, without notice to the plaintiff. No one appearing, the action was dismissed.

It was not until the 9th March, 1916, that the plaintiff became aware of what had happened, and then he promptly took proceedings to obtain a proper trial, and to that end made application to the Judge in the Division Court. The Judge—the same one who had presided on the 20th May, 1915—treated the entry of judgment on that date as a nullity, and proposed to try the case.

Not overlooking the strictness with which the Courts have applied sec. 123 of the Act, and recognising the want of inherent jurisdiction to set aside the judgment—Re Nilick v. Marks (1900), 31 O.R. 677—the learned Judge was of opinion that the present case did not fall within that decision, or within sec. 123, but that it came rather within Keating v. Graham (1895), 26 O.R. 361, 377, where it was said that the judgment ought never to have been signed; and within Hammond v. Schofield, [1891] 1 Q.B. 453, 455, where it was said that such a judgment ought to be treated as never having existed.

Motion refused without costs.

BRITTON, J. APRIL 5TH, 1916.

*WILLOUGHBY v. CANADIAN ORDER OF FORESTERS.

Insurance—Life Insurance—Endowment Certificate — Proof of Age of Insured — Statutory Admission — Insurance Act, R.S.O. 1914 *ch.* 183, *sec.* 166, *sub-secs.* 7, 9, 10, 11.

Action by the widow of William R. Willoughby, who died in 1915, to recover $1,000 and interest upon an endowment certificate issued by the defendants to the deceased, dated the 21st November, 1888.

The deceased continued to be a member of the defendants' Order in good standing until his death.

In the application for the certificate, the deceased stated that his age was 33, and that was the age stated in the certificate.

The only defence was, that, by the terms of the application and certificate, the defendants were not obliged to pay until the age of the deceased should be admitted or proved.

The action was tried without a jury at Brockville.

J. A. Hutcheson, K.C., for the plaintiff.

W. A. Hollinrake, for the defendants.

BRITTON, J., in a written opinion, said, after stating the facts, that there was no suspicion of fraud, no wilful misrepresentation, nothing to shew that the age was not truly stated, nothing against the standing of the deceased in the Order. The defence was technical.

The plaintiff relied upon the provisions of the Insurance Act, R.S.O. 1914 ch. 183, sec. 166, sub-secs. 7, 9, 10, 11.

The learned Judge said that the defendants had not complied with sub-secs. 7 and 9, requiring that notice of the condition as to proving age should be printed in red ink upon the certificates, receipts, and pass-books issued by the society to the members, and must be deemed to have admitted the age stated in the application as the true age: sub-sec. 10—sub-sec. 11 making all the provisions of sec 166 applicable to past as well as future contracts. The deceased had a pass-book, in which his monthly payments were entered, and the notice was not upon it.

Judgment for the plaintiff for $1,000 with interest and costs.

CLUTE, J. APRIL 6TH, 1916.

HAMMILL v. MILLAR.

Mortgage—Proposed Sale under Power—Arrangement between Mortgagee and Mortgagor as to Purchase by Mortgagor—Prejudice of Purchasers of Equity of Redemption—Injunction.

Motion by the plaintiffs to continue an interim injunction restraining the defendant from proceeding with the sale, under the power of sale contained in a mortgage of land.

The motion came on for hearing in the Weekly Court at Toronto, and was turned into a motion for judgment.

H. J. Martin, for the plaintiffs.

W. C. Davidson, for the defendant.

CLUTE, J., in a written judgment, said that the facts were not in dispute. The mortgage contained the usual power of sale. The plaintiffs were the purchasers of the equity of redemption, and the defendant was the mortgagee. Default having been made in regard to the payments due under the mortgage, and the plaintiffs not having paid, Hunter, one of the mortgagors, paid to the defendant's solicitors $75, being the interest due, and $10 to cover the costs of the sale proceedings so far as they had gone. The solicitors for the defendant then wrote to Hunter a letter saying that they held the mortgage, to the extent of the arrears paid, on his behalf, and would continue the proceedings in the name of the defendant, but for the benefit of Hunter so far as he was interested, and they would look to Hunter for their costs, and he was to indemnify the defendant against costs. The letter also contained a record of an understanding that unless a bid was made in excess of the amount due, the property should be conveyed to Hunter.

