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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 26TH, 1917.

BADENACH v. INGLIS.

Settlement of Action—Dispute as to whether Items of Account Included—Reference to Take Accounts—Report—Appeal—Evidence—Absence of Mistake or Fraud—Costs.

Appeals by the defendant Annetta Blanche Inglis, by the defendant Sarah H. Badenach, and by the plaintiff, from the order of SUTHERLAND, J., 11 O.W.N. 391.

The appeals were heard by MEREDITH, C.J.C.P., LENNOX, J., FERGUSON, J.A., and ROSE, J.

Alexander MacGregor, for the appellant A. B. Inglis.

D. O. Cameron, for the appellant S. H. Badenach.

C. H. Porter, for the appellant plaintiff.

THE COURT dismissed all the appeals with costs.

SECOND DIVISIONAL COURT. APRIL 27TH, 1917.

LOCKIE v. TOWNSHIP OF NORTH MONAGHAN.

Highway — Boundaries — Ascertainment — Encroachment on Land of Neighbouring Owner—Highway Acquired by Purchase—Possession for more than 20 Years—Limitations Act—Onus—Finding of Trial Judge—Appeal—Permission for Further Litigation—Right to Flow of Water of Creek—Agreement with Municipality—Duty of Municipality to Maintain Flow—Interference when Road Constructed—Responsibility of Municipality—Dedication and Acceptance—Municipal Act, secs. 433, 460 (6)—Breach of Duty—Remedy—Injunction—Damages—Costs.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of the County Court of the County of Peterborough.

The action was for the recovery of land and an injunction and damages in respect of an obstruction to the flow of the waters of a creek.

The judgment appealed against awarded the plaintiff $300 damages and costs in respect of the creek, but dismissed the claim for the land without costs, and ordered the defendants to keep their culverts in good repair.

The appeal and cross-appeal were heard by MEREDITH, C.J. C.P., RIDDELL, LENNOX, and ROSE, JJ.

E. D. Armour, K.C., for the defendants.

D. O'Connell and J. Wearing, for the plaintiff.

MEREDITH, C.J.C.P., in a written judgment, said that the land of which the plaintiff sought to recover possession was the westerly half of a travelled highway, his contention being that the true easterly boundary of his land ran along the middle of the travelled part of the highway, the whole length of his land. His lot was the north half of 4; the next lot to the east was 5. More than 20 years ago, the owners of the north half of 5 sold to some of their neighbours, for the purposes of a highway, 45 feet in width of lot 5 all along its westerly limit. A provincial land surveyor was employed to run the line between 4 and 5; he ran that line accordingly; and the road was at once made along that line; and it had ever since been a highway, 45 feet in width, intended and supposed to be upon the strip of land purchased for that purpose. The road was said to be now a gravelled road. As the case was not one of a mere right of way over land, but of the purchase and actual possession by the purchasers of land, cutting trees, digging ditches, making line-fences, etc., the plaintiff's right to recover seemed to be barred by the Limitations Act; the possession by the purchasers was sufficient for that purpose. The onus of proof of the true easterly limit of his land was on the plaintiff. He endeavoured to prove that the road was upon his land to some extent; but the trial Judge was quite right in finding that the plaintiff had not satisfied the onus.

On this branch of the case the judgment of the trial Judge should be affirmed, with a variation: that part of it intended to permit further litigation of the question of recovery of possession by the plaintiff of the highway, or any part of it, should be struck out.

Upon the original allowance for road, and at the north-east corner of the plaintiff's land, the creek makes an abrupt turn, forming an elbow, thence running away from the plaintiff's land

in an easterly direction towards the Otonabee river. In the opening of this allowance for road and making it fit to be travelled upon, and some time before the other highway was projected, it was arranged between the Reeve of the Township of North Monaghan and the plaintiff that the difficulties in the making of the road caused by this elbow in the creek should be overcome, as far as practicable, by intercepting the bulk of the water on the north side of the road and sending it down a channel to be cut there, and so prevent its double crossing of the road at the elbow; but that part of the water should be let through a culvert to the south side of the road, enough to supply water for cattle on the plaintiff's land; and this was done to the satisfaction of all concerned. The result of this was, that the plaintiff's right in regard to the flow of the stream was to a flow sufficient for the purpose of watering his cattle, and no more. That was arranged for by two culverts. But, when the new road was opened, it became necessary to carry the now reduced stream, going westward, under this road; and that was done by means of a culvert. The plaintiff complained of the insufficiency of this culvert; and the fact was, that the flow of the water had, in recent years, been appreciably intercepted, and the plaintiff was not getting that flow of water which was intended to be continued after the diversion of the main body.

Upon the whole case, for the purpose of an action for damages only, it could not be said that the trial Judge was wrong in his finding of fact that the stream once reached the plaintiff's land.

The defendants were not bound to supply the water, but they were bound to do nothing to obstruct it. If in the process of nature the course of the stream were changed, or dammed up, so that the plaintiff lost all or any part of the advantages he had from the flow of the stream, the defendants could not be answerable; but, if anything done by them caused the loss, the defendants would be liable. Their duty was not only to make the flow large enough, but to keep it large enough, to take through it enough water for the plaintiff's cattle.

The defendants denied responsibility in respect of this highway, on the ground that it had never been established by by-law of the council or otherwise assumed for public use by the corporation: Municipal Act, R.S.O. 1914 ch. 192, sec. 460 (6). But the road was dedicated to the public by those who opened it; a deed to the township corporation was executed, and was registered by an officer of the corporation; some money was paid by the corporation for repairs done upon the road; and there was no evidence of any repudiation of these acts. Upon the acceptance by the

defendants of the dedication of the land as a highway, the land vested in them, under the provisions of sec. 433 of the Act.

In the circumstances of the case, the plaintiff was not entitled to a perpetual injunction, but was entitled to reasonable damages, which should be assessed at $100.

There should be no order as to costs, either in the Court below or in this Court, success and failure being divided.

LENNOX, J., agreed with the Chief Justice.

RIDDELL, J., after some fluctuation of opinion, agreed in the result.

ROSE, J., also agreed in the result, for reasons stated in writing.

Judgment below varied.

SECOND DIVISIONAL COURT. APRIL 27TH, 1917.

*McTAVISH v. LANNIN AND AITCHISON.

Costs—Security for—Public Authorities Protection Act, R.S.O. 1914 ch. 89, sec. 16—Action against Peace Officers—Entry of Dwelling-house without Search-warrant—Trespass to Land, Goods, and Person—Slander—Arrest without Warrant—Execution or Intended Execution of Duty—Good Defence on Merits—Criminal Code, sec. 30—Discretion.

Appeal by the plaintiff from the order of MIDDLETON, J., 11 O.W.N. 445.

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

R. T. Harding, for the appellant.

R. S. Robertson, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that the action was really one for trespass to the plaintiff's land, goods, and person, and for defamation of character in accusing her, in her own house and before her infant children, of theft, and threatening to take her to gaol for that offence, though they had no intention

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

of doing so unless she was frightened into making a confession of guilt of a crime that had never been committed. The defence was that the defendants were peace officers, and that all that was done by them was done in the due execution of their duties as such officers.

In the first place, the defendants were charged with trespass to land—breaking into the plaintiff's house; and, as they did not go there to apprehend the woman, but only to get evidence against her, it was not possible that that was done in the performance of any duty. According to the testimony of one of the defendants, they went away satisfied that she was not guilty.

In the next place, they were charged with trespass to the woman's goods—searching her house; and, as there was no suggestion that this, or that anything else done by the defendants, was done under a warrant authorising it, they could not be aided by their official capacity.

