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APPELLATE DIVISION.

OCTOBER 19TH, 1915.

BRADEN v. VARLOW FOUNDRIES LIMITED.

Contract—Construction—Scope of Sub-contract for Ventilating and Heating of Building—Temporary Heating during Progress of Work—Breach of Contract—Damages.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 8 O.W.N. 575.

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

G. F. Henderson, K.C., for the appellant.

R. McKay, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

OCTOBER 20TH, 1915.

RUSHWORTH v. JOHNSTON.

Principal and Agent—Agent's Commission on Sale of Property — Employment of Agent — Description of Property — Amended Description—Failure to Sell according to.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing without costs an action for commission or remuneration for the plaintiff's services in selling or endeavouring to sell a pulpwood property for the defendant.

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

J. B. Clarke, K.C., for the appellant.

J. W. Mitchell, for the defendant, respondent.

RIDDELL, J., delivering the judgment of the Court, said that the defendant employed the plaintiff to sell certain property, and got for and delivered to him information from which the plaintiff drew up a description of the property. Before anything in the way of a sale was placed in train, the plaintiff asked for and received from the defendant further particulars, shewing that, instead of 26 square miles of pulpwood lands, there were only 5; nevertheless, the plaintiff sold on the original description. The purchaser refused to complete his purchase, alleging indeed other grounds than the difference in acreage of the limits.

There was no contract enforceable at law entered into by means of the plaintiff's efforts, nor did he secure a customer willing to take the property.

However the case might have stood had there been no changed description given, and the plaintiff had made a sale on the original description (as to which such cases as Green v. Lucas (1875), 31 L.T.R. 731, 33 L.T.R. 584, may be looked at), it was clear that the defendant's employment of the plaintiff, at the time of the alleged sale, was to sell according to the amended description and not otherwise—and on this the plaintiff did nothing.

This was in substance what the learned Chief Justice of the Common Pleas had found.

Appeal dismissed with costs.

OCTOBER 20TH, 1915.

SEVERT v. PLAUNT.

Crown Lands—Purchase from Crown—Purchase-money Unpaid—Assignee of Purchaser—Right to Sue in Trespass—Evidence—Order in Council—Removal of Pine Timber—Damage to Land by Covering with Refuse—Assessment of Damages by Jury—New Trial.

One McFarland bought certain land in the district of Temiskaming from the Government, and entered into a contract to deliver (say) 1,000 ties to the defendant on cars at New Liskeard; McFarland did not pay for the land, but was recognised by the Department of Crown Lands as purchaser; he sold out to Evoy, Evoy to the plaintiff. McFarland had cut some ties, in-

tending to apply them on the contract with the defendant; but had not delivered any. The defendant, knowing of the plaintiff's rights, entered upon the land, and removed the ties which had been cut. Of this no complaint was made. But he went in and cut down 126 more trees, and left tops, etc., cumbering the ground, whereupon the plaintiff brought this action for damages for trespass, in the District Court of the District of Temiskaming. The action was tried with a jury, who found a verdict for the plaintiff for $200, after a charge not objected to. From the judgment directed to be entered on this verdict, the defendant appealed.

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

W. L. Scott, for the appellant.

A. G. Slaght, for the plaintiff, respondent.

RIDDELL, J., delivering the judgment of the Court, said that the charge of the District Court Judge indicated damages as being recoverable on two heads: (1) the value of the timber taken away; (2) the damage to the land from the tops, refuse, etc., being left on the ground.

As to the former ground, the defendant now offered in evidence an order in council shewing that the pine was not the property of the plaintiff; and, as this was an official document and could not be fabricated, it should be received, but only on terms of the costs up to the time of its production before this Court being paid by the appellant.

But, even if the first ground of damages went by the board, the second remained. The defendant had no right to cover the plaintiff's land with such dangerous refuse in any event. The plaintiff gave evidence that the damage to him from this cause amounted to $378. Another witness said "a couple of hundred dollars anyway;" one witness for the defence avoided the question; and the others said nothing about it. A jury would scarcely be justified in finding the damages on this head at less than $200; and, in view of the fact that the defendant did not ask that the jury should distinguish between damage for timber taken away and damage from improperly leaving refuse on the ground, a new trial should not now be granted.

