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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 13TH, 1916.

BIGGAR v. BIGGAR.

Husband and Wife—Money Paid by Wife to Husband—Action to Recover as Money Lent—Onus—Finding of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 10 O.W.N. 368.

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

C. W. Bell, for the appellant.

W. M. McClemont, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. NOVEMBER 14TH, 1916.

WILLOX v. MICHIGAN CENTRAL R.R. CO.

Railway—Fire Caused by Sparks from Engine—Negligence—Evidence—Finding of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 15.

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

Gideon Grant, for the appellant.

D. W. Saunders, K.C., and S. S. Mills, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. NOVEMBER 17TH, 1916.

*RE CANADA COMPANY AND TOWNSHIP OF COLCHESTER NORTH.

Assessment and Taxes—Assessment Amendment Act, 1916, sec. 6 (3), (6)—"Special Case"—County Court Judge—Appeal to Divisional Court—Advertisement Offering Mineral Rights in Lands for Sale at Price Certain—Absence of Sales—Admissibility as Evidence of Actual Value—Reduction of Assessments—Petroleum Mineral Rights—Academic Question—Costs of Appeal.

Appeals by the Canada Company from the judgment of the Judge of the County Court of the County of Essex dismissing the company's appeals from the decisions of the Courts of Revision of the Townships of Colchester North, Sandwich South, Maidstone, and Tilbury North, affirming the assessments of the appellant company in respect of mineral rights in lands in the four townships.

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

J. M. Pike, K.C., for the appellants.

J. H. Rodd, for the township corporations.

RIDDELL, J., in a written judgment, said that the Canada Company, in making grants of land, reserved to themselves "all mines and quarries of metals and minerals and all springs of oil in or under the said lands, whether already discovered or not." In Colchester North, the assessment was $10,822 in respect of mineral rights in 5,411 acres; and in the other townships the mineral rights were assessed at varying rates, higher and lower. The assessments were confirmed (one with a variation in amount) by the Courts of Revision, and the company appealed to the County Court Judge. Upon the hearing, the Judge ruled against certain evidence and certain objections.

The Judge had signed what purported to be a "special case" for this Court under the Assessment Amendment Act, 1916, 6 Geo. V, ch. 41, sec. 6. According to that Act, on the request of either party to an appeal before him, the Judge is to make a note of any question of law or construction of a statute, and he "may

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

thereupon state such question in the form of a special case, setting out the facts in evidence relative thereto, and his decision of the same as well as his decision of the whole matter:" sec. 6 (3).

The "special case" now before the Court did not comply with the definite directions of the statute; the Court was left to gather from other papers and from counsel what the matters for decision were.

One matter was clear from the papers. The company advertised their rights in the lands in question for sale to the public at the price of 50 cents per acre; and the County Court Judge held that this was not evidence for the company as to "actual value."

The opinion of RIDDELL, J., was that a bona fide offer on the part of the owner (and there was here no attack on the good faith of the company) to sell anything is some evidence of its actual value: what weight should be given to it by a Judge is for him to decide, but he must consider it.

It appeared that the Court had no power under the statute to send the case back to the County Court Judge. Sub-section 6 indicates that any change to be made in the assessment roll must be made to appear "by the judgment of the Divisional Court upon the case stated."

As a matter of law, the advertisement was evidence against the company that the mineral rights had some value, and was evidence for the company, in the absence of other evidence of value —the fact that no sale had been made being proved—that the actual value did not exceed 50 cents per acre. The County Court Judge, therefore, should have found that the mineral rights were not worth more than 50 cents per acre.

The Court was also asked to decide that, of mineral rights, only petroleum mineral rights were assessable. It was admitted, however, that only petroleum mineral rights were really assessed; and the Court should decline to answer a merely academic question.

Alterations should be made in the several assessment rolls reducing the assessments to 50 cents per acre. There should be no costs.

MEREDITH, C.J.C.P., and MASTEN, J., agreed in the result, each giving written reasons.

MIDDLETON, J., dissented. He was of opinion, for reasons stated in writing, that the question as to evidence passed upon by the other members of the Court was not properly before the Court, and could not be considered.

Appeal allowed with costs; MIDDLETON, J., *dissenting.*

SECOND DIVISIONAL COURT. NOVEMBER 17TH, 1916.

BILLINGS v. CITY OF OTTAWA AND COUNTY OF CARLETON.

Municipal Corporations—Erection of Bridge—Trespass upon Land of Private Owner—Onus—Evidence — Failure to Establish Title as to any Part of 66 Feet Strip—Extension of Pier beyond Strip — Encroachment — Compensation — Deprivation of Access to Highway—Absence of Expropriation Proceedings—Right of Action—Remedy under sec. 325 of Municipal Act, R.S.O. 1914 ch. 192—Arbitration—Costs—Appeal.

Appeals by the defendants from the judgment of SUTHERLAND, J., 10 O.W.N. 450.