For the trespass to the plaintiff's person the defendants were in the same position as in regard to the trespass to land: they did not act or intend to act under the provisions of sec. 30 of the Criminal Code—they intended to arrest the woman only if and after she had admitted or shewn that she was guilty, and that time never came.

In respect of the charge of slander, it was difficult to understand what justification the defendants' office, or the law, could afford, or protection give.

The things which a defendant must prove to entitle him to an order for security for costs under sec. 16 of the Public Authorities Protection Act, are: (1) that the things which the plaintiff complains of were done by the defendant in pursuance or execution or intended execution of a statute or of a public duty or authority; and (2) that the defendant has a good defence to the action on the merits or that the grounds of it are trivial or frivolous.

The first requisite was entirely wanting: no statute, public duty, or authority required or justified the defendants' conduct; it could be excused only if leave and license were proved. It is not what a defendant may imagine or believe some statute, duty, or authority justifies: the "intended execution" is of a real, not an imaginary, statute, duty, or authority.

No defence specially applicable to a peace officer had been shewn to any of the plaintiff's four causes of action.

Section 16 is permissive, and means that the Court should in a proper case make the order; and so the real question is, what is a proper case? Applying general principles, and looking into and dealing with the merits so far as necessary to determine

whether there is a defence upon the merits, and also whether the case is one in which the order ought to be made, the conclusion was that this was not a proper case.

There was no warrant for the order in any respect or to any extent; and so the appeal should be allowed with costs of the motion and appeals to be paid to the plaintiff by the defendants forthwith.

RIDDELL and LENNOX, JJ., agreed in the result, each giving written reasons.

ROSE, J., dissented, for reasons stated in writing.

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

SECOND DIVISIONAL COURT. APRIL 27TH, 1917.

*McCONNELL v. McGEE.

Division Courts — Jurisdiction — Division Courts Act, sec. 62(a)— "Personal Action"—Trespass to Land—Title to Land not in Question—Costs.

Motion by the plaintiff to extend the time for appealing from a judgment of the County Court of the County of Huron (adjourned before the Court by a Judge in Chambers).

The motion and also the merits of the proposed appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

L. E. Dancey, for the plaintiff.

W. Proudfoot, K.C., for the defendant.

MEREDITH, C.J.C.P., in a written judgment, said that the proposed appeal was against the ruling of the County Court Judge that the plaintiff's cause of action was one within the jurisdiction of a Division Court, and the Judge's order that the costs of the action should be taxed accordingly (the damages being assessed at $60): see Rule 649 and the County Courts Act, R.S.O. 1914 ch. 59, sec. 40 (1) (*d*). There was no thought of appealing until a recent decision, that Division Courts have not jurisdiction in any case of trespass to land, was noted: Re Harmston v. Woods (1917), ante 23; and the time for appealing without leave had expired.

The learned Chief Justice is of opinion that an action for trespass to land is a "personal action," within the meaning of sec. 62 (1) (*a*) of the Division Courts Act, R.S.O. 1914 ch. 63, and is within the competence of a Division Court, if the title to the land is not brought in question; that the dictum of Anglin, J., in Neely v. Parry Sound River Improvement Co. (1904), 8 O.L.R. 128, 129—"An action for damages for trespass to land is not a personal action"—is erroneous; that Re Harmston v. Woods should be overruled; that the application to extend the time for appealing should be dismissed, and so the ruling of the County Court Judge affirmed in this case, which was one of trespass on the facts of the particular case, formerly called "trespass on the case" or "case" only; and one in which no question of title to land was or could be involved, the parties being tenant and landlord, the plaintiff's claim being for damages for injury to his garden caused by the defendant's cattle, and the one question involved in it, and determined by a jury, being apparently whether the landlord had contracted to keep up the fences between his land and that part of it let by him to the plaintiff.

RIDDELL, J., also read a judgment, in which he discussed the statute and case law with elaboration. His conclusion was the same as that of the Chief Justice.

LENNOX and ROSE, JJ., concurred.

Motion dismissed with costs as of an appeal, including the costs of the application in Chambers.

SECOND DIVISIONAL COURT. APRIL 27TH, 1917.

*MARTIN v. EVANS.

Mortgage — Foreclosure — Final Order — Motion to Open up — Remainder in Land—Limitations Act, R.S.O. 1914 ch. 75, sec. 20—Irregularity in Judgment—Invalidity of Final Order—Laches—Estoppel—Parties—Representative of Estate of Deceased Mortgagor.

Appeal by James Evans and William Evans the younger from the order of MIDDLETON, J., ante 52.

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

W. S. MacBrayne, for the appellants.

E. D. Armour, K.C., for the executors of the deceased plaintiff, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that two questions had been raised: (1) whether the final order of foreclosure, obtained upon præcipe, in this action, was invalid; and, if so, (2) whether the appellants and those they represented in this matter had lost all right and title to the lands in question under the Limitations Act, or were precluded from making any claim to them by laches or estoppel; and laches might be urged as a ground for sustaining the final order of foreclosure, and also as a ground for rejection of any claim for redemption, even if the order were invalid.

After an examination of the facts and of the proceedings which led up to the final order, the Chief Justice said that it was wholly invalid and must be set aside, not as an indulgence, but ex debito justitiæ: Hoffman v. Crerar (1899), 18 P.R. 473, 19 P.R. 15; Appleby v. Turner (1900), 19 P.R. 145, 175; Anlaby v. Prætorius (1888), 20 Q.B.D. 764; Muir v. Jenks, [1913] 2 K.B. 412; Crane & Sons v. Wallis, [1915] 2 I.R. 411.

With the final order for foreclosure gone, all other questions fell to the ground. What was left was a subsisting action for foreclosure, in which, until final order of foreclosure, the defendants were entitled to redeem. The Statute of Limitations was out of the question; so too were laches and estoppel; and the pending action saved the respondents from the Statute of Limitations, which would have prevented an action being brought now.

A legal representative of the estate of the father of the appellants is a necessary party to this application; and such a representative should be appointed and added, as undertaken by counsel for the appellants.

The appeal should be allowed and the judgments and final order of foreclosure be discharged. The respondents can then proceed to enforce their mortgage, and the appellants can redeem, both according to their rights under it. The appellants should have their costs here and below.

RIDDELL and ROSE, JJ., agreed that the appeal should be allowed.

LENNOX, J., dissented, for reasons briefly stated in writing.

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

SECOND DIVISIONAL COURT. APRIL 27TH, 1917.

CLARK v. HOWLETT.

Sale of Goods—Action for Balance of Price of Drove of Cattle—Entire Contract—Acceptance and Receipt of Part—Property Passing—Statute of Frauds—Part Performance—Evidence—Finding of Jury—Finding of Trial Judge—Appeal.

Appeal by the defendant from the judgment of the County Court of the County of Middlesex in favour of the plaintiff for the recovery of $448 as the balance due on the price of cattle sold by the plaintiff to the defendant.

The appeal was heard by MEREDITH, C.J.C.P., LENNOX, J., FERGUSON, J.A., and ROSE, J.

W. R. Meredith, for the appellant.

J. M. McEvoy, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that three questions of fact arose: (1) whether the defendant bought from the plaintiff the 15 head of cattle in question; (2) whether the defendant accepted and actually received part of them; and (3) whether the property in them passed to the defendant so as to give to the plaintiff a right of action for the price of them, after such delivery of them as was made by him.