The plaintiff contended that, the amount due having been paid by one of the mortgagors, no sale could be had: Robertson v. Norris (1858), 4 Jur. N.S. 155, 443.

The learned Judge said that he did not wish to be taken as deciding that a mortgagor cannot intervene in a case like the present, and, with the authority of the mortgagee, proceed to sell, he being personally liable on the covenant; but the proposed sale could not be sustained, for the reason that the arrangement shewn by the letter amounted to an agreement that Hunter might become the purchaser of the property for the

amount of the mortgage, and it would not be proper to arrange for a possible purchase by the mortgagor, his solicitors having the control of the sale. The transaction would be unfair to the plaintiffs, and the proposed sale ought not to be permitted.

The plaintiffs having until recently held the property without making any payment, and intimating that they do not intend to make any payment, there should be no costs.

Judgment for the plaintiffs for the injunction as prayed.

KELLY, J., IN CHAMBERS. APRIL 7TH, 1916.

GRASS v. J. I. CASE THRESHING MACHINE CO.

Venue—County Court Action—Provision in Contract—Ineffectiveness—Judicature Act, sec. 57.

Appeal by the defendants from an order of the Master in Chambers refusing to transfer the action from the County Court of the County of Kent to the County Court of the County of York.

J. D. Falconbridge, for the defendants.

J. M. Ferguson, for the plaintiff.

KELLY, J., read a judgment in which he said that the action was begun in the County Court of the County of Kent to recover a commission for making a sale of a traction engine for the defendants. By a written agreement of the 23rd November, 1910, the plaintiff became a selling agent for the defendants. The agreement contained a clause providing that any action against the company in relation to any matter arising under or by reason of the agreement should be begun and be triable in the county in which the principal office of the defendants was situated—in this case the county of York. The defendants rested their case for a change of venue solely on this provision of the contract.

The learned Judge said that sec. 57 of the Judicature Act, R.S.O. 1914 ch. 56, enacting that such a provision is of no effect, was conclusive against the defendants: Bell v. Goodison Thresher Co. (1906), 12 O.L.R. 611.

Appeal dismissed with costs.

CLUTE, J. APRIL 7TH, 1916.

HARRISON v. MATHIESON.

Judgment—Motion for Judgment on Report Varied on Appeal—Proposed Appeal to Supreme Court of Canada—Prejudice—Stay of Proceedings—Supreme Court Act, R.S.C. 1906 *ch.* 139, *sec.* 2 (*e*)—3 *& 4 Geo. V. ch.* 51, *sec.* 1—4 *& 5 Geo. V. ch.* 15, *sec.* 1—*"Final Judgment"—Practice.*

Motion by the plaintiff for judgment on the report of a County Court Judge as varied by the order of LENNOX, J., 9 O.W.N. 170, affirmed by a Divisional Court, ante 54.

The motion was heard in the Weekly Court at Toronto.

R. T. Harding, for the plaintiff.

R. S. Robertson, for the defendant Mary Mathieson.

CLUTE, J., said that no reason was suggested why judgment should not be given, except that the defendant Mary Mathieson proposed to appeal from the decision of the Divisional Court to the Supreme Court of Canada, and that security was being perfected.

Counsel for the defendant Mary Mathieson, relying on Hesseltine v. Nelles (1912), 47 S.C.R. 230, urged that she would be prejudiced in her proposed appeal if judgment on further directions were now pronounced. The learned Judge said that the case referred to had, he thought, no application to the present case; and, if it did apply, the amendment of sec. 2(*e*) of the Supreme Court Act, R.S.C. 1906 ch. 139, by 3 & 4 Geo. V. ch. 51, sec. 1, had enlarged the meaning of "final judgment," which now means any judgment which determines in whole or in part any substantive right of any of the parties; and by 4 & 5 Geo. V. ch. 15, sec. 1, the amendment is made applicable to judicial proceedings commenced before the date of the passing of 3 & 4 Geo. V. ch. 51.