That the plaintiff had a right to the land was clear from Goff v. Lister (1867-8), 13 Gr. 406, 14 Gr. 451; and the cases of National Trust Co. v. Miller and Dickson, Schmidt v. Miller

and Dickson (1911), 2 O.W.N. 993, 19 O.W.R. 38, 46 S.C.R. 45, Eastern Construction Co. Limited v. National Trust Co. Limited and Schmidt, [1914] A.C. 197, have no adverse bearing on the point now decided.

In this view, it was not necessary to express an opinion as to the rights of the plaintiff in and to the timber.

Were the Court to grant a new trial, it would almost certainly be a cruel kindness—as it could be granted only upon payment of all costs, and another jury would not be likely to give less damages than $200.

Appeal dismissed with costs.

OCTOBER 20TH, 1915.

KAMINISTIQUIA POWER CO. v. SUPERIOR ROLLING MILLS CO. LIMITED.

Damages—Breach of Contract to Take Electric Energy Supplied by Power Company—Measure of Damages—Peculiar Commodity — Money Damages Equivalent to Stipulated Price.

Appeal by the defendant company from the judgment of BRITTON, J., 8 O.W.N. 518.

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

G. Lynch-Staunton, K.C., for the appellant company.

W. N. Tilley, for the plaintiff company, respondent.

THE COURT dismissed the appeal with costs.

OCTOBER 22ND, 1915.

*PIONEER BANK v. CANADIAN BANK OF COMMERCE.

Guaranty—Bank—Condition Precedent to Liability — Implied Term or Condition—Bill of Lading—Form of.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., of the 10th June, 1915, in favour of the plaintiffs, in an action upon a guaranty.

McCabe, a fruit-dealer in Toronto, wished to buy California

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

oranges. Hicks, a broker, bought for McCabe from the Mutual Orange Distributors, in California, two car-loads of oranges on cars P.F.E. 8304 and 11914. Hicks advised McCabe of the purchase, and asked for a "bank guaranty." McCabe saw his bankers, the defendants, and they wired to the plaintiffs, bankers in California, on the 21st November, 1913: "We guarantee payment of drafts on J. J. McCabe with bills lading attached not exceeding in all $1,629.70 covering two cars oranges containing 396 boxes each in P.F.E. 8304 and P.F.E. 11914." The cars had already started for the east; bills of lading attached to a draft came forward, and the draft was refused. In the meantime the agent of the consignors had changed the destination of the goods or part of them; when the goods arrived at Toronto, McCabe could have got them had he wished to do so; but prices had changed, and he did not want them. In the bills of lading, the Mutual Orange Distributors were both consignors and consignees—reading "Consigned to Mutual Orange Distributors, notify J. J. McCabe" (the name being in pencil). On the face of the bills of lading appeared: "Deliver without bills lading on written order of Mutual Orange Distributors' agent.

The Chief Justice of the Common Pleas found that the plaintiffs were entitled to recover upon the guaranty; and the defendants appealed.

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

R. C. H. Cassels, for the appellants.

D. W. Saunders, K.C., for the plaintiffs, respondents.

RIDDELL, J., delivering the judgment of the Court, said that he did not accede to the argument that the defendants had the right to have the bills of lading in the name of McCabe; no legal advantage would have accrued to the defendants from McCabe being the consignee rather than the Mutual Orange Distributors. But the effect of the added clause permitting delivery without bills of lading on the mere order of the agent of the Distributors was different. The bills of lading were attached to the draft, and the condition was thus literally fulfilled; but, in construing the contract, a condition might be implied: Halsbury's Laws of England, vol. 7, p. 512, para. 1035 et seq. The object of attaching the bills of lading to the draft was the security of the defendant, which might have been effected by bills of lading, properly drawn or endorsed, whereby the defendants should become en-

titled to the goods themselves; or the bills sent forward might be for the protection of the defendants in that, the bills being in their hands, no one could legally obtain possession of the goods without the defendants' consent. Both banks, the plaintiffs and defendants, understood that such a protection should be afforded by the bills of lading, and that anything, even though called a bill of lading, which did not afford that protection to the defendants, would cause "such a failure of consideration as could not have been within the contemplation of either side:" The Moorcock (1889), 14 P.R. 64, 68; and the bills of lading sent were not such as the defendants had a right to receive before being bound by their guaranty.

The evidence did not establish as a fact that the form of the bills of lading was the usual form.

The conduct of the defendants and McCabe did not affect the legal right of the bank to insist on the strict performance of the condition precedent to their guaranty attaching.

Appeal allowed with costs, and action dismissed with costs.

HODGINS, J.A. OCTOBER 19TH, 1915.