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

F. B. Proctor, for the appellants the city corporation.

J. E. Caldwell, for the appellants the county corporation.

D. J. McDougal, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the action was one substantially for trespass to lands—the act complained of was the building of a bridge as part of a public highway. It was admitted that the bridge was built in part upon the highway; but the plaintiff contended that its piers were about three times the width of the highway, and that to the extent of that excessive width it was upon his land; the defendants' contention being that the highway was really one of the usual width of 66 feet, and that the bridge was in all respects well within the highway except to the extent of a few feet of one of its piers admittedly extending beyond the 66 feet line.

The onus of proof was upon the plaintiff: he must prove that his land had been invaded; and it was enough to defeat the substantial part of his claim to say that he had not proved title to any part of the 66 feet strip—nor to anything but land out of which was excepted the highway in question.

The defendants must pay for the land taken by them beyond the 66 feet line: this they could have expropriated; if the parties cannot agree upon a sum as compensation, it may be fixed by the proper local officer.

A minor claim was made by the plaintiff for compensation for the deprivation of some right of access from the highway to

his land. This seemed to be the only real injury the plaintiff had sustained. In other respects, the elevation of the road, and the conversion of it from an embankment into a bridge, seemed to have been a benefit to him, giving him a means of access from one part of the island to the other, which he had not had before without crossing the embankment. In such circumstances, extravagant claims ought not to be encouraged. There ought not to have been costly litigation between the parties over their rights. The defendants not only admitting but contending that the case was one for compensation under the arbitration clauses of the Municipal Act, the plaintiff's claim, in respect of deprivation of right of access, must be prosecuted in that way, and not in this action.

The appeals should be allowed, the judgment below set aside, and judgment should be entered dismissing the action except as to the amount to be agreed upon between the parties, for which judgment should be entered for the plaintiff; if the parties do not agree, there should be a reference, and judgment should go for the plaintiff for the amount found due upon it. No costs of the action. Costs of the reference, if any, to be dealt with by the Referee. Costs of the appeals to the appellants. Compensation for deprivation of rights of access to be sought under the arbitration clauses of the Municipal Act.

RIDDELL, J., agreed in the result, for reasons stated in a written judgment.

MIDDLETON and MASTEN, JJ., concurred.

Appeals allowed.

SECOND DIVISIONAL COURT. NOVEMBER 17TH, 1916.

*MAHAFFY v. BASTEDO.

Execution—Writ of Fi. Fa.—Sale of Land by Sheriff under Writ Renewed after Death of Execution-plaintiff—Validity of Sale—Necessity for Revivor of Action.

Appeal by the defendant Bastedo from the judgment of the District Court of the District of Muskoka in favour of the plaintiff in an action to set aside a sale of land by a sheriff under a writ of fieri facias.

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

W. H. Kennedy, for the appellant.

R. U. McPherson, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that the facts were simple and not in dispute. On the 4th June, 1910, judgment was obtained by A., now deceased, against B. On the 7th June, a writ of execution was put in the sheriff's hands. On the 24th October, B. sold his land to the plaintiff, who, on the 15th November, caused a mortgage thereon to be discharged. On the 11th October, 1911, A. died, and on the 8th November probate of his will was granted. On the 5th June, 1913, the writ of execution was renewed; and on the 12th December, 1914, the sheriff sold the land of B. to the defendant.

The District Court Judge held that the plaintiff had title because there was no revivor of the action by the executors of A.

"If, after execution awarded, the plaintiff die, yet . . . the sheriff may levy the money:" Thoroughgood's Case (1597), Noy 73. See also Tomlin's Law Dictionary, vol. 2, "Scire Facias" (iii.); Churchill on Sheriffs, 2nd ed., p. 216.

The theory was, that the issuing of a writ of fi. fa. was a judicial act: Wright v. Mills (1859), 4 H. & N. 488, 492; and that the writ was an order of the Court to make the money—in other words, the authority of the sheriff came from the Court, not from the plaintiff.

This doctrine had never been questioned, and could not now be successfully attacked. The fi. fa. lands in Ontario has, by virtue of 5 Geo. II. ch. 7 (Imp.) and subsequent legislation, an effect unknown to the common law of England; but there is no reason why it should be treated in a different way from a fi. fa. goods. None of the Rules affects or modifies this principle. The renewal was simply an extension of the effect of the writ, and did not require a revivor: Doel v. Kerr (1915), 34 O.L.R. 251, and cases cited.

The questions as the effect of the discharge of the mortgage should not be disposed of here. If the parties cannot agree, they may be determined in an action for that purpose in which all the facts can be brought out.

The appeal should be allowed with costs and the action dismissed with costs.

MIDDLETON, J., read a judgment to the same effect, in which MASTEN, J., concurred.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*

HIGH COURT DIVISION.

BOYD, C. NOVEMBER 13TH, 1916.

*BALDWIN v. HESLER.

Judgment—Application to Open up—Rule 523—Fraud—Discovery of New Evidence—Seduction—Resemblance of Child to Person other than Defendant—Admissibility—Discredited Witness—Affidavits—Weight of Testimony.

Motion by the defendant in an action for seduction, under Rule 523, to set aside the judgment for the plaintiff or suspend its operation.