The plaintiff's story was, that the defendant bought from him, in one entire transaction, the 15 head of cattle, which were to be delivered by the plaintiff at a place named by the defendant, on the following day; the defendant's story was, that he bought from the plaintiff, in one transaction, 10 out of 14 head of cattle owned by the plaintiff, to be brought to a place of delivery named by him, on the following day, when he was to make his selection of 10, and that he bought, on the same occasion, but in a separate transaction, another animal, a bull, at a separate price, and that the bull was to be delivered by the plaintiff at the same time and place as the others. The 15 head were brought by the plaintiff to the place agreed upon; the defendant accepted and received and paid for and took away the bull; but the other cattle were left there, the parties not being able to agree as to what the bargain was.

At the trial a jury was sworn, but the only question left to it for determination was, whether the assertions of the plaintiff, or those of the defendant, at the trial, were in accordance with

the fact—whether the story of the plaintiff or that of the defendant, told in the witness-box, was the true story of all that took place.

It must be considered that, by mutual assent, the trial Judge was to determine all matters of fact not submitted to and found by the jury.

The trial Judge found and determined, having regard to the facts found by the jury, that the acceptance and appropriation to his own use of the bull by the defendant was an acceptance and actual receiving of part of the goods bought under the contract, as found by the jury, so as to give the plaintiff the right to enforce that contract notwithstanding a plea of the Statute of Frauds.

The evidence adduced at the trial was sufficient to support that finding—whatever might be said of the case if the defendant had promptly returned the bull after the dispute in regard to his rights as to the other animals arose. According to the finding of the jury, there was but one entire contract; and so the defendant could rightly accept and receive the animal only as a part performance of that contract; otherwise his retention of it was unlawful. In all the circumstances of the case, it could not be said that the Judge was wrong in this respect: see Page v. Morgan (1885), 15 Q.B.D. 228; Taylor v. Smith, [1893] 2 Q.B. 65; and Abbott & Co. v. Wolsey, [1895] 2 Q.B. 97.

The question whether the property in the cattle passed to the purchaser was one of intention; and, upon the finding of the jury, the only proper conclusion was, that the property passed to the buyer before action brought. There was no evidence as to when payment was to be made; but it should be found that payment was to be made at the time of delivery, the next day after the sale.

The Statute of Frauds did not make the contract illegal or otherwise void; it but prevented the enforcement of it if either party chose to resist enforcement under its provisions. The delivery of the bull being a compliance with the provisions of that enactment, the property in the cattle passed to the defendant; and, there having been a delivery of all of them at the time and place agreed upon, the plaintiff was right in suing for money payable by the defendant to him for goods sold by him to the defendant; and so the appeal should be dismissed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

SUTHERLAND, J. APRIL 23RD, 1917.

RE SINGER AND KATZ.

Arbitration and Award—Motion to Set aside Award Valid on its Face—Objections to Award—Witnesses not Sworn—Arbitration Act, R.S.O. 1914 ch. 65, schedule A., cl. (j)—No Objection Raised before Arbitrators—Exclusion of Parties during Sittings of Arbitrators—Absence of Mistake—Award Covering all Matters in Dispute—Dismissal of Motion.

Application by Moses D. Katz and Esther Katz to set aside an award of three arbitrators made upon a submission of all the differences and disputes outstanding between the applicants, on the one side, and Jacob Singer and Solomon Singer, on the other side, arising out of a partnership in the business of manufacturing and dealing in tallow.

The application was heard in the Weekly Court at Toronto.
N. D. Tytler, for the applicants.
J. Singer, for the respondents.

SUTHERLAND, J., in a written judgment, set out the facts and dealt with the many grounds upon which the application was based. Most of the grounds related to questions of evidence and fact; these were all decided against the applicants.

It was objected that the arbitrators did not at the arbitration take the viva voce testimony of witnesses under oath, as required by the Arbitration Act, R.S.O. 1914 ch. 65, schedule A., cl. (*j*). No objection was, however, taken to this during the course of the arbitration; none of the witnesses on either side appeared to have been sworn before giving their testimony. The point was not now open to the applicants: Russell on Awards, 9th ed., p. 141; Ridoat v. Pye (1797), 1 B. & P. 91; Biggs v. Hansell (1855), 16 C.B. 562.

Another ground of objection was, that the arbitrators, at their sittings, at times excluded the parties to the arbitration. There was no satisfactory evidence to support this objection. No mistake in the legal principles upon which the award was based was manifest, and the arbitrators did not admit any such mistake.

The submission was wide in its terms. The findings of fact were full and definite, though the manner in which they were

arrived at was not fully indicated. The award appeared to deal with and dispose of all the differences and disputes outstanding between the parties with reference to the partnership matters, which were admitted to have been the only matters in controversy between the parties; and the award was valid on its face.

Reference to Dinn v. Blake (1875), L.R. 10 C.P. 388; McRae v. Lemay (1890), 18 S.C.R. 280; Re Macdonald and Macdonald (1911), 3 O.W.N. 1.

Motion dismissed with costs.

SUTHERLAND, J. APRIL 24TH, 1917.

EVANS v. EVANS.

Husband and Wife—Alimony—Quantum—Reference—Finding of Nominal Sum—Appeal—Maintenance of Infant Child of Parties—Costs.

Appeal by the plaintiff from the report of the Local Master at Cayuga, upon a reference in an action for alimony, finding the nominal sum of $1 per annum as the sum which the defendant should pay to the plaintiff for alimony; and motion by the defendant for judgment confirming the report and for costs.

The appeal was heard in the Weekly Court at Toronto.

J. E. Jones, for the plaintiff.

C. J. Holman, K.C., for the defendant.

SUTHERLAND, J., in a written judgment, set out the facts and referred to the proceedings in the action (see 9 O.W.N. 493, 10 O.W.N. 77, 11 O.W.N. 34), and to a sum of $3,000 paid by the defendant to the plaintiff before action; he also cited Eversley on Domestic Relations, 3rd ed. (1906), p. 169; McCulloch v. McCulloch (1863), 10 Gr. 320, 322; Cowie v. Cowie (1909), 13 O.W.R. 599, 603; Morgan v. Morgan (1912), 3 O.W.N. 1220, 1222; and said that he was not able to conclude that the Master had erred in any way or that there was any justification for varying or modifying his report. The appeal must be dismissed and the report should be confirmed.

The custody of the infant son (two years old) of the plaintiff and defendant did not come up in such a way that it could be properly dealt with on this motion; but, if the defendant would agree that the plaintiff should have the custody of this child

and agree to pay an annual sum to the plaintiff for its support and maintenance, and if the plaintiff would agree to keep and maintain it, the order dismissing the appeal might include a term to that effect. Such an agreement, so evidenced, might preclude future contention and litigation over the custody and maintenance of this child.

The reference had been fruitless to the plaintiff as a means of obtaining substantial alimony. Perhaps the undertaking given by the defendant when the case was before the Appellate Division was inconsiderately given. That undertaking led in the end to the reference, and the defendant must pay the costs thereof.

No order as to the costs of the appeal or the costs of the motion.

CLUTE, J. APRIL 26TH, 1917.

*SHAW v. HOSSACK.

Promissory Notes—Money Lent—Exaction of Excessive Rate of Interest—Ontario Money-Lenders Act, R.S.O. 1914 ch. 175, sec. 4—Dominion Money-Lenders Act, R.S.C. 1906 ch. 122, secs. 6, 7—Harsh and Unconscionable Transactions—Reduction of Rate—Account—Costs—Contemporary Agreements in Respect of Notes—Validity.

Action upon four promissory notes made by the defendants, husband and wife.