There being no stay at present in the proceedings in appeal, there was no reason why the plaintiffs should not have judgment in terms of the report as varied.

Judgment for the plaintiff for $16,105.25, with interest from the 1st November, 1915, against the defendant Mary Mathieson as executrix, and declaring that a mortgage for $2,200 has been paid and should be delivered up to be cancelled, and judgment against the defendant Mary Mathieson personally for $10,822.87, with interest from the 13th November, 1915, together with the costs of the action and of the reference and of this motion.

LENNOX, J. APRIL 7TH, 1916.

RE HOGAN.

Will—Gift of Residue to Executors to be Expended in Support of Charities or Charitable Institutions—Discretion of Executors—Death of one of two—Mortmain and Charitable Uses Act, R.S.O. 1914 *ch.* 103, *sec.* 2(*c*)—"*Land*"—*Money Secured on Land—Validity of Gift—Generality—Indefiniteness—Scheme for Distribution—Costs.*

Motion by the executrix of the will of Andrew Hogan, deceased, under the Trustee Act, for an order determining whether the residuary devise in the will was valid, and, if valid, settling a scheme for distribution.

The testator, after making a number of specific bequests and giving directions as to a monument, devised and bequeathed to his executors all the residue, "to be expended by them for the support of such charities or charitable institutions as to them may seem fit."

The executor named in the will died in the lifetime of the testator. Upon proof in solemn form, probate was granted to the executrix.

The whole estate was of about the value of $7,000, a small part of it being derived from a mortgage upon land.

The residue was of about the value of $800.

The motion was heard in the Weekly Court.

J. D. Shaw, for the executrix.

W. R. Meredith, for the Inspector of Prisons and Public Charities.

O. L. Lewis, K.C., for the heirs-at-law.

LENNOX, J., said that under the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, sec. 2(*c*), "land" does not include "money secured on land, or other personal estate arising from or connected with land." A perpetual trust, unless it is charitable, is void: Thomson v. Shakespear (1880), 1 DeG. F. & J. 399; Income Tax Commissioners v. Pemsel, [1891] A.C. 531, 581. But a gift or legacy to a perpetual non-charitable institution is valid if, when it is paid over, the institution can lawfully expend it, for the purposes of the institution, as it pleases: In re Clark, [1901] 2 Ch. 110, 114.

The testator shewed a clear intention of charity. The direction was very general, but not indefinite.

Reference to Blain v. Duncan, [1902] A.C. 37; Grimond v. Grimond, [1905] A.C. 124; In re Macduff, [1896] 2 Ch. 451; Hunter v. Attorney-General, [1899] A.C. 309, 323; Crichton v. Grierson (1828), Wilson & Shaw's Sc. App. Cas. 329, per Lord Lyndhurst.

In this case, a charity of a public character, something to benefit the people, was intended.

The testator had made an effective disposition in favour of charity, and the executrix had power to make a selection of the public charity or charities to be benefited. The preamble to 43 Eliz. ch. 4, now incorporated in R.S.O. 1914 ch. 103, in general terms, furnishes the guiding principle of construction.

The death of the executor need not embarrass the executrix. Even if there were no trustee or executor, the intention of charity being clear, the gift would not fail.

The gift was not, as argued, too broad and general to be effective. Reference to Gillies v. McConochie (1882), 3 O.R. 203; Anderson v. Kilborn (1875), 22 Gr. 385; Phelps v. Lord (1894), 25 O.R. 259; In re Pardoe, McLaughlin v. Attorney-General, [1906] 2 Ch. 184; Atkinson v. Cinq-Mars (1915), 25 D.L.R. 404; Grimond v. Grimond, supra; Morice v. Bishop of Durham (1804), 9 Ves. 399; Halsbury's Laws of England, vol. 4, pp. 182, 183; In re Davidson, Minty v. Bourne, [1909] 1 Ch. 567; In re Salter, Rea v. Crozier, [1911] 1 I.R. 289.