Bertha Bissett, the girl seduced, was the adopted daughter of the plaintiffs, Henry Baldwin and his wife Alberta.

The motion was made upon the following grounds: (1) that the judgment was obtained by the fraud of the plaintiffs and by coercing Bertha Bissett to give false testimony; (2) that the defendant was taken by surprise in that dates were sworn to at the trial of his having had intercourse with the girl long prior to the date given in the statement of claim or sworn to by the plaintiffs in their examination for discovery; (3) that the defendant had discovered, since the trial, new evidence which, if it had been brought forward at the trial, would have changed the result.

The defendant filed an affidavit of Bertha Bissett in which she stated that she never had carnal connection with the defendant; that the plaintiff Henry Baldwin was the father of her child; and that the child strongly resembled him in features and complexion. She also swore that the plaintiff Alberta Baldwin prepared a statement and compelled her (Bertha) to learn it and swear to it in Court.

This was contradicted by the plaintiff Alberta, who gave an explanation of the existence of a statement of dates etc. written by her, which the girl had found after the trial.

There were other affidavits on both sides.

The application was to have been made before the trial Judge, BRITTON, J.; but, in his absence, the parties agreed to its being heard by the Chancellor.

The application was accordingly heard in the Weekly Court at Toronto.

W. M. German, K.C., for the defendant.

A. C. Kingstone, for the plaintiffs.

THE CHANCELLOR, in a written judgment, set out the facts, and said that he had consulted with Britton, J., who was not dissatisfied with the verdict, and concurred in the disposition to be made of the present application.

The Chancellor had not considered the scope of Rule 523, because, in his opinion, the application failed entirely on the merits. The girl and the guilty person alone knew the real facts. The only ground which induced the Chancellor not to give effect to the ruling in Rushton v. Grand Trunk R.W. Co. (1903), 6 O.L.R. 425, during the argument, was that as to the written statement of dates; but that ground was completely displaced by the counter-affidavits. The girl appeared as a witness who discredited herself—she had no regard for the sanctity of an oath. In all such cases, the evidence of one who impeaches his own veracity is to be received with the most scrupulous jealousy: Merchants Bank v. Monteith (1885), 10 P.R. 467, 475.

If there is such a striking likeness between the child and the plaintiff Henry, that is a matter that cannot have been discovered since the trial; and no Court would open up a judgment on the ground that the child of a girl seduced resembled some one else than the defendant who had been found guilty. That is evidence of the most precarious kind. Though similar evidence was admitted by the Judge of first instance in Bagot v. Bagot (1878), 1 L.R. Ir. 308, and in some succession cases there referred to, the Court of Appeal in the Bagot case decided upon other grounds: Bagot v. Bagot (1879), 5 L.R. Ir. 72, 73.

Application dismissed with costs.

KELLY, J. NOVEMBER 13TH, 1916.

LEFEVRE v. LE DUC.

Title to Land—Evidence—Lost Document—Unsatisfactory Evidence of Contents—Adverse Possession of Small Enclosed Portion of Land—Limitations Act—Payment of Taxes—Unenclosed Land—Recovery of Possession by Registered Owner.

Action to recover possession of 100 acres of land, parts of the easterly halves of lot 30 in the 3rd concession and lot 30 in the 4th concession of the township of Baxter.

The plaintiff relied principally on an alleged understanding or agreement between him and his step-son, Sylvester Houle, since deceased, to the effect that the latter was to be entitled to the lands for his life; and the plaintiff said that he permitted Houle's family to remain on the land after his death.

The action was commenced on the 11th January, 1916, against Richard Le Duc, who in his appearance asserted that he was in possession as tenant of Josephine Laplume, the widow of Houle, remarried. She appeared under Rule 53, and was the substantial defendant.

On the 3rd September, 1897, the plaintiff obtained a certificate of ownership under the Land Titles Act of lots 30 in the 3rd and 4th concessions of Baxter, having been located for these lots under the Free Grant and Homesteads Act.

Sylvester Houle was married to the defendant in 1882, and died on the 22nd October, 1895, leaving his widow and four children. From the time of the marriage until Houle's death, except for about fifteen months, seven or eight years after the marriage, their place of residence was on the land in dispute; and, after Houle's death, the defendant, until recently, continued to reside there without interruption except for short intervals.

The action was tried without a jury at Barrie.

J. G. Guise-Bagley, for the plaintiff.

W. A. J. Bell, K.C., for the defendant Laplume.

KELLY, J., in a written judgment, after setting out the facts, said that there was much conflict in the evidence; but it was common ground that some agreement or document relating to this land was given by the plaintiff to Sylvester Houle about the time of his marriage. This writing was not produced, but it was shewn that it was in existence for many years. The evidence of its contents was unsatisfactory. If the fact was, as the plaintiff contends, that what he gave Houle was only a life interest, then, from Houle's death, the defendant's possession of the part of the land to which possession extended was adverse to the plaintiff's title.

The learned Judge was unable to make any finding upon which to base a declaration of the meaning and effect of the lost document.