The action was tried without a jury at Toronto.

W. J. McCallum, for the plaintiffs.

J. M. Ferguson and D. J. Coffey, for the defendants.

CLUTE, J., in a written judgment, said that the plaintiffs claimed interest upon each and all of the four notes at 2 per cent. per month; but only one of the four on its face bore interest at that rate. The rate was stipulated for, in respect to the other notes, by collateral writings. Various securities were assigned by the defendant D. C. Hossack to the plaintiffs as additional security for the loans in respect of which the notes were given. The defendants set up that the interest was excessive, and that the transactions were harsh and unconscionable, and counterclaimed for relief from excessive charges and for an accounting at a reasonable rate. The notes were several times renewed and interest paid at the rate of 2 per cent. per month.

By consent of the parties, judgment had been entered for the principal advanced, and it was agreed that, if the Court should find that any sum was due in respect of overcharges of interest, it should be deducted from the amount for which judgment had been entered.

The plaintiffs formerly were builders and contractors, and were now engaged in manufacturing hats. They also carried on money-lending, and had made other loans at 2 per cent. per month.

The learned Judge found that the plaintiffs were money-lenders within the meaning of the Ontario Money-Lenders Act, R.S.O. 1914 ch. 175, and also within the meaning of the Dominion Money-Lenders Act, R.S.C. 1906 ch. 122; that the transactions under which the notes sued on were given were harsh and unconscionable: sec. 4 of the Ontario Act; and that, having regard to the risk and to all the circumstances, the cost of the loans and each of them was excessive.

Reference to secs. 6 and 7 of the Dominion Act; Bellamy v. Porter (1913), 28 O.L.R. 572; Bellamy v. Timbers (1914), 31 O.L.R. 613.

The transactions should be opened up and interest allowed at the rate of 12 per cent. per annum only, all proper deductions made in respect of sums above that amount, and the amount of the judgment entered reduced accordingly.

If the parties cannot agree upon the figures, there will be a reference to take an account.

The defendants should have the costs of their defence and counterclaim subsequent to the entry of judgment, and the costs of the reference, if any.

A contemporary agreement in respect of a note may be valid, whether oral or in writing: see Maclaren on Bills and Notes (1909), pp. 46, 47, 48; Young v. Austen (1869), L.R. 4 C.P. 553; Brown v. Langley (1842), 4 M. & G. 466; Salmon v. Webb (1852), 3 H.L.C. 510.

CLUTE, J. APRIL 27TH, 1917.

RE WRIGHT.

Will—Devise to Town Corporation in Trust to Provide Home for Aged Women—Inadequacy of Property Devised for Purpose—Discretion of Council—Application in Aid of Erection of House of Refuge for County—Cy Près Doctrine—Selection of Aged Women for Benefits of Home.

Motion by the Corporation of the Town of Napanee, upon originating notice, for an order determining a number of ques-

tions arising upon clause 6 of the will of Richard James Wright, deceased.

The motion was heard at the non-jury sittings at Napanee, as in Weekly Court.

W. S. Herrington, K.C., for the applicants.

W. G. Wilson, for the Corporation of the County of Lennox and Addington.

T. B. German, for the executors.

D. H. Preston, K.C., for the Official Guardian.

CLUTE, J., in a written judgment, said that clause 6 contained a devise of a house and lot in Napanee, after the death of the testator's wife, "to the Municipal Council of the Corporation of the Town of Napanee in trust to be applied in providing a home for aged women, and to best carry out the said purpose the said . . . council . . . if they deem it wise, are to have the privilege of selling and converting the said property into money and in that form apply it to the said purpose in such way as they think best, and the said . . . council to select the particular aged women who are to receive the benefits of such home."

There is no house of refuge nor home of any kind for aged people in the county of Lennox and Addington; and the trust fund ($3,203.03) is said to be inadequate for the purpose of building a suitable home. The town council, on the 5th March, 1917, resolved to turn the trust fund over to the Corporation of the County of Lennox and Addington to be applied for the purpose of aiding in the erection of a house of refuge in the county.

The county corporation had received another considerable gift for the erection of a house of refuge in the county, and the county council was willing to accept the trust fund for that purpose. All parties represented upon the motion were in favour of transferring the fund to the county corporation accordingly.

The learned Judge was of opinion that the course suggested was the best that could be taken to effect the object of the testator, and that the town corporation had power, both under the terms of his will and applying the doctrine of *cy près*, to follow that course.

The questions submitted should be answered in the affirmative with one modification, viz., an arrangement may (if it can) be made with the county corporation to erect a ward or section for aged women in a house of refuge to be erected by the county corporation.

As to the selection of the aged women who are to receive the

benefit of the home, it may be done through the reeve of the town, who is a member ex officio of the county council.

The town council would be justified in applying the income to the care and maintenance of aged women in a private house or elsewhere than in "a home for aged women."

Reference to Morrison v. Bishop of Fredericton (1909), 4 N.B. Eq. 162; Power v. Attorney-General for Nova Scotia (1903), 35 S.C.R. 182; Jarman on Wills, 5th ed., p. 200; Theobald on Wills, 7th ed., p. 375; Re Trenhaile (1911), 3 O.W.N. 355; the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, secs. 2, 14.

Costs of all parties out of the estate.

MASTEN, J. APRIL 27TH, 1917.

OSBORNE v. ROOS.

Landlord and Tenant—Lease of Part of Building for Theatre—Covenant of Landlord to Keep Demised Premises Heated—Breach—Damages.

Action for damages for breach of a covenant; tried without a jury at Kitchener.

J. M. McEvoy and J. A. Scellen, for the plaintiff.
M. K. Cowan, K.C., and H. J. Sims, for the defendant.

MASTEN, J., in a written judgment, said that the plaintiff was the owner of a moving picture "show" and tenant of the defendant's premises upon which the "show" was operated. In the lease the defendant covenanted to "keep the said premises properly heated at his own expense." The plaintiff and one Zuber occupied different parts of the same building—the defendant's building—Zuber using his part as an hotel. The boiler from which the theatre was supplied with heat was in the basement of the Zuber hotel, and from this as a common source was derived the steam for heating both the hotel and the theatre; and it was Zuber's duty on behalf of the defendant to keep the theatre warm.

The learned Judge finds that the theatre was not at all times kept adequately warm—that the covenant had not been fulfilled.

As to damages, sufficient had been shewn to indicate that there was some loss of revenue and that there would have been larger audiences if the theatre had been more comfortable.

Judgment for the plaintiff for $300 damages with County Court costs and no set-off.

CLUTE, J. APRIL 27TH, 1917.

*DOMINION SUPPLY CO. v. P. L. ROBERTSON MANUFACTURING CO. LIMITED.

Contract—Sale of Goods by Manufacturers—Condition as to Prices at which Sales to be Made by Vendee to Customers—Criminal Code, sec. 498 (b), (d)—Restraint and Injury to Trade and Commerce—Unduly Preventing or Lessening Competition—Combination or Conspiracy—Agreement—Public Policy—Action for Breach of Contract—Counterclaim—Costs.

Action to recover damages for the non-delivery of a balance of 15,000 kegs of nails purchased by the plaintiff (one Samwell, carrying on business in the trade name of "The Dominion Supply Company"), from the defendant company, in November, 1915.

The defendant company delivered 2,581 kegs. Specifications were put in for 7,500 kegs which were not delivered, and the defendant company refused to deliver the same, and assumed to cancel the contract, upon the ground that the plaintiff had become disentitled to receive further delivery, owing, as it was alleged, to his breach of contract in selling under the association price.