*RE INDEPENDENT ORDER OF FORESTERS AND TOWN OF OAKVILLE.

Assessment and Taxes—Exemption—Orphan Asylum—Assessment Act, R.S.O. 1914 ch. 195, sec. 5(9).

Case stated by the Judge of the County Court of the County of Halton for the opinion of a Judge of a Divisional Court of the Appellate Division, pursuant to sec. 81 of the Assessment Act, R.S.O. 1914 ch. 195, as follows:—

The Independent Order of Foresters are the owners of a tract of land in the town of Oakville, comprising about 23 acres, and on this is erected a large building—the land being assessed at $9,200 and the building at $48,000.

These premises are for the purpose of affording a home, maintenance, etc., for the orphan children of deceased members of the Order—and in some cases for the child or children of a deceased member, the surviving parent being unable or unfit to care for such child or children.

This home is maintained altogether by the Order, and its

doors are open only to the children of deceased members of the Order.

It is not carried on for profit or gain, nor is the land or any part of it occupied by a tenant or lessee.

Question: "Is this home an institution entitled to exemption from taxation, as held by me, under the provisions of sub-sec. 9 of sec. 5 of the Assessment Act, R.S.O. 1914 ch. 195?"

The case was referred by an order in council, and was heard in Chambers on the 5th October.

D. Henderson, for the town corporation.

W. H. Hunter, for the society.

HODGINS, J.A., said that the Assessment Act, R.S.O. 1914 ch. 195, sec. 5, sub-sec. 9, exempts "every . . . orphan asylum;" and the institution in question comes literally within those words. The words following—"and every boys' or girls' or infants' home or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain"—indicate that the orphan asylum must be a charitable institution within the meaning of the cases cited by counsel for the town corporation.

The judgment in Struthers v. Town of Sudbury (1900), 27 A.R. 217, dealing with a hospital, states the principle to be applied; and the changes in the statute since that decision suggest that it has been accepted by the Legislature as correct.

Question answered in the affirmative; costs follow the result.

HIGH COURT DIVISION.

SUTHERLAND, J. OCTOBER 18TH, 1915.

ROBINSON v. MOFFATT.

Infant—Contract to Purchase Land—Repudiation—Absence of Fraud—Action to Recover Money Paid on Account of Purchase—Rescission—Specific Performance—Costs.

Action to recover $390 which the plaintiff had paid to the defendant upon a contract for the purchase of land, and for rescission of the contract, or, in the alternative, for specific performance.

The action was begun on the 19th October, 1914; the plaintiff alleging that he was an infant, and suing by his next friend.

The contract was made on the 2nd June, 1913. On the 12th November, 1914, the plaintiff signed a written repudiation of the contract, on the ground that he was an infant when he entered into it, and the action was also based upon that ground.

On the 30th September, 1915, the action was tried without a jury at Toronto.

J. J. Gray, for the plaintiff.

W. E. Raney, K.C., for the defendant.

SUTHERLAND, J., in a written judgment, said that it appeared in evidence that the plaintiff was born on the 20th February, 1894, and came of age on the 20th February, 1915. During the hearing, the plaintiff filed a written statement, signed by him, whereby he adopted the proceedings of his next friend and assumed liability for the whole costs of the action.

The learned Judge said that it appeared from the evidence that no advantage was taken of the plaintiff on the contract of sale, either as to title or as to value. No fraud was perpetrated upon the plaintiff; he simply rued his bargain; and he could not recover the money paid by him on account of the contract: Short v. Field (1915), 32 O.L.R. 395, following Wilson v. Kearse (1800), Peake Add. Cas. 196. The alleged delay of the defendant was not such as to bring this case within the general law as indicated in Sugden's Vendors and Purchasers, 14th ed., p. 268; Stickney v. Keeble, [1915] A.C. 386.

The plaintiff may have judgment for specific performance on condition of his paying the defendant's costs of suit. If he is not prepared to accept this, the action will be dismissed with costs.

MIDDLETON, J. OCTOBER 20TH, 1915.

WALLACE v. CITY OF WINDSOR.

Highway—Nonrepair—Injury to Pedestrian by Fall on Defective Sidewalk—Negligence—Lack of System—Failure to Give Notice to Municipality in Due Time—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 460 (4), (5)—*Reasonable Excuse—Absence of Prejudice.*

Action for damages for injuries sustained by the plaintiff by a fall upon a sidewalk in the city of Windsor.

The action was tried without a jury at Sandwich.