The defendant relied upon the Limitations Act. There was now enclosed by fences about 15 acres, nearly all within the east half of lot 30 in the 3rd concession. A dwelling-house and outbuildings were erected thereon during Houle's lifetime, and some

small additions made after his death. The defendant had, since the death of Houle in 1895, by herself or her tenants, been in actual, constant, and visible occupation and possession, to the exclusion of the plaintiff, of the 15 acres referred to, and was entitled thereto as against the plaintiff.

The defendant contended that her possession and occupation extended to the whole 100 acres, and relied on payment of taxes etc. The learned Judge said that the payment of taxes for the whole of the lot by the occupant of the enclosed portion was not, in the circumstances, an act so enuring to the benefit of the person paying as to deprive the owner of the remaining part of his right thereto. The land outside the 15 acres was uncleared and uncultivated; the defendant's cattle and the cattle of the plaintiff and others had been allowed to roam and pasture thereon, and the defendant had taken firewood therefrom; it appeared to be used as common land; and the right of the plaintiff, the registered holder of the title, was not barred: Harris v. Mudie (1882), 7 A.R. 414; McIntyre v. Thompson (1901), 1 O.L.R. 163; Huffman v. Rush (1904), 7 O.L.R. 346; Halsbury's Laws of England, vol. 19, p. 110, para. 203.

Judgment for the defendant for the enclosed part of the land, about 15 acres; judgment for the plaintiff for the remainder; no costs.

LENNOX, J. NOVEMBER 13TH, 1916.

*SUSSEX v. ÆTNA LIFE INSURANCE CO.

Insurance—Life Insurance—Default in Payment of Premium at Stipulated Time—Conditions of Policy—Construction—"Privileges" — "Insurability" — Reinstatement—Evidence—Proof "Satisfactory to Company."

Action for a declaration that a policy of life insurance issued by the defendants to the plaintiff on the 24th March, 1914, was a valid and subsisting security, or that the plaintiff was entitled to have the policy reinstated under the 14th condition thereof, and for an order directing the defendants to reinstate the policy.

The insurance was for $3,000. The plaintiff agreed to pay 20 consecutive annual premiums of $80.04 each, and he paid the first and second. The third fell due on the 21st March, 1916, and was not paid, nor was it paid within the 31-days' grace allowed.

On the 25th April, 1916, the plaintiff sent the defendants a cheque for $80.04, which was refused and returned.

Condition 5 of the policy provided: "This policy shall not take effect until the first premium hereon shall have been actually paid . . . If any subsequent premium be not paid when due, then this policy shall cease, subject to the values and privileges hereinafter described, except that a grace of 31 days, during which time this policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of 6 per cent. per annum is also paid thereon for the days of grace taken. . . ."

Condition 14: "Within five years after default in payment of premium . . . this policy . . . may be reinstated upon evidence of insurability satisfactory to the company and by payment of arrears of premiums with interest. . . ."

At the time the insurance was effected, the plaintiff was a commercial traveller; he had since become a soldier, and was about to go or had gone abroad upon active service.

The defendants were willing to continue the insurance, but only upon condition of notification as to military service and payment of an extra premium.

Condition 7 declared that the policy contained no restriction regarding service in the army in time of war.

The plaintiff, before action, furnished proof of good health, tendered the overdue premium with interest, and offered to furnish any further proof of "insurability" required.

The action was tried without a jury at London.

E. W. M. Flock, for the plaintiff.

H. S. White, for the defendants.

LENNOX, J., in a written judgment, set out the facts, and said that "proof of insurability" in condition 14 meant that the insured at the time of application for reinstatement was a proper risk for insurance upon the basis of the original contract, and the condition of the health of the insured was the only matter to which it could, in this case at all events, have reference. The proof was to be "satisfactory to the company;" but that did not permit the company to be arbitrary or unreasonable.

The policy ceased on the 21st March, 1916 (condition 5), "subject to the . . . privileges hereinafter described." One of the "privileges" was that provided by condition 14, and under that the plaintiff was entitled to reinstatement.

Judgment for the plaintiff accordingly, with costs.

CLUTE, J. NOVEMBER 14TH, 1916.

NORCROSS BROTHERS CO. v. HENRY HOPE AND SONS OF CANADA LIMITED.

Building Contract—Sub-contract—Delay of Sub-contractors—Waiver—Reasonable Time for Delivery of Material and Completion of Work—Reasons for Delay—Breach of Contract—Damages—Costs.

Action for damages for default in fulfilling a sub-contract within the time limited.

The plaintiffs were building contractors in a large way, having their head office at Worcester, Massachusetts, and engaged in the construction of buildings in the United States and Canada. The defendants were a company incorporated under the laws of Ontario and carrying on business at Toronto.

On the 29th April, 1913, the plaintiffs entered into a contract with the Board of Education for the City of Toronto to erect a Central Technical School building; and on the 19th June, 1913, the plaintiffs made a sub-contract with the defendants whereby the defendants agreed to furnish the steel sash required in the exterior and court walls of the building, as described in the contract and specifications, for the sum of $19,500, to be delivered "at such time as will not delay the construction of the building—all the casement sashes required for the exterior to be your 4 C section as shewn on pages 28 and 29, with a T-iron frame going entirely round the opening as illustrated in your catalogue, page 51." The defendants also agreed to set complete in place all their work for the additional sum of $2,000. By article 6 of the contract, delivery was to be commenced on the 1st January and completed on the 1st February, 1914.