Having regard to the small sum which appeared to constitute the residue, it would not be proper to direct a reference for the purpose of settling a scheme for distribution. The learned Judge will himself settle a scheme upon an affidavit or affidavits being furnished: see Halsbury, vol. 4, p. 166. The known wishes of the testator should not be ignored.

Costs of the application, fixed at $15 to each party, to be paid out of the residue.

CLUTE, J., IN CHAMBERS. APRIL 8TH, 1916.

*REX v. SINCLAIR.

Criminal Law—Theft—Police Magistrate's Conviction—Motion to Quash—Jurisdiction—Place of Offence—Place of Residence of Accused—Criminal Code, sec. 577—Railway Conductor—Appropriation of Money Received from Passenger—Evidence—Penalty—Fine—Authority to Impose—Criminal Code, secs. 773(a), (b), 777, 780, 1035.

Application to quash a conviction of the defendant by the Police Magistrate for the City of Toronto for stealing $5 of the moneys of the Grand Trunk Railway Company, within the Province of Ontario.

The defendant had been a conductor in the service of the company; he resided in the city of Toronto.

D. Campbell, for the defendant.

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

CLUTE, J., in a written judgment, dealt with the various objections raised:—

(1) That the magistrate had no jurisdiction because it did not appear that the offence was committed within the city of Toronto.

The trial having proceeded without objection on that ground, the magistrate had jurisdiction under sec. 577 of the Criminal Code.

(2) That what took place did not amount to theft.

The accused was conductor of a train running from Stratford to Toronto. Three men were carried on that train upon a payment of $5 made by one of them. The defendant took the $5 (a bank-note) and gave hat-checks to the men. The $5 was not handed over to the company; the return made was that the only cash received on the trip was 15 cents, and the hat-checks were handed in to represent that amount. The conductor thus recognised the money as belonging to the company, and paid over a part of it with his returns. This was striking evidence that he received the $5 as a fare, appropriating all but the 15 cents. There was evidence upon which the conviction could properly be made.

Rex v. McLellan (1905), 10 Can. Crim. Cas. 1, followed in preference to Rex v. Thompson (1911), 21 Can. Crim. Cas. 80.

(3) That there was no authority for imposing the penalty which was imposed, viz., a fine of $100.

Upon a consideration of the provisions of secs. 773(*a*) and (*b*), 777 (as amended by 8 & 9 Edw. VII. ch. 9, sec. 5), 780, and 1035 of the Criminal Code, it appeared that the penalty was within the powers of the magistrate.

Motion dismissed with costs.

CLUTE, J. APRIL 8TH, 1916.

*ST. MARY'S MILLING CO. LIMITED v. TOWN OF ST. MARY'S.

Water—Mill-site—Riparian Rights—Dam—Raceway—Flow of Water — Obstruction — Trespass—Damages—Injunction—Declarations of Title—Costs.

The plaintiffs, alleging that they were the owners of mills and lands upon the banks of the river Thames at St. Mary's, and had constructed and maintained a dam opposite their mills for the purpose of developing power for use in the mills, brought this action to recover damages for trespasses committed by the defendants, the town corporation and the mayor and a councillor, for a declaration of the plaintiffs' rights, for an injunction, and for other relief.

The action was tried without a jury at Goderich.