F. C. Kerby, for the plaintiff.

A. St. G. Ellis, for the defendant corporation.

MIDDLETON, J., said that on the 13th February, 1915, the plaintiff fell on the sidewalk upon Ouellette avenue, one of the main streets of Windsor, and sustained serious injury. The fall was undoubtedly caused by the defective condition of the sidewalk, and the lack of repair of the sidewalk was the result of actionable negligence on the part of the municipality.

The walk was constructed of concrete, but a hole had formed in it as the result of natural decay. This hole had been in existence for a long time; and, although it was upon a main thoroughfare of the city, and daily passed by thousands, it was permitted to remain. The negligence was the lack of any kind of system to secure information as to the condition of the municipal pavements.

The difficulty in the plaintiff's way was that, although the accident was on the 13th February, no notice was given to the defendant corporation until the 12th March; sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192, provides (sub-sec. 4) that no action shall be brought in the case of an urban municipality unless notice of the action is given within 7 days after the happening of the injury. The Court has power, under sub-sec. 5, to disregard the failure to give notice if of opinion that there is reasonable excuse for the lack of notice, and that the corporation was not thereby prejudiced in its defence.

The corporation was not prejudiced in its defence in this action; but, it could not be found, on the evidence, that there was a reasonable excuse for the lack of notice. The case was entirely governed by Anderson v. City of Toronto (1908), 15 O.L.R. 643. The plaintiff could not be said to have been incapable of considering her situation except as a sufferer. She undoubtedly was in pain from the time of the accident, but was in no such condition as that of the plaintiff in Morrison v. City of Toronto (1906), 12 O.L.R. 333. She went home unaided; she ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then her injured limb was much inflamed and very painful.

The action should be dismissed without costs.

The plaintiff's damages were assessed at $600 to avoid the necessity for a new trial in the event of a successful appeal.

MIDDLETON, J. OCTOBER 20TH, 1915.

GRAY v. WABASH R.R. CO.

Railway—Injury to Persons Crossing Track by Passing Train —Negligence—Findings of Jury—Failure to Ring Bell and Blow Whistle—Negligence not Connected with Injury—Negligence of Persons Injured in Attempting to Cross without Looking.

Action to recover damages for injuries sustained by the plaintiffs by being struck by a train of the Wabash Railroad Company operated upon the line of the Grand Trunk Railway Company, while the plaintiffs were attempting to cross the line in a buggy. The action was against both companies.

The action was tried with a jury at Sandwich.

J. H. Rodd, for the plaintiffs.

H. E. Rose, K.C., for the defendants the Wabash Railroad Company.

D. L. McCarthy, K.C., for the defendants the Grand Trunk Railway Company.

MIDDLETON, J., said that, upon the answers of the jury, there must be a verdict in favour of the Grand Trunk Railway Company, for no negligence had been found against it.

The action arose out of a collision between a Wabash train and a horse driven by the plaintiffs along the Tecumseh road, which runs almost parallel with the railway, but crosses it at the point where the collision occurred; a short distance east of a railway station. The train came from the west. The plaintiffs were also driving from the west; then they turned northeast to cross the track. They had first to cross over a siding some 40 feet south of the track. Upon this siding were some box-cars, which obstructed the view westerly. The station building also obstructed the westerly view; but, after the siding had been crossed and before the plaintiffs had reached the main track, they had a clear view westerly of 550 feet. They said that they looked westerly and saw no train. There was no reason why the train could not have been seen; because, although snow was falling, the occupants of the dwelling on the other side of the Tecumseh road saw the train and realised the peril in which the plaintiffs were. Manifestly, if the plaintiffs had looked, as they said they did, they must have seen the

train, for they had not gone more than 25 feet before the engine struck their horse's head; so that undoubtedly they drove right in front of the approaching train.

The whistle was sounded as the train approched the station, but, according to the findings of the jury, the bell was not ringing immediately before the train reached the crossing, and no danger-whistle was blown between the station and the crossing.

In explaining the answer made by the jury, the foreman made it quite plain that they were not prepared to find that that negligence caused the accident. The foreman said "I could not go further than to say it might have prevented it."

Upon this, the plaintiffs failed. To succeed, they must establish not only negligence on the part of the defendant company, but that that negligence caused the accident. The jury were not satisfied that the negligence found did cause the accident.

The plaintiffs failed, not only upon the answers of the jury, but also because, on the undisputed facts, the whole occurrence was the result of their own negligence in attempting to cross without looking for an approaching train.