The plaintiffs alleged that the defendants continuously failed to deliver the sash; that the delivery was not completed so as to enable the building to be closed before the frost came in the latter portion of 1914; that the defendants were well aware and were notified by the plaintiffs that the failure to deliver the sash was causing delay and loss and would cause delay and loss if not delivered in time to enable the building to be closed in before the frost came, notwithstanding which the defendants failed to make such delivery.

The defence was, that the delays, if any, in carrying out the contract were created by the plaintiffs and their architects, who required certain changes to be made in the form, description, and

details of the sash, in reference to the T-iron frame, in which the architects required an alteration to be made, involving the introduction of a new and special section called the "long flange section." The defendants said that they endeavoured to make the changes, but were delayed in so doing, and were ultimately instructed by the plaintiffs and their architects to proceed with the work as provided in the original contract, which they did—the plaintiffs were responsible for the delay.

The defendants had been paid the contract-price of their material and work.

The action was tried without a jury at Toronto.

R. McKay, K.C., for the plaintiffs.

George Wilkie, for the defendants.

CLUTE, J., in a written judgment, set out at length the facts and the correspondence between the parties. He said that delivery was not commenced or completed within the time stated in the contract; it did not commence until September, 1914, and was not completed until December, 1914. The delivery provided for in the contract was waived by the parties owing to the delay in the endeavour to get the long flange in place of the T-frame, and a new date for delivery was fixed for June following; the plaintiffs still asking for and the defendants endeavouring to supply the long flange. What took place appeared from a long correspondence and several interviews, the result of which, the plaintiffs contended, established a default on the part of the defendants. The defendants contended that, the time for delivery mentioned in the contract having been waived, delivery within a reasonable time was all that was required; that they did deliver within a reasonable time; and that the plaintiffs suffered no loss by the defendants' default, if any.

The fact that article 6 was waived and a new date fixed did not amount to a waiver of that part of the contract which provided that delivery should be made at such time as would not delay construction of the building. It was in the contemplation of both parties that the change would not delay the construction of the building.

It was contended for the defendants that they had a reasonable time to complete, and that the reasonableness must be measured by the circumstances arising at the date when the contract-time had ceased to be applicable, and not at the time the contract was entered into: Hudson on Building Contracts, 4th ed., p. 503, and cases cited; also, that the time for completion

might be affected not only by the circumstances arising at the date when the contract-time had ceased to be applicable, but also during its performance, by current changes affecting the contract: Sims & Co. v. Midland R.W. Co., [1913] 1 K.B. 103; Hicks v. Raymond, [1893] A.C. 22. The learned Judge referred to the cases cited and to McDonell v. Canada Southern R.W. Co. (1873), 33 U.C.R. 313, 320.

Notwithstanding all that was said as to the causes of delay, the learned Judge was of opinion, having regard to the form of the contract, that there was undue delay both in the delivery and setting, and a breach of the contract in that regard.

The evidence as to damages was very indefinite. A number of items of damage were given by the plaintiffs, but only one should be allowed, viz., the actual net cost of screening of operations and protecting buildings, $905.78. The plaintiffs knew at an early date that the building must be enclosed if the trades under the other sub-contracts were not to be delayed; they intended to enclose the building themselves if it were not done by the defendants; they took the responsibility; and the measure of damages would be, not what they suffered from their enclosing the building imperfectly, but what would be a reasonable charge for doing that which the defendants had failed to do.

The plaintiffs' items of damage were exaggerated and unreasonable, and they should have no costs.

Judgment for the plaintiffs for $905.78 without costs.

LATCHFORD, J., IN CHAMBERS. NOVEMBER 17TH, 1916.

*REX v. BERRY.

Canada Temperance Act—Magistrate's Conviction—Certiorari—Motion to Quash—R.S.C. 1906 ch. 152, sec. 148—Jurisdiction of Magistrate—No Evidence to Warrant Conviction—Power of Court to Review Finding of Magistrate.

Motion by the defendant to quash his conviction, removed into the Court by certiorari, for a breach of Part II. of theCanada Temperance Act, R.S.C. 1906 ch. 152. The conviction was made by the Police Magistrate for the Town of Clinton and Village of Hensall. The alleged offence was committed in Hensall.

The sole ground relied upon was, that there was no evidence

before the magistrate to warrant the conviction, and he therefore acted without jurisdiction.