The defendant company pleaded that its contract with the plaintiff was subject to a condition that the plaintiff would sell the nails to his customers at the association price; that the plaintiff sold at a price below the association price; and had thus broken the contract. The defendant company counterclaimed for $1,000 agreed upon as the amount due under the contract.

In reply, the plaintiff said that, if there was any such condition, it was illegal and in contravention of sec. 498 of the Criminal Code, and therefore not binding on the plaintiff.

The action and counterclaim were tried without a jury at Kingston.

J. L. Whiting, K.C., for the plaintiff.

J. B. Clarke, K.C., for the defendant company.

CLUTE, J., in a written judgment, said that the plaintiff admitted that he sold at prices less than the association prices, and asserted a right to do so. He denied that there was any such limitation in the contract as was alleged by the defendant company.

In the view of the learned Judge, the whole correspondence between the parties was so connected as to be admissible to shew what the contract was; and from the correspondence it clearly appeared that the contract was subject to the provision alleged by the defendant company. Having regard to all the facts and the nature of the contract and what took place between the parties after the defendant company heard of the breach of contract by the plaintiff, the defendant company was justified in regarding the plaintiff's action as a repudiation of his part of the contract and a refusal in advance to be bound by it, and the defendant company was justified in treating it as cancelled and in refusing to fill the further specifications after the breach.

If sec. 498 of the Criminal Code was applicable, and the illegal part of the contract could not be separated, but formed part of the consideration, the whole contract was void; the plaintiff, being a party to it, could not sue upon it, and so the plaintiff's action would fail.

The learned Judge, after quoting sec. 498 of the Code, making it an indictable offence to conspire, combine, agree, or arrange with any other person (*b*) "to restrain or injure trade or commerce in relation to any . . . article or commodity . . . (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, . . . or supply of any . . . article or commodity," referred to Hately v. Elliott (1905), 9 O.L.R. 185; Rex v. Elliott (1905), 9 O.L.R. 648; Wampole & Co. v. F. E. Karn Co. Limited (1906), 11 O.L.R. 619; Rex v. Beckett (1910), 20 O.L.R. 401, 427; Weidman v. Shragge (1912), 46 S.C.R. 1; Stearns v. Avery (1915), 33 O.L.R. 251; and to a number of English and American cases.

The result of a consideration of all the cases was to shew that sec. 498 was not to be construed as in accordance with the common law, but in the way indicated by the Canadian cases.

The contract between the parties included the agreement on the part of the plaintiff to maintain association prices. It was because the plaintiff refused to be bound by this clause of the contract that the defendant company refused to make further deliveries.

The agreement was made on the 14th May, 1914, between

some fifteen firms and companies, of which the defendant company was one.

The learned Judge set out the principal provisions of the agreement; and said that, in his opinion, the contract between the parties, including as it did the limitations provided by the association agreement, was ex facie a breach of clauses (*b*) and (*d*) of sec. 498. Having regard to the scope of the association, including all Canada, the fixing of the prices of the manufacturers, the wholesalers, and the jobbers, to retailers, precluded competition in the trade of the entire product of this industry in Canada; and it must, therefore, unduly restrain and injure trade and commerce in relation to such articles, and unduly prevent or lessen competition in the purchase, barter, and sale of the same. The agreement was contrary to public policy and in breach of the Code.

The plaintiff was, therefore, not entitled to sue the defendant company for a breach of the contract; and the defendant company was not entitled to recover the $1,000 agreed upon as the amount due under the contract.

If the plaintiff should elsewhere be held entitled to recover, his damages should be assessed at $1 per keg for the number specified, in addition to the 2,500 delivered.

Both action and counterclaim should be dismissed; and, as both parties were in pari delicto, there should be no order as to costs.

MIDDLETON, J. MAY 1ST, 1917.

DANFORTH GLEBE ESTATES LIMITED v. HARRIS.

Injunction—Application for Interim Order—Nuisance—Irreparable Injury—Balance of Convenience—Glue Factory—Established Business—Refusal to Interfere.

Motion by the plaintiffs for an interim injunction to restrain a nuisance from a glue and fertiliser factory.

The motion was heard in the Weekly Court at Toronto.

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

W. N. Tilley, K.C., and A. C. Heighington, for the defendants.

MIDDLETON, J., in a written judgment, said that there could be no doubt that the glue factory had in times past been objectionable to residents in its neighbourhood; and there was, on the material, reason to suppose that some inconvenience and annoyance would be occasioned in the future; but this was not enough to entitle the plaintiffs to an interim injunction.

Among other things, a plaintiff must shew that an injunction before the hearing is necessary to protect against irreparable injury. Mere inconvenience is by no means enough. Irreparable injury means something that cannot be atoned for by damages or in some other way adequately remedied.

Again, the balance of convenience must always be considered; and the interference with an established industry in actual operation is regarded as a serious element.

There are many cases in which an interim injunction has been granted to prevent the establishment of a business which is likely to result in a nuisance, but none in which a business established and in operation for some time and which is alleged to constitute a nuisance has been interfered with by an interim order.

This business was established in 1887. In December, 1906, a true bill was found for a nuisance at the General Sessions. The prosecution was not pressed, for some reason; and, after the indictment had been traversed from time to time till May, 1908, it was dropped from the list; and nothing more had been done.

An action, Smyth v. Harris, was begun in October, 1912; and, after a motion for an injunction, a speedy trial was arranged, but a settlement was made—the exact nature was not disclosed.

The matter remained dormant until the commencement of this action on the 2nd November, 1916; notice of trial was given on the 31st March; and the case stood to be heard in its turn.

What was really sought was not an interim injunction, but that this case should be given priority over other cases standing for hearing.

The plaintiffs said that the motion had been delayed till they were ready for trial. The defendants said that, not anticipating a trial out of ordinary course, they were not ready.

The learned Judge thought that he should not interfere. The action was now ready for hearing, and it would not be right to displace other actions, or to force the defendants to trial out of ordinary course. There had been no great diligence, there would be no irreparable injury, and the defendants might be prejudiced.

The defendants were negotiating for the purchase of a new site; and, if the arrangements could be carried through, they would move from the present location; in which event the action might not have to be prosecuted.

The material shewed that recently the smells complained of had not been as bad as formerly. The defendants should undertake to use all reasonable endeavours to ameliorate the condition until the trial.

Costs to be in the cause unless the trial Judge should otherwise direct.

MIDDLETON, J., IN CHAMBERS. MAY 2ND, 1917.

*REX v. JACKSON.

Judicial Decisions—Effect of—Judicature Act, sec. 32—Motion to Quash Conviction—Decision upon—Dictum on Motion for Leave to Appeal—Application for Discharge upon Habeas Corpus.

Motion by the defendant, on the return of a habeas corpus, for an order for his discharge from custody under a warrant of commitment issued pursuant to the conviction in question in Rex v. Jackson (1917), ante 77, 161.

T. N. Phelan, for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that in this case the Chief Justice of the King's Bench refused to quash the conviction (ante 77). The Chief Justice of the Exchequer was applied to for leave to appeal. He was of opinion (ante 161) that there was no authority to permit an appeal, but indicated that he did not agree with the view expressed on the motion to quash. As there was no jurisdiction to entertain the motion, this opinion had no binding effect so far as Middleton, J., was concerned; and, on the other hand, the view acted upon by the Chief Justice of the King's Bench was binding.

A motion was now made on the return of a habeas corpus, to discharge the prisoner, and the learned Judge was asked to sit in review upon the decision of another Judge. This was the thing prohibited by the Judicature Act, sec. 32. Middleton, J., understood it to be his duty to follow the decision of the Chief Justice of the King's Bench, leaving all criticism to the appellate Court.