Action dismissed, with costs if demanded.

MIDDLETON, J. OCTOBER 20TH, 1915.

*RE OWEN SOUND LUMBER CO.

Company—Winding-up—Directors — Misfeasance — Winding-up Act, R.S.C. 1906 *ch.* 144, sec. 123—*Scope of—Procedure —Irregularity in Election of Directors—De Facto Directors —Liability—Payment of Dividends out of Profits—Costs.*

Appeals by the liquidator of the company—in liquidation under the Winding-up Act, R.S.C. 1906 ch. 144—from the finding of the Local Master at Owen Sound that certain of the directors of the company were not liable for misfeasance in office.

The appeals were heard in the Weekly Court at Toronto.

D. Robertson, K.C., and G. H. Kilmer, K.C., for the appellant.

C. A. Masten, K.C., and W. H. Wright, for Wesley Sheriff and W. H. Merritt, respondents.

C. A. Moss, for J. M. Kilbourn, respondent.

MIDDLETON, J., pointed out that the misfeasance section—123 of the Winding-up Act was one which did not create liability,

but related to procedure only—the liability must be found outside of the section. The Master erred when he allowed those who were de facto directors of the company to escape liability by alleging irregularity in the proceedings of the company leading up to their election—when they assumed to exercise the fiduciary office of director, they became liable in all respects as though rightly appointed to the office.

The directors were not guilty of intentional dishonesty; but more than honesty is required—reasonable intelligence and diligent attention to business. Before paying the extraordinary dividends declared in the case of this company, the directors should at least have had proper and adequate balance-sheets; and they ought not to have divided profits not yet earned.

With respect to the sums paid to the directors as bonuses for their becoming sureties for advances made to the company, it could not be said that this was such a misfeasance as to create liability.

Upon the material before the Court, the amount of dividends paid out of capital—for which alone a case had been made against the directors—did not clearly appear; and there should be a reference back to the Master to ascertain and state for what amount the directors should be liable in respect of dividends paid out of capital in 1912 and 1913.

As success was divided, there should be no costs; but the liquidator should be allowed his costs out of the estate.

MIDDLETON, J. OCTOBER 20TH, 1915.

RE BILTON.

Costs—Will—Probate — Unsuccessful Claim under Pretended Codicils—Claimant not Entitled to Costs out of Estate.

Application by the executors of Naomi Bilton, deceased, for an order disposing of the costs of a former application: see 8 O.W.N. 553.

H. E. Rose, K.C., for the executors.
J. A. Paterson, K.C., for the University of Toronto.
J. T. Small, K.C., for the Canadian Red Cross Society.

MIDDLETON, J., said that, on looking into this matter carefully, counsel for the Canadian Red Cross Society now aban-

doned any contention on the part of the society; and the only question to be disposed of was that of costs.

Further reflection had confirmed the view expressed upon the argument, that the costs of the society ought not to come out of the estate. To order that would be to make the successful party pay the costs of the unsuccessful.

The principle on which costs in probate and will cases are paid out of the estate is this: the testator has done something which necessitates litigation, and has so cast the burden upon his own estate.

Here the testatrix had done nothing of that kind. The confusion had not been shewn to be caused by any action of hers; therefore, there was no power to do that which was sought.

The executors should have their costs out of the estate; and, as the University was the main beneficiary, its costs might also be paid in that way.

SUTHERLAND, J., IN CHAMBERS. OCTOBER 22ND, 1915.

RE CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO. AND BUCKLEY.

Railway—Expropriation of Land—Agreement with Owner as to Compensation—Meaning of "Compensation" in sec. 210 *of Railway Act, R.S.C.* 1906 *ch.* 37*—Payment into Court—Collateral Agreement—Farm-crossings—Drainage — Board of Railway Commissioners.*

Application by the railway company, under sec. 210 of the Dominion Railway Act, R.S.C. 1906 ch. 37, for leave to pay into Court the money-compensation for parts of lots 17 and 18 in the 5th concession of the township of Hinchinbrooke, taken for the railway, together with six months' interest, and for directions pursuant to sec. 210 et seq.