L. E. Dancey, for the defendant.
J. R. Cartwright, K.C., for the Attorney-General.

LATCHFORD, J., in a written judgment, said that the contention on behalf of the Attorney-General was, that, as the right to certiorari and to an appeal were taken away by sec. 148 of the Canada Temperance Act, the evidence could not be looked at to determine whether or not it was sufficient to warrant the conviction. In Regina v. Wallace (1883), 4 O.R. 127, the Queen's Bench Division had under consideration sec. 111 of the Canada Temperance Act of 1878. Section 148 of the present Act is almost the same as sec. 111 of the former Act, sec. 148 being wider in its application. The Wallace case is a decision on the very question arising in this case, and should be followed. Jurisdiction to enter into the inquiry existed in the magistrate. There was no allegation that his jurisdiction was ousted by any claim made on reasonable grounds during the trial. If he erred in his appreciation of the testimony adduced, and found the accused guilty without evidence of guilt, his action implied not want of jurisdiction, but an improper exercise of it; and that was, by the statute, as interpreted by the Wallace case, not open to review upon such an application as the present.

Reference also to Rex v. Carter (1916), 26 Can. Crim. Cas. 51; Colonial Bank of Australasia v. Willan (1874), L.R. 5 P.C. 417, 442; Ex p. Hackett (1882), 21 N.B.R. 513; Regina v. Cunerty (1894), 26 O.R. 51; Regina v. Coulson (1893), 24 O.R. 246, 249; Regina v. Coulson (1896), 27 O.R. 59; Rex v. Cook (1908), 18 O.L.R. 415, 419; Rex v. Borin (1913), 29 O.L.R. 584; Rex v. McPherson (1915), 25 Can. Crim. Cas. 62; In re Trepanier (1885), 12 S.C.R. 111, 129.

Motion dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. NOVEMBER 18TH, 1916.

RE SOVEREIGN BANK OF CANADA.
WALLIS'S CASE.

Judgment Debtor—Order for Examination of Wife of, for Discovery in Aid of Execution—Ex Parte Order Set aside—Costs—Rules 582, 583.

Appeal by Martha Wallis, the wife of Thomas Wallis, a contributory, against whom the liquidator of the bank had recovered judgment in the winding-up proceedings, and placed an execution in the sheriff's hands, from an order of J. A. C. Cameron, the Official Referee before whom the proceedings were pending, directing the appellant to attend for examination, at the instance of the liquidator, for discovery in aid of the execution against her husband.

W. Lawr, for the appellant.
M. L. Gordon, for the liquidator.

SUTHERLAND, J., in a written judgment, said that the order appealed against was made, as alleged, under Rule 583 or perhaps under Rule 582; and under either Rule it was not proper to make it without notice to the appellant, the person directed to attend for examination: Blakeley v. Blaase (1888), 12 P.R. 565. The learned Judge expressed no opinion as to whether an order could, in the circumstances, be obtained under either Rule. The order was not properly obtained ex parte, and must be set aside with costs.

FALCONBRIDGE, C.J.K.B. NOVEMBER 18TH, 1916.

RE PERRIE.

Will—Construction—Specific Legacies—Estate Insufficient to Pay in Full—Cesser of Life Interest in Fund Set apart—Application of Fund to Supplement Abated Legacies.

Motion by the executors and trustees under the will of Elizabeth Ann Perrie, deceased, for the opinion, advice, and direction of the Court respecting the distribution of a sum of money invested under para. 20 of the will, it having transpired that there was not sufficient money in the estate to pay the specific legacies

in full, and that Agnes Fahey, mentioned in para. 20, died without leaving any issue her surviving.

By para. 20, the testatrix directed her executors and trustees to invest the sum of $20,000 and to pay the interest thereof to Agnes Fahey "during her life, and after her decease to pay the interest to any children she may leave her surviving equally until they attain the age of 30 years, when they shall divide the same equally among such children, but, in case she leaves no child or children her surviving, then the same shall be added to and disposed of in the same manner as the residue of my estate is herein directed to be disposed of."

The questions submitted by the applicants were:—

(a) Should the money invested for Agnes Fahey be paid into the residue of the estate and be disposed of as directed by para. 32 of the will (the residuary clause)?

Or (b) should the money be paid in satisfaction of the specific legacies which were abated by reason of the insufficiency of the estate?

(c) If the said money should be disposed of as directed by para. 32, are the heirs or devisees of Gideon Perrie, who died on the 17th January, 1910, entitled to one-third thereof?

The motion was heard in the Weekly Court at Toronto.

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

J. G. Farmer, K.C., for T. M. Waddell and J. J. Barry.

M. J. O'Reilly, K.C., for the Kirk estate and others.

F. W. Harcourt, K.C., for infants (unborn).

M. Malone, for D. A. Fletcher.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that, on the principles laid down in In re Tunno (1890), 45 Ch.D. 66, and Arnold v. Arnold (1834), 2 My. & K. 365, at p. 374, the answer to question (a) should be "No," and to question (b), "Yes." Owing to these answers, it was unnecessary to consider question (c).

Order declaring accordingly; costs of all parties out of the estate.

HELSDON v. BENNETT—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 13.

Trial—Jury Notice—Place of Trial.]—Motion by the defendant for an order striking out the jury notice and directing that the action be placed on the non-jury list for trial at Stratford on the 28th November, 1916. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he must give the plaintiff credit for having some confidence in the merits of his case and for a desire also to bring it on for trial as soon as it is safe for him to do so. He also has some rights as to the place of trial. The defendant's motion for trial at Stratford ought not to prevail. If there should be separate sittings at Woodstock in the spring for jury and non-jury cases, this case should be entered for trial at the jury sittings, and the motion to strike out the jury notice referred to the trial Judge. Costs of both motions (as in Chambers) to be costs in the cause to the successful party. W. C. Brown for the defendant. W. N. Tilley, K.C., for the plaintiff.