Without expressing any independent opinion, he remanded the prisoner to custody.

MIDDLETON, J., IN CHAMBERS. MAY 2ND, 1917.

RE SOLICITOR.

Solicitor—Bill of Costs—Solicitors Act, R.S.O. 1914 ch. 159, sec. 34—Itemised Bill—Lump Charge.

Motion by the client for an order directing the solicitor to deliver an itemised bill of costs.

P. White, K.C., for the client.
W. N. Tilley, K.C., for the solicitor.

MIDDLETON, J., in a written judgment, said that, according to decisions which were binding upon him, a bill which details the services rendered and is followed by a lump charge is not a compliance with the Solicitors Act, R.S.O. 1914 ch. 159, sec. 34.

The learned Judge was not called upon to express any opinion as to the extent which the solicitor, who was also a barrister, might go in making a lump charge for services rendered by him as a barrister.

The situation created by the statute and the decisions upon it was most unfair to the profession and seemed to call for remedy. Where a professional man is called upon to advise upon a complicated situation and to take charge of investigations and negotiations, his fee can be better estimated by the result attained and the care and skill shewn in what was done than by any summation of items each attached to an individual move in the game played with living persons.

But, with reference to the matter under discussion, common sense and case-law had long since parted company, and by statute the Judge was bound to follow the cases.

There should be an order for delivery of an itemised bill; but no costs of the motion should be awarded.

MIDDLETON, J. MAY 2ND, 1917.

*RE GALBRAITH AND KERRIGEN.

Deed—Conveyance of Land—Defect in Form—Omission of Words Identifying Parties as Grantor and Grantee—Inference—Objection to Title.

Motion by Galbraith, the vendor, under the Vendors and Purchasers Act, for an order declaring that an objection made by the purchaser, Kerrigen, to the title to land, the subject of an agreement for sale and purchase, was invalid.

The motion was heard in the Weekly Court at Toronto.
D. G. M. Galbraith, for the vendor.
J. T. Richardson, for the purchaser.

MIDDLETON, J., in a written judgment, said that on the 27th April, 1915, one Tisdall, the owner of the land, sold to Galbraith. A deed was executed by Tisdall and his wife, but it was defective in form. Tisdall was named as party of the first part, Galbraith as party of the second part, and Tisdall's wife as party of the third part. The printed form used contemplated the addition of the words "hereinafter called the grantor" after Tisdall's name and "hereinafter called the grantee" after Galbraith's name, but these expressions were omitted. The deed proceeded, "The grantor doth grant unto the grantee" etc., etc.—"The party of the third part, wife of the party of the second part," bars her dower. A new deed cannot now be obtained.

Reference to Lord Say and Seal's Case (1711), 10 Mod. 41; Mill v. Hill (1852) 3 H.L.C. 828, 847, 848, 851, 852.

The deed was intended to convey the land. The parties to the deed were known and named. The owner would primâ facie be the grantor. He and his wife alone signed. His wife bars her dower. From this it was to be assumed that he was the grantor, and Galbraith, the remaining party, the grantee. All this, derived from the deed itself, was sufficient to shew that the objection was not well taken.

Order declaring accordingly.

MIDDLETON, J., IN CHAMBERS. MAY 3RD, 1917.

HOEHN v. MARSHALL.

Writ of Summons—Substituted Service—Writ Coming to Knowledge of Defendant before Expiry of Time for Appearance—Motion by Defendant to Set aside Service—Irregularities in Papers—Defendant not Misled—Costs—Practice.

Motion by the defendant to set aside an order for substituted service of the writ of summons, and the service thereof—the service being attacked on account of many irregularities in the papers.

H. S. White, for the defendant.
G. C. Campbell, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the object of service is to afford the defendant notice of the writ. This had

been attained; the papers had come to the defendant's knowledge, and she had ample time to appear and defend. In these circumstances, no good purpose could be served by setting aside the service. No case was found in which a defendant was permitted to set aside substituted service where there had been no prejudice—the papers having been received in time to enable an appearance to be entered. The situation would be very different if judgment had been signed before the process reached the defendant.

The plaintiff's solicitor had been diligent in the making of many errors, and the defendant's solicitor had been careful in searching for them. None of them could in any way mislead.

In Dickson v. Law, [1895] 2 Ch. 62, a motion to set aside a writ, because of somewhat similar errors, was dismissed with costs. In other cases the rule had been laid down that the Court ought not to interfere when the errors were not such as to mislead—e.g., where there was no place for entry of appearance, the defendant was not misled, for the writ was shewn to have been issued from the office of a local registrar, and the defendant's solicitor knew well enough what to do.

No one was seriously embarrassed in this case by the use of the words "High Court Division" at the head of the writ. The other objections had even less merit.

The case cited should not be followed as to costs; to give the costs to the plaintiff would only reward laxity of practice; nor should the defendant have costs; to give her costs would encourage motions without substance. Leaving each party to bear his and her own costs might serve a good purpose.

Motion dismissed; the time for appearance and defence being extended for 6 days after the date of this order.

MIDDLETON, J. MAY 4TH, 1917.

*RE LOSCOMBE.

Trusts and Trustees—Marriage Settlement—Appointment of New Trustee—Power of Life-tenants to Appoint—Loss of Writing Conferring Appointment—Recognition of Trustee by Deed of Life-tenants—Construction of Settlement-deed—"Surviving Children"—Children of Children not Surviving Excluded.

Motion by E. W. Loscombe, as trustee under a marriage settlement, for the advice and direction of the Court as to the carrying out of the trusts of the settlement.

The motion was heard in the Weekly Court at Toronto.

W. F. Kerr, for E. W. Loscombe and F. C. Loscombe.

D. B. Simpson, K.C., for H. C. Loscombe, Blair T. Reid, C. W. Loscombe, and George S. Reid.

C. J. Holman, K.C., for Katie Klosse.

MIDDLETON, J., in a written judgment, said that the late Robert Russell Loscombe, on the 3rd March, 1873, made an ante-nuptial settlement in view of his approaching marriage with Catherine Reid. He was then a widower with six children, and Mrs. Reid a widow with three sons. The marriage was duly solemnised, and one child, Ernest W. Loscombe, was issue of the marriage. The settlor died in October, 1915— his wife having predeceased him, in August, 1914. Annie Burnham, a daughter of the settlor, predeceased him and his wife, and left her surviving a daughter, Katie Klosse, who claimed a share in the property to be distributed after the death of the settlor and his wife.

It was objected that E. W. Loscombe was not duly appointed and was not in fact trustee under the settlement. The original trustees were two in number, and both were now dead. Under the deed, the settlor and his wife had power to appoint new trustees if any trustee should die or become incapable of acting. No appointment could be found; but on the 26th August, 1904, a deed was executed by the settlor and his wife, which recited the settlement, the death of Fisher, the incapacity of Cameron, and that E. W. Loscombe was appointed trustee. This deed amounted to an appointment and cured any irregularity or defect in any former appointment: Poulson v. Wellington (1729), 2 P.Wms. 533; In re Farnell's Settled Estates (1886), 33 Ch.D. 599. The objection failed.