J. D. Spence, for the railway company.
W. H. Irving, for A. F. Buckley, the owner.

SUTHERLAND, J., said that, by a written option from the owner, accepted by the company, the former was to receive $20 an acre for the land taken and $50 "for all damage done to the property on both lots, namely, cutting timber," making in all

$256.50. The option further provided that the owner was to "have a farm-crossing on each lot," but made no reference to drainage. It appeared that the lots were, at the time of the option, subject to a mortgage, and that the company's solicitors had partly arranged with the mortgagee to pay off a portion of the mortgage-moneys and obtain a release therefrom of the strip taken for the railway. The matters of title had been arranged, when the owner declined to execute a conveyance or accept the money; this motion was made in consequence.

In answer, Buckley filed an affidavit in which he set up an oral agreement with the company's engineers and officials as to the manner in which the crossings should be made, as to non-interference with his drainage, damage from overflow of water, the filling in of a natural watercourse, and damage from blasting.

The learned Judge was of opinion that the compensation stipulated for in the option was compensation within sec. 210; but that the matters in dispute, such as farm-crossings and drainage, were properly the subject of consideration and determination by the Railway Board.

Order made allowing the company to pay the money into Court as asked, without prejudice to any application which the owner might make to the Board or any action he might otherwise take with reference to the matters referred to in his affidavit and the alleged collateral agreement; the amount paid in to be subject to the terms of sec. 213 of the Act. No costs of the application.

PERSOFSKY v. FINKELSTEIN—SUTHERLAND, J.—OCT. 18.

Fraud and Misrepresentation—Sale of Business—Representations as to what was Included—Evidence—Costs.]—Action by Persofsky, Weiner, and Berman against Finkelstein and Dobinsky for a declaration that nothing was due upon a certain mortgage made by the plaintiffs and for damages for misrepresentations upon the sale of a moving picture theatre business and plant. The plaintiffs alleged that the defendants falsely represented to the plaintiffs Weiner and Berman that the defendants had paid for the leasehold interest and chattels $1,970, and that they were the owners of the moving picture machines, goods and effects, consisting of lamps, fixtures, machinery, office furniture, and more than 400 theatre chairs, and that the net profits of the business had never been less than $25 weekly, and that they also falsely and fraudulently represented to the plaintiff Persof-

sky that they were the owners of the said goods and chattels, subject only to the condition that the same were not removable before the expiration of the lease. The action was tried without a jury at Toronto. SUTHERLAND, J., in a written judgment, said that neither the evidence of the plaintiffs nor that of the defendants was entirely satisfactory. It was the duty of the purchasers to ascertain the terms of the written lease, and notice of its terms must be imputed to them. As to Persofsky, the very terms of the option under which he purchased plainly intimated to him that the contents of the theatre belonged to the lessors. The defendants testified that they did not represent that they owned the chairs and other chattel property in the theatre, but expressly notified the purchasers that these were the property of the lessors and could not be removed during the currency of the lease. Apart from any question as to the form of the action, the plaintiffs had not made out their case, and the action must be dismissed, but without costs. F. J. Hughes, for the plaintiffs. L. F. Heyd, K.C., for the defendants.

MISITE v. TORONTO HAMILTON AND BUFFALO R.W. CO.—SUTHERLAND, J., IN CHAMBERS—OCT. 18.

Pleading—Statement of Defence—Action for False Arrest and Imprisonment — Justification — Reasonable and Probable Cause—Setting out Facts.]—Appeal by the defendants from an order of a Local Judge directing the defendants to amend para. 5 of their statement of defence by shortly pleading justification. The action was for false arrest and imprisonment. SUTHERLAND, J., said that the facts which may be proved by the defendants at the trial may be pleaded. In an action of this character the facts known to the defendants which would lead to a reasonable belief that the plaintiff was guilty of the offence with which he was charged are facts which are relevant on the allegation of want of probable cause. While in para. 5 the allegations of fact were somewhat minute and in detail, they were such as might properly be set out therein, and as to which evidence might be given at the trial: Stratford Gas Co. v. Gordon (1892), 14 P.R. 407; Duryea v. Kaufman (1910), 21 O.L.R. 161; Bristol v. Kennedy (1912), 4 O.W.N. 537. Appeal allowed and order set aside with costs. J. D. Bissett, for the defendants. T. N. Phelan, for the plaintiff.

FUSSELL v. COLTMAN—SUTHERLAND, J., IN CHAMBERS—OCT. 19.