RE PORT ARTHUR WAGGON CO. LIMITED—SMYTH'S CASE—RIDDELL, J., IN CHAMBERS—NOV. 13.

Company—Winding-up — Contributory — Order of Judge in Court—Leave to Appeal—Winding-up Act, R.S.C. 1906 ch. 144, sec. 101.]—Motion by the liquidator of the company for leave to appeal from the order of BRITTON, J., of the 15th January, 1916, allowing an appeal from a decision of the Master in Ordinary in a winding-up matter: 9 O.W.N. 383. RIDDELL, J., in a written judgment, said that several points of considerable importance, which should be authoritatively settled, were raised. The delay had been considerable, and the explanation rather limped. But, on the whole case, he was of opinion that, upon the applicant paying forthwith the costs of this application, and within 20 days giving the security required by the Act, he should have leave to appeal; the respondent upon the appeal to be at liberty to raise the objection that the liquidator has disposed of the assets. Peter White, K.C., for the applicant. Strachan Johnston, K.C., for W. R. Smyth, the respondent.

BROWN ENGINEERING CORPORATION LIMITED v. GRIFFIN AMUSEMENT CORPORATION LIMITED—MULOCK, C.J.Ex., IN CHAMBERS—NOV. 15.

Master in Chambers—Jurisdiction—Removal of Cause from Inferior Court—Rule 208 (14)—Order of Officer Exercising Jurisdiction of Master—Nullity—Appeal.]—Appeal by the defendants from an order of one of the Registrars, sitting for the Master in Chambers (Rule 760), refusing to transfer this action from a County Court into the Supreme Court of Ontario. The plaintiffs' claim was within the jurisdiction of the County Court. The defendants counterclaimed for an amount beyond the jurisdiction of the County Court. MULOCK, C.J.Ex., in a written judgment, said that an application for the removal of a cause from an inferior Court was expressly excepted from the jurisdiction of the Master in Chambers: Rule 208 (14). The Registrar's order was a nullity and not appealable. Appeal dismissed. S. W. Burns, for the defendants. E. F. Raney, for the plaintiffs.

SOUTHBY v. SOUTHBY—FALCONBRIDGE, C.J.K.B.—NOV. 16.

Injunction—Costs.]—Motion by the plaintiff to continue an interim injunction granted by MIDDLETON, J. The motion was heard in the Weekly Court at Toronto. The learned Chief Justice continued the injunction until the trial, but to the extent of $675 only. The costs of the defendants the Molsons Bank, fixed at $20, to be paid out of the balance. Other costs to be costs in the cause unless the Judge at the trial should otherwise order. J. F. Boland, for the plaintiff. H. S. White, for the defendant Southby. A. J. Anderson, for the defendant bank.

MOONEY v. MCCUAIG—BRITTON, J.—NOV. 16.

Vendor and Purchaser—Agreement for Sale of Land—Authority of Agent of Vendor—Ratification—Specific Performance—Reference—Costs.]—Action by the purchaser for specific performance of a contract for the sale and purchase of land. The action was tried without a jury at L'Orignal. BRITTON, J., in a written judgment, said that, although the agreement for sale was not signed by the defendant, but by one Cheaney on the defendant's behalf, the authority of Cheaney as agent was established and

the sale made to the plaintiff ratified and confirmed by the defendant. Judgment for specific performance, with a reference to the Local Master at Ottawa as to title, interest, etc. The defendant to pay the costs of the action and reference. The costs, if not otherwise paid, to be deducted from the purchase-money. W. S. Hall, for the plaintiff. John Maxwell, for the defendant.

MINOR v. GRAND TRUNK R.W. CO.—BRITTON, J.—NOV. 16.

Railway—Injury to Person and Vehicle Crossing Tracks—Negligence—Findings of Jury—Excessive Speed of Train—Evidence.]—The plaintiff was the owner of a motor truck car which he used in his business as a carter at Port Colborne. On the 27th October, 1915, the plaintiff, being in possession of the car and lawfully upon the highway, was obliged to cross the defendants' line of railway; in crossing, the car was struck by the engine of the defendants' train, the plaintiff was thrown to the ground and injured, and the car was completely destroyed. The plaintiff charged negligence of the defendants in running the train which did the damage. The action was for the recovery of the damages sustained, and was tried with a jury at Welland. Questions were submitted to and answered by the jury as follows: (1) Were the defendants guilty of any negligence which occasioned the damage to the plaintiff? A. Yes. (2) If so, what is the negligence you find? A. According to the evidence, we find that the train was going at too high rate of speed at the time of the accident. (3) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No. (4) Damages? A. $1,000. Upon the answer to the second question, and upon the evidence, the defendants asked for a dismissal of the action. BRITTON, J., in a written judgment, said, after setting out the facts, that there was evidence that the speed was, in the circumstances, in approaching the crossing over which the plaintiff was moving, excessive. If any evidence was given, that ought reasonably to be considered, of excessive speed, and that the accident was occasioned thereby, the case could not be properly withdrawn from the jury. Judgment for the plaintiff for $1,000 damages, with costs. W. M. German, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendants.