The property was by the deed conveyed to trustees for the benefit of the husband for life and on his death for the benefit of the wife for life, charged in each case with the maintenance of the children, "and from and after the decease of the survivor" upon trust for the support, education, and maintenance of the said children respectively as aforesaid until the youngest child becomes of the age of 21 years, when the trustees "shall sell . . . the property . . . and shall divide the proceeds of such sale, as well as all other moneys appertaining to the said trust, between the surviving children of the said Robert R. Loscombe and Catherine Reid and of either of them and the children of the said intended marriage share and share alike." There was no clause in the deed making any provision for the children of any child who might predecease, and the only gift to children was in the direction to divide, above quoted.

Reference to Wakefield v. Maffet (1885), 10 App. Cas. 422; Howgrave v. Cartier (1814), 3 V. & B. 79, 85, 86; Wakefield v. Richardson (1883), 13 L.R. Ir. 17.

No rule or case justifies a declaration that, when the settlor directs his property to be divided among those who survive, he means that the division shall include the children of those who do not survive. Nor can it be declared that by "surviving children" are meant those who attain 21 and do not survive the period mentioned.

It should be declared that Katie Klosse is not entitled to share in the distribution. Costs of all parties out of the fund.

FLEXLUME SIGN CO. LIMITED v. GLOBE SECURITIES LIMITED—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 23.

Appeal—Application for Leave to Appeal from Order of Judge in Chambers—Rule 507.]—Motion by the defendants, under Rule 507, for leave to appeal from the order of MIDDLETON, J., ante 138. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he had no reason to doubt the correctness of the order, and there was no other ground on which leave should be granted. Leave refused. Costs of the motion to the plaintiffs in any event. F. Arnoldi, K.C., for the defendants. A. C. McMaster, for the plaintiffs.

RE CANADIAN PEAT CO. LIMITED—MIDDLETON, J., IN CHAMBERS—APRIL 24.

Appeal—Motion to Extend Time for Appealing after Expiry—Order of Master in Winding-up Matter Refusing to Set aside Sale of Property—No Substantial Question on Merits—Refusal of Motion.]—Motion by a creditor for an order extending the time for appealing from an order of a Local Master refusing to set aside a sale of property in a winding-up matter. MIDDLETON, J., in a written judgment, said that the chance of any success upon an appeal was exceedingly small. The applicant said that the property, sold for $4,250, ought, if such steps were taken as he thought necessary, to bring $5,000, or $750 more. His claim was $52.70, out of some $7,000, so that his share, if he succeeded and his success brought about the increased price, would be a very small sum. Sentiment and not the money in question

prompted this motion. When there is a right to prolong litigation, the Court is slow to interfere; but, when the right is lost, and an indulgence is asked, the applicant must shew, among other things, some substantial question having an appearance of merit. When this is not shewn, those who have slumbered upon their rights until some "statute of repose" has run, waken too late. Motion dismissed with costs fixed at $25 to each respondent. P. E. F. Smily, for the applicant. F. D. Kerr, for the purchaser. F. Wearing, for the liquidator.

RE BUTCHER—MIDDLETON, J., IN CHAMBERS—APRIL 25.

Infant—Custody—Neglected Child—Children's Aid Society—Rights of Parents—Acquired Rights of Foster-parents—Welfare of Child.]—Motion by the father and mother of a boy of twelve years of age for an order, upon the return of a habeas corpus, directing that the custodian of the boy, one Albert Moody, a farmer in Haliburton, with whom the boy was placed by the Children's Aid Society of Peterborough, shall deliver the boy to the applicants. The learned Judge, upon a careful examination of the evidence before him, came to the conclusion that, on the whole case, the child's interest will be best served by leaving him where he is. He also said that, when once the children have been taken from the parents and made wards of the Children's Aid Society, and are adopted, the foster-parents have rights that cannot be lightly disregarded. The parents have forfeited their natural rights, and others have acquired rights. Motion dismissed; no costs. G. N. Gordon, for the applicants. A. W. Ballantyne, for the Children's Aid Society of Peterborough and Moody, respondents.

DEISENROTH v. TORONTO BOARD OF EDUCATION—LATCHFORD, J. —APRIL 25.

Contract—Building Contract—Breach by Proposed Building-owner—Loss of Contractor—Damages.]—Action for damages for loss sustained by the plaintiff by reason of the breach of a contract made in September, 1914. The plaintiff, a contractor, was to erect a school building in High Park, and the defendants were to

pay therefor $9,953. The defendants, in January, 1916, determined not to proceed with the building, and notified the plaintiff of their decision. No building was done by the plaintiff, but drawings had been prepared and time spent in arranging for the purchase and supply of material. The defendants paid $300 into Court. The action was tried without a jury at Toronto. LATCHFORD, J., set out the facts in a written judgment, and referred to Ontario Lantern Co. v. Hamilton Brass Manufacturing Co. (1900), 27 A.R. 346, for the general principles applicable. Having regard to the whole case, he was of opinion that the $300 paid into Court was insufficient to reimburse the plaintiff for the damage she sustained; and he assessed the damages at $500, and directed that judgment be entered for the plaintiff for that amount with costs on the County Court scale without set-off. George Wilkie, for the plaintiff. W. J. McWhinney, K.C., and S. Rogers, for the defendants.

GOAD v. KIELY SMITH & AMOS—LENNOX, J.—APRIL 25.

Broker—Dealings for Customer on Margin in Company-shares—Commission—Extra Charges of Agents—Contract—Sale-notes—Alleged Oral Variation—Selling out without Notice—Action for Damages—Costs.]—Action by George Goad against a firm of stock-brokers to recover damages for an alleged breach of contract in selling shares of a company's stock ("Industrial Alcohol") carried by the defendants for the plaintiff on margin, without notice to the plaintiff, and for moneys alleged to have been overpaid to the defendants, etc. The action was tried without a jury at Toronto. LENNOX, J., in a written judgment, said that there was a distinct agreement and understanding as to the rate of commission to be paid the defendants for such services as they directly performed, and this was not in dispute; but the plaintiff contended that this was to include everything. The learned Judge finds that the defendants are entitled to charge a commission at the rate admitted and also such sums as they were charged and had to pay their New York agents. The parties undertook to agree upon the amount of the commissions when the basis of payment should be determined.—The plaintiff alleged that Knox, the defendants' agent at South Porcupine, made a distinct and positive oral agreement with them, varying the terms of the written agreement shewn by the sale-notes, and that the defendants "closed

him out" contrary to this qualifying agreement. The learned Judge finds that the parties dealt with each other upon the basis and in the terms of the writings (the sale-notes).—The action should be dismissed, subject to the question whether the defendants have been overpaid in respect of commissions. No costs to either party as against the other. Peter White, K.C., and J. S. Duggan, for the plaintiff. Hamilton Cassels, K.C., and R. S. Cassels, K.C., for the defendants.

McCARTNEY v. McCARTNEY—FALCONBRIDGE, C.J.K.B.—APRIL 26.

Improvements—Infant Put in Possession of Land by Grandfather—Representations Inducing Belief that Land Given to Infant—Lien for Improvements—Recovery of Possession—Costs.]—Action to recover possession of land and for damages and other relief. The action was tried without a jury at Guelph. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff was the father of the adult defendant and the grandfather of the infant defendant. The Chief Justice finds that the claims of the plaintiff and the adult defendant the one against the other fairly balance each other, and declares that there is nothing due or owing from the one to the other. It was proved to the satisfaction of the Chief Justice that the plaintiff, by representations and acts—in particular by the delivery of a deed of the land and of a will which he had executed in the infant's favour—induced both defendants to believe that he had given the land to his grandson, the said infant; and the plaintiff had put the infant in possession thereof. On the faith of such representations and belief, the infant had worked on the land ever since he was able to work, and had, with the assistance of his father and by hired labour, permanently improved the land to the amount of at least $350, and he had not received for his own use any of the produce of the land or the price or value thereof. If the plaintiff now insists upon evicting the boy, it should be only on terms of paying into Court for him (the infant) the said sum of $350. In all his findings of fact, the learned Chief Justice had taken into account the demeanour of the parties and their witnesses. No costs. R. L. McKinnon, for the plaintiff. H. Guthrie, K.C., and J. A. Mowat, for the defendants.