Judgment — Default Judgment — Motion to Set aside — Laches.]—Motion by the defendant to set aside a judgment entered against him in this action, which was brought to recover the amount of a promissory note made by the defendant. The writ of summons was issued on the 29th June, 1914, and served on the defendant the next day. An appearance was entered and an affidavit of the defendant setting up a defence was filed. Subsequently pleadings were delivered. On the 10th October, 1914, the defendant was served with a subpœna and appointment to attend on the 16th October for examination for discovery. He did not attend; and the plaintiff served his (the defendant's) solicitors with a notice of motion for an order striking out his defence and permitting the plaintiff to enter judgment. The defendant was not represented upon the motion and did not answer it, and an order was made as asked by the plaintiff, upon which judgment was signed and execution issued, and a return of nulla bona was made on the 19th January, 1915. In the same month, an action upon the judgment was brought by the plaintiff in the Province of Saskatchewan; in that action the defendant had delivered a defence. The affidavit of the defendant on which this motion was based was sworn on the 4th June, 1915; but the notice of motion was not served until the 30th September. No grounds of irregularity were stated in the notice of motion; on the argument it was intimated that Rules 56, 327, and 336, had not been complied with. SUTHERLAND, J., said that it was clear that since January, 1915, the defendant had been aware of the existence of the judgment; and, in view of the great laches and delay on his part, it would not be right to set aside the judgment. Motion dismissed with costs. E. Gillis, for the defendant. F. J. Foley, for the plaintiff.

SEGUIN v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY—MIDDLETON, J.—OCT. 20.

Negligence—Collision between Street Railway Car and Automobile—Which Party at Fault—Findings of Jury—Dangerous Crossing—High Rate of Speed—Evidence—Damages—Costs.]—The plaintiff was injured in a collision between an automobile, in which he was a passenger, and a street car of the defendants, at a place where and on a day when there was much traffic. The

driver of the automobile attempted to cross the tracks at a regular crossing, but behind a line of cars going one way, and was struck by a car going the other way. The plaintiff brought this action to recover damages for his injuries. It was tried with a jury at Sandwich. The jury absolved the driver of the automobile from blame, and found that the crossing was a dangerous one, and that the defendants' car was approaching at too high speed—the rate being described in evidence as from 8 to 10 miles an hour. MIDDLETON, J., said that there was much in the evidence to indicate that the conduct of the driver of the automobile in attempting to cross the tracks as he did was the sole cause of the collision and the plaintiff's injury; but the jury had found otherwise; there was evidence upon which the findings might be supported; it was not open to the Judge to nonsuit; and the plaintiff was entitled to a judgment upon the findings of the jury. The assessment of the damages at $500 was extremely liberal, and, while the plaintiff should have judgment for that sum, the costs should be on the appropriate scale, and there should be no certificate to prevent a set-off in favour of the defendants. F. C. Kerby, for the plaintiff. M. K. Cowan, K.C., for the defendants.

DIEHL v. CARRITT—MIDDLETON, J.—OCT. 20.

Company—Paper Company—Debenture-holders — Receiver —Sale of Assets—Claim by Electric Light Company in Priority to Debentures—Trial of Issue—Finding of Fact.]—The Imperial Paper Mills of Canada Limited executed two certain debenture mortgages upon the assets of its undertaking. A receiver was appointed, the assets were sold, and the purchase-money paid into Court. The Sturgeon Falls Electric Light Company Limited filed with the receiver a claim upon the money in Court to the amount of nearly $100,000, for which it asserted priority over the debenture-holders; and an issue in respect of that claim, between the electric light company and the receiver, representing the debenture-holders, was directed to be tried, and was tried by MIDDLETON, J., without a jury, at Toronto, on the 12th, 13th, 14th, and 15th October, 1915, on oral evidence. Held, upon a review of the evidence, that the proper inference of fact was that, the Imperial Paper Mills of Canada Limited declining to assume the burden of the Sturgeon Falls Pulp Company's agreement, it was arranged that $100 a month should be charged

for water power, set off and more than set off by the charge of $156 for the energy supplied, and that this was to continue until some more satisfactory arrangement with the electric light company could be negotiated; and the accounts must be taken upon that basis. The result was, that the account was practically balanced, apart from a sum due by the paper company to the light company in respect of damage done by flooding land —admittedly not a claim against the receiver and not entitled to priority over the debenture claim. The substantial claim failed; and the issue should be decided in favour of the receiver, with costs to be set off pro tanto against two small claims understood to be undisputed. W. M. Douglas, K.C., and H. W. Mickle, for the claimant company. J. H. Moss, K.C., for the receiver.

RE TAYLOR—SUTHERLAND, J., IN CHAMBERS—OCT. 21.