R. S. Robertson, for the plaintiffs.

F. H. Thompson, K.C., and F. C. Richardson, for the defendants.

CLUTE, J., set out the facts and made certain findings, in a written judgment of considerable length. He referred to Halsbury's Laws of England, vol. 28, para. 838; vol. 11, para. 613; Attorney-General v. Rowley Brothers and Oxley (1910), 75 J.P. 81; Baily & Co. v. Clark Son & Morland, [1902] 1 Ch. 649; Sutclife v. Booth (1863), 32 L.J.Q.B. 136; Wood v. Waud (1849), 3 Ex. 748; Rameshur Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121; Greatrex v. Hayward (1853), 8 Ex. 291, 293; Burrows v. Lang, [1901] 2 Ch. 502; Birmingham Dudley and District Banking Co. v. Ross (1888), 38 Ch. D. 295; Whitmores (Edenbridge) Limited v. Stanford, [1909] 1 Ch. 427; Arkwright v. Gell (1839), 5 M. & W. 203; Kensit v. Great Eastern R.W. Co. (1884), 27 Ch. D. 122, 133, 134 (C.A.); Nuttall v. Bracewell (1866), L.R. 2 Ex. 1.

The learned Judge's conclusions were: that the plaintiffs were entitled to succeed upon the main issue, and should be declared to be the owners of the lands described in the statement of claim and entitled to the possession, use, and enjoyment thereof without interference on the part of the defendants; that the plaintiffs were entitled to an injunction restraining the defendants from entering on the lands and from interfering with the possession, use, and enjoyment thereof by the plaintiffs; and that the plaintiffs were entitled to damages for trespass, assessed

at $200; that the defendants the Corporation of the Town of St. Mary's were entitled to the flow of the water through the raceway, unimpeded, and to damages for the obstruction thereof by the plaintiffs, assessed at $40, which sum might be deducted from the damages allowed to the plaintiffs, and to an injunction restraining the defendants from obstructing the same.

The plaintiffs should have the general costs of the action, and the defendants such portion of their costs as was incident to the findings in their favour.

RE CARPENTER LIMITED—HAMILTON'S CASE—SUTHERLAND, J., IN CHAMBERS—MARCH 27.

Company—Winding-up—Contributories—Order of Judge on Appeal from Order of Referee—Leave to Appeal to Divisional Court—Refusal.]—Motion by the liquidator for leave to appeal to a Divisional Court of the Appellate Division from the order of CLUTE, J., 9 O.W.N. 447. SUTHERLAND, J., said that, upon a careful perusal of the evidence of the liquidator, who was examined for the purposes of this motion by those resisting the application, and having regard to the principles on which applications for leave in such cases as this should be dealt with (see Re McGill Chair Co. (1912), 3 O.W.N. 1326, 22 O.W.R. 223), this was not a case in which leave should be granted. Motion dismissed with costs. J. A. Macintosh, for the liquidator. K. F. Mackenzie, for Hamilton and others, the alleged contributories.

MCALPINE V. MCKAY—BRITTON, J.—APRIL 3.

Will—Due Execution—Testamentary Capacity—Absence of Undue Influence—Findings of Fact of Trial Judge—Costs.]—Action for a declaration that a testamentary writing executed by Malcolm D. McCaul, who died on the 3rd November, 1914, and propounded by the defendants McKay and Hossack, the executors named therein, as the last will and testament of the deceased, was not executed in accordance with the Wills Act, and was not the act of the testator because of undue influence and want of testamentary capacity. The testator was an aged man, unmarried, and a cripple. He executed the will a few days before his death. He had no relatives nearer than cousins, and by his will he gave legacies, varying in amount from $10,000 to $100, to several of his cousins, but nothing to some of them, and the re-

sidue of his estate to the trustees of Knox Church, Embro, to be used for church purposes. The action was tried without a jury at Woodstock. The learned Judge reviewed the evidence, in a written opinion, and found that the will was executed in due form of law; that the testator, at the time of the execution, was of sound and disposing mind and memory; and that there was no evidence of any undue influence used or practised upon the testator. Considering the fact that the testator did not make any bequest to the cousins in whose interest the plaintiffs brought this action, and considering the amount and disposition of the residue, the learned Judge dismissed the action without costs, and directed that the costs of those who had been brought into the litigation without any fault of theirs should be paid out of the residue. O. L. Lewis, K.C., and J. L. Patterson, for the plaintiffs. D. C. Ross, for the defendants Mary E. and Thomas Campbell. W. T. McMullen, for the defendants the executors and certain of the legatees. The church trustees were not represented by counsel.