HUNTER v. PERRIN—FALCONBRIDGE, C.J.K.B.—APRIL 27.

Judgment—Summary Application—Failure to Serve one Defendant—Counsel Appearing on Motion—Motion to Set aside Judgment Granted on Terms—Execution to Stand as Security.]—Motion by the defendant Perrin for leave to appeal from or to set aside a judgment of a Local Judge, disposing of the action, upon a summary application. The motion was heard in the Weekly Court at Toronto. The learned Chief Justice, in a written judgment, said that Joss v. Fairgrieve (1914), 32 O.L.R. 117, was not quite on all fours. In this case counsel did appear for the defendant Perrin on the motion; but that defendant swore that the said counsel was not his solicitor on the record nor in the proceedings in the action; that no notice of motion for judgment was ever served on him (the defendant Perrin); and that the said counsel did not communicate to him (the defendant Perrin) the fact that he (counsel) had been served on the defendant Perrin's behalf with the notice. On consideration of all the circumstances and the voluminous documents and correspondence, the Chief Justice was of opinion that the judgment ought to be set aside and the defendant Perrin let in to defend, on the terms of the execution standing in the meantime as security. Costs in the cause. H. D. Gamble, K.C., for the defendant Perrin. A. W. Langmuir, for the plaintiff.

UNITED STATES FIDELITY AND GUARANTY CO. v. UNION BANK OF CANADA—CLUTE, J.—APRIL 27.

Costs—Recovery by Plaintiff against Defendant—Recovery over by Defendant against Third Party.]—Upon counsel speaking to the minutes of the judgment pronounced by CLUTE, J., on the 11th April, 1917 (noted ante 141), the learned Judge ruled that the defendant bank was entitled to recover from the third party the plaintiff company's costs of the action for which the defendant bank was liable, the defendant bank's costs of its claim against the third party, and the defendant bank's costs incurred in its defence of the plaintiff's claim. See King v. Federal Life Assurance Co. (1895), 17 P.R. 65; Hartas v. Scarborough (1889), 33 Sol. Jour. 661.

WOODBECK v. WALLER—MASTEN, J., IN CHAMBERS—APRIL 28 AND MAY 5.

Money in Court—Absconding Debtor—Claims of Judgment Creditors—Creditors Relief Act—Absconding Debtors Act—Distribution of Fund by Court—Reference—Costs.]—Motion by the defendant and by W. T. Curtis and others, judgment creditors of Charles S. Saylor, for payment out to the applicants of the moneys in Court to the credit of this action, in which Saylor had an interest. See Woodbeck v. Waller (1917), 11 O.W.N. 386. MASTEN, J., in a brief memorandum in writing, on the 28th April, said that, having regard to the provisions of the Creditors Relief Act, R.S.O. 1914 ch. 81, sec. 24 et seq., and to the provisions of the Absconding Debtors Act, R.S.O. 1914 ch. 82, and to Re Bokstal (1896), 17 P.R. 201, the fund in Court, with accrued interest, must be paid out to the Sheriff of Peterborough for distribution pursuant to the Creditors Relief Act. On the 5th May, the learned Judge made a second memorandum in which he said that, before the issue of the order, a further affidavit had been filed shewing no executions and no writs of attachment in the Sheriff's hands. This varied the situation—the provisions of the Creditors Relief Act did not apply. Consequently, the order should be for distribution by the Court of the moneys in its hands among all creditors who established their claims, in the same manner as in an administration suit. Creditors should be advertised for in a newspaper published at Peterborough. The Assistant Clerk in Chambers should ascertain the creditors and report a scheme for division of the fund in Court, after deducting the costs of this application, of the reference, and of an order for distribution. C. W. Kerr, for the applicants.

RE JENKINS AND HUTCHINSON—MIDDLETON, J.—MAY 1.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title Dealt with under Rule 603—Reference as under Quieting Titles Act.]—Motion by the vendor in a contract for the sale of land for an order declaring the purchaser's objections to the title invalid. The motion was made under the Vendors and Purchasers Act, and was heard in the Weekly Court at Toronto. MIDDLETON, J., in a short memorandum, said that there were a

number of objections to the title, and, in the absence of the deeds' he could not deal with them satisfactorily. The motion should be dealt with as an application under Rule 603 to quiet the title as to these particular matters, and there should be a reference to the Referee at Toronto to deal with the particular matters as he would under the Quieting Titles Act. R. G. Agnew, for the vendor. No one appeared for the purchaser.

WHITE v. BELLEPERCHE—MIDDLETON, J., IN CHAMBERS—MAY 2

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Parties—Joinder of Plaintiffs and Causes of Action—Rule 66.]—Motion by the defendants, under Rule 507, for leave to appeal to a Divisional Court from the order of BRITTON, J., in Chambers, ante 165. Leave was refused by MIDDLETON, J., who said that, although, in his opinion, the case was near the line, he had no reason to doubt the correctness of the order, and a further appeal should not be allowed. Motion dismissed with costs to the plaintiffs in any event. A. W. Langmuir, for the defendants. H. S. White, for the plaintiffs.

RE WILLIAMSON, PENNELL v. MCCUTCHEON—MIDDLETON, J., IN CHAMBERS—MAY 4.

Distribution of Estates—Administration—Confirmation of Report—Payment out of Money in Court.]—Motion by the plaintiff in an administration proceeding for an order confirming the report of a Special Referee and for payment out of the money in Court in accordance with the report. See ante 154. MIDDLETON, J., in a short memorandum, said that the order for distribution should be made as asked. He could add nothing useful to what he said on the former motion (ante 154). W. Proudfoot, K.C., for the plaintiff. W. B. Raymond, for the Union Bank of Canada. S. H. Bradford, K.C., for the widow. A. M. Denovan, for the executors. F. W. Harcourt, K.C., for the infants. H. S. White, for the Sheriff of Peel. A. C. Heighington, for the Bank of Ottawa.

BYRNE v. GENTLES—MIDDLETON, J., IN CHAMBERS—MAY 4.

Costs—Security for—Former Action Involving same Issue—Addition of Necessary Parties—Nominal Plaintiff.]—Appeal by the defendant Gentles from an order of the Master in Chambers refusing the application of the appellant to stay all proceedings in this action until Matthew B. Whittlesey and A. W. Diack shall be added as parties or until the plaintiff shall give security for the appellant's costs of the action. MIDDLETON, J., in a written judgment, said that he had spoken to LATCHFORD, J., who tried the action of Gentles v. Byrne, and who stated that the whole matter was tried out before him in that action save the allegation now made by the plaintiff (as to which he had no concern) that the defendants defrauded each other. Upon the ground, therefore, that the former action was for the same cause, the proceedings should be stayed until security for costs should be given. The action could not be disposed of in the absence of Whittlesey and Diack, in any way that would be conclusive, and they must be added, as plaintiffs if they consented, as defendants if they did not consent. A case had probably been made for security upon the ground that the plaintiff was a nominal plaintiff only, but it was not necessary to discuss that aspect of the case. Costs in the cause. D. L. McCarthy, K.C., for the defendant Gentles. A. G. Ross, for the plaintiff.