Lunatic—Application for Appointment of Committee—Refusal as Unnecessary.]—Application by the executors of E. Taylor, deceased, for an order appointing a committee of the estate of Mary Taylor, who had an interest in the estate in the hands of the applicants, and was said to be of unsound mind. SUTHERLAND, J., said that the material filed was contradictory, and he was not convinced that there was any need at present for an order. Motion refused, with costs fixed at $35. L. R. Knight, for the applicants. G. H. Hopkins, K.C., for others interested.

SILVERMAN v. WHITE—BRITTON, J.—OCT. 21.

Damages—Trespass—Conversion — Removal of Buildings from Mining Claim—Title to Buildings—Bill of Sale—"Plant" —Liability of Wrongdoer for Acts of Servants—Assessment of Damages—Costs.]—Action to recover $5,000 damages for the removal and conversion by the defendants of the buildings, plant, machinery, and other chattel property, upon a certain mining claim called the "Triumph." The action was tried without a jury at Kenora. The learned Judge finds that the defendant White, who was the owner of another claim not far from the "Triumph"—without wrongful intent, but intending to buy and pay for property which was for sale—went upon the "Triumph" claim, which had not been worked for some years, tore down what remained of the buildings, and removed the material to his own claim. The plaintiff purchased for $150

"all the plant, engines, machinery and gear, fixed and movable utensils and effects," upon the "Triumph" claim, and obtained a bill of sale therefor. All the articles, except the buildings, were returned by the defendants in good order, and the plaintiff had suffered no damage by reason of their being removed. The only property of value retained by the defendant White was the lumber that was in the buildings taken down. The plaintiff was entitled to these buildings; they passed to her as part of the "plant;" that word may mean buildings specially built for the work in connection with which the word is used: see the Encyclopædia of the Laws of England, sub verb. "Plant." The defendant White contended that he was not responsible for the work of tearing down by the other defendants; but that contention could not prevail; the work was done by the servants of White and was within the scope of what White intended and directed his men to do. Giving the plaintiff the benefit of every doubt as against a wrongdoer, in a case which was not one for exemplary or vindictive damages, the sum of $300 was fair and ample as damages. Judgment for the plaintiff for $300 with costs and without set-off of costs. Allan McLennan, for the plaintiff. J. S. McGillivray, K.C., for the defendants.

TUTTY v. HELLER—SUTHERLAND, J., IN CHAMBERS—OCT. 22.

Mortgage—Action for Foreclosure—Entry of Judgment—Application for Stay of Proceedings—Large Arrears of Interest and Taxes—Mortgagors and Purchasers Relief Act, 1915—*Dismissal of Application.*]—The plaintiffs asked the learned Judge to re-open and reconsider the order pronounced on the 5th May, 1915 (8 O.W.N. 429), but not yet issued. The learned Judge said that the facts were not made entirely clear on the first argument. The taxes left unpaid by the defendants and paid by the plaintiffs were larger in amount than he had supposed. The matter was, by consent, allowed to stand over until after vacation. The motion was originally by the defendants for an order staying proceedings. A statement of the mortgage accounts was now put in, which shewed that the defendants were largely in arrears for interest and taxes. The original motion should be dismissed with costs. Christopher C. Robinson, for the plaintiffs. J. C. McRuer, for the defendants.

RE FARMERS BANK OF CANADA (DEWAR'S CASE)—SUTHERLAND, J.—OCT. 22.

Bank—Winding-up—Decease of Person Named on List of Contributories — Order Substituting Executors — Practice.]—Motion by the executors of John Dewar, deceased, for an order discharging, varying, or setting aside an order made by J. A. McAndrew, Official Referee, in the course of the winding-up of the bank, providing that the proceeding against John Dewar as an alleged contributory might be continued by the liquidator against the executors, and that the list of contributories be amended by substituting the names of the executors for the name of John Dewar, and that all proceedings stand in the same plight and condition as at the time of his death. SUTHERLAND, J., said that he thought the motion was misconceived. It did not appear that the list of contributories had yet been settled—the next step was to proceed to settle the list. It was still open to the executors to appear and contest. Upon the executors filing an affidavit setting out the facts as disclosed in their affidavits filed on this motion, the liquidator would have to determine whether to go on and seek to make the estate liable or call upon the legatees among whom the estate has been distributed to contribute pro rata. Motion dismissed; costs to be disposed of by the Referee in the further proceedings before him. A. A. Ingram, for the executors. B. H. L. Symmes, for the liquidator.