RE PARKIN ELEVATOR CO. LIMITED—DUNSMOOR'S CASE—MIDDLETON, J. IN CHAMBERS—APRIL 4.

Company—Winding-up—Creditor's Claim — Special Privilege as Wage-earner — Sales-agent—Commission—Divided Employment — Leave to Appeal.]—Motion by the liquidator, under the Winding-up Act, R.S.C. 1906 ch. 144, for leave to appeal from the order of FALCONBRIDGE, C.J.K.B., ante 66, allowing an appeal from an order of a Local Master, in the course of the liquidation, and declaring that the claimant had a right, as a wage-earner, to rank preferentially for $1,629. MIDDLETON, J., said that he had looked into this matter with sufficient care to satisfy himself that the case was one in which further litigation was justified. It had not, to his mind, yet been clearly established by any authoritative decision that the claim of an agent such as Dunsmoor fell within the preference given to wage-earners. Leave to appeal should be granted. Costs of the application to be costs in the appeal. H. S. White, for the liquidator. P. Kerwin, for the claimant.

WAY v. SHAW—BRITTON, J.—APRIL 4.

Evidence—Action by Personal Representative to Set aside Mortgage Made by Deceased Person—Denial of Signature of Subscribing Witness—Conflict of Evidence—Finding of Fact of Trial Judge.]—Action by the administrator with the will annexed of the estate of William George Way, deceased, to set aside a mortgage alleged to have been made to the defendant by the deceased upon land in the village of Tweed, dated the 21st June, 1912, but not registered until the 21st May, 1915, shortly after the death of the mortgagor. The action was tried without a jury at Belleville. The main ground upon which the mortgage was impeached was that Eward, the person named as the subscribing witness to the mortgage, and who appeared to have made the affidavit of execution, stated that he did not in fact witness the execution and that he did not make the affidavit. The evidence was contradictory and conflicting. BRITTON, J., set forth the fact in a written opinion, and discussed the weight of the evidence, documentary and oral. He found that the mortgage was in fact signed by the deceased. Action dismissed, with costs to the defendant, but only up to and including the 9th December, 1915. No costs to either party after that date; but the sum of $50 paid into Court by the defendant as security for subsequent costs is to be paid out to the plaintiff. E. G. Porter, K.C., for the plaintiff. W. C. Mikel, K.C., for the defendant.

MYERSCOUGH v. DAY—KELLY, J.—APRIL 5.

Deed—Conveyance of Land—Mistake as to Quantity—Rectification—Vesting Order—Wife's Inchoate Dower Right—Payment by Vendor of Value if Wife Refuses to Bar.]—Action for rectification of a deed of conveyance of land or for a declaration that the plaintiff was entitled to a conveyance from the defendants of 50 acres in addition to 50 acres conveyed by the deed of which rectification was sought and a vesting order. The action was tried without a jury at Brantford. The learned Judge found that the written contract was for the sale of 100 acres; that there was no cancellation or variation of the contract; and that it was by mistake that in the conveyance to the plaintiff only 50 acres were granted; that neither the plaintiff nor the defendant Charles B. Day, the vendor, was aware of the mistake at the time the deed was delivered. The wife of

the defendant Day, who joined in the deed to bar her dower, and who was also a defendant in this action, swore that she became aware of the error when she read the deed before she signed it. She was not a party to the contract for sale, although she knew of it and did not disapprove. She now insisted that she was not bound to execute a rectifying document. The plaintiff was entitled to his remedy against the defendant Charles B. Day, who had no justification for a refusal to complete the sale agreed upon. Judgment directing that, if the defendant Charles B. Day shall fail, within 10 days, to execute and deliver, at his own expense, a proper conveyance to the plaintiff in fee simple, also executed by his wife for the purpose of barring her dower, of the 50 acres in question, the right, title, and interest which on the 20th July, 1915, the said Charles had, and the right, title, and interest which he now has, in the 50 acres, shall be vested in the plaintiff, and directing a reference to the Local Master at Brantford to ascertain the value of the dower interest of the defendant Ada Day in the land, and for payment by the defendant Charles B. Day of the amount when so ascertained. The defendant Charles B. Day to pay the costs of the action; the costs of the reference to be paid by both defendants, subject to any direction which may be made on the application of either party after the reference, by KELLY, J. W. S. Brewster, K.C., for the plaintiff. S. Alfred Jones, K.C., for the defendants.

SMITH v. JACOBS—KELLY, J.—APRIL 6.

Mortgage — Foreclosure — Appropriation of Payments — Principal and Interest — Insurance Premium and Interest in Arrear —Mortgagors and Purchasers Relief Act, 1915.]—An action by a morgagee for foreclosure. The plaintiff alleged that there were arrears both of principal and interest, and that the defendants also owed, in respect of the mortgaged land, taxes and insurance premium down to the 15th May, 1915, the action having been commenced on the 9th June, 1915. The action was tried without a jury at Brantford. KELLY, J., in a written judgment, said that the defendants set up that several payments made on the mortgage should have been appropriated to interest, instead of principal, and that that would have had the effect of reducing, if not altogether wiping out, the arrears of interest till the time the action was brought: upon the evidence, the learned Judge said, effect could not be

given to this contention. The taxes in arrear when the action was commenced had since been paid, but the insurance premium was still due and unpaid. Nothing had been paid on the mortgage since September, 1914, and the defendants had been continuously in possession of the mortgaged land. The defendants invoked the Mortgagors and Purchasers Relief Act, 1915, as a ground for staying the proceedings; but the learned Judge was unable to see that the Act could be applied. Judgment for the plaintiff as prayed with costs; reference to the Local Master at Brantford. M. F. Muir, K.C., for the plaintiff. M. W. McEwen, for the defendants.

CURTIS v. ROBINSON—KELLY, J.—APRIL 7.

Title to Land—Cloud on Title—Registered Conveyances—Action for Removal from Register—Res Judicata—Laches and Acquiescence.]—Action for a declaration that two indentures registered upon the title to a parcel of land in the township of Brantford were null and void as against the plaintiffs, and that the registration thereof should be vacated and the land released therefrom. The action was tried without a jury at Brantford. The defendant relied on the title acquired through the conveyances attacked, which were made to her by her brother and sister on the 27th November, 1909, and contended that, notwithstanding the judgment of TEETZEL, J., in May, 1909, dismissing an action for redemption brought by the present defendant against the plaintiffs' predecessor in title, it was still open to her to raise the contention put forth in that action, and to assert, in respect of the position she now held as transferee of her brother and sister, the right denied her by TEETZEL, J., on her own personal claim of the same character. KELLY, J., said that, apart from other considerations, the decision of TEETZEL, J., not appealed against, was binding on him, and particularly so because the defendant, aware of the effect of it as she was, and having taken no steps to set it aside, soon thereafter, but subsequent to the purchase by Davis, the immediate predecessor of the plaintiffs, procured and registered conveyances from her brother and sister, and then quietly sat by and waited for several years without any active attempt to assert the right she claimed to have so acquired. Judgment declaring that the two conveyances attacked are null and void against the plaintiffs and against their title to the land, and that the registration thereof should be vacated. The plaintiff Charles Curtis to have his costs of the

action against the defendant, but not to include any additional costs occasioned by adding Clara Burtch as a co-plaintiff; no costs to or against Clara Burtch. E. R. Read, for the plaintiffs. A. L. Baird, K.C., for the defendant.

CORRECTION.

In FRY AND MOORE v. SPEARE, ante 44, the judgment below is reported at p. 632 of 34 O.L.R., not p. 63, as stated.