SNITZLER ADVERTISING CO. v. DUPUIS—FALCONBRIDGE, C.J.K.B.—NOV. 17.

Account — Reference — Procedure — Direction to File Statement of Account—Settled Account—Surcharge.]—Appeal by the plaintiffs from a ruling of the Local Master at Sandwich, upon a reference to take accounts, that the plaintiffs should file a statement of account. The appeal was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the formal judgment, as varied by the Divisional Court, was all that he had any right to regard, and it left the matter absolutely at large. The Master seemed to have proceeded in an entirely regular way—and the true method of determining the amount due, if any, was to find out what the plaintiffs paid. If they had a settled account, it was for them to allege and prove it. It was not easy to see how the defendant could surcharge and falsify on accounts presented as the plaintiffs insisted they ought to be presented. To give effect to the plaintiffs' contention would be virtually to try here some of the matters which had been referred to the Master. His direction in the premises seemed quite proper and reasonable. Appeal dismissed. Costs to the defendant in any event. T. Mercer Morton, for the plaintiffs. H. J. Scott, K.C., for the defendant.

MYLAM v. RAT PORTAGE LUMBER CO. AND FRASER—LENNOX, J.—NOV. 17.

Trespass — Timber — Conversion — Damages — Evidence — Counterclaim.]—The plaintiff claimed $4,000 for trespass to land and conversion of timber etc. The defendants denied the plaintiff's title and disputed their liability; the defendant company brought into Court $236.72, and counterclaimed to recover $225. The action was tried without a jury at Port Arthur. LENNOX, J., in a written judgment, said that the plaintiff had established a cause of action. There was no certain measure of damages; but, even with this admitted, and the speculative character of the plaintiff's mining rights kept in mind, much of the evidence for the plaintiff, in addition to being rather hazy, was very exaggerated. The estimate of damages made by the plaintiff's chief witness and Canadian representative, J. S. Whiting, when he promoted an action for Mrs. Whiting some years ago, ought to steady one who attempted to follow the figures to the dizzy heights

to which they mounted upon the trial of this action. It was impossible entirely to separate Emily L. Whiting, J. S. Whiting, and the plaintiff. There was no way of reaching the fair amount to be allowed by any species of mathematical calculation. Neither was it right that the defendants should be dealt with separately. Considering and taking into account all the evidence given by the company of wrongs said to have been committed by the plaintiff's agent, the net result of all the evidence at the trial, was a judgment dismissing the counterclaim and awarding the plaintiff $600 with costs against both defendants, the money paid into Court to be applied thereon pro tanto. J. T. McGillivray, for the plaintiff. James A. Kenney, for the defendants.

ROOS v. SWARTS—SUTHERLAND, J.—NOV. 18.

Master's Report—Evidence — Appeal — Motion for Judgment —Dismissal of Cross-action.]—The motions not disposed of by the judgment of SUTHERLAND, J., 10 O.W.N. 446, were renewed, an order having been made appointing a personal representative of the estate of Edward R. Swarts, and reviving the action in the name of such personal representative as a defendant. The motions were heard in the Weekly Court at Toronto. The learned Judge, after setting out the facts and discussing the contentions of the parties, said that he had come to the conclusion that the orders asked for by the two notices of motion given on behalf of the plaintiff Roos should be made with costs, and that the order asked on the part of the defendant Swarts should be refused with costs. C. Garrow, for the plaintiff. L. E. Dancey, for the defendant.

LONGSTREET v. SANDERSON—FALCONBRIDGE, C.J.K.B.—NOV. 18.

Executors — Right to Property of Testator—Intention of Relatives in Possession of Assets to Oppose Grant of Probate of Will—Injunction.]—Motion by the plaintiffs to continue an interim injunction restraining the defendants from in any way dealing with or interfering with the assets of the estate of the late Charles W. Sanderson. The motion was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs derived their title from the will of the deceased, and the property of the testator vested in them from the moment

of the testator's death. It would be dangerous doctrine that persons merely suggesting infirmity in the will or in the testator's capacity to make one and expressing the intention to oppose probate thereof should be allowed to remain in possession and withhold property of the testator from those named in the will as executors and devisees. The injunction should be continued until the trial or other final disposition of the action. Costs of the motion to be costs in the cause unless the Judge at the trial should otherwise order. T. R. Ferguson, for the plaintiffs. W. C. Brown, for the defendant Mary Sanderson. T. J. Agar, for the defendant Clare S. Laub.

WARE v. HENDERSON—CAMERON, MASTER IN CHAMBERS—Nov. 18.

Discovery—Examination of Defendant—Secret Process—Disclosure.]—Motion by the plaintiffs for an order striking out the defence of the defendant R. J. Henderson, upon the ground of his refusal to answer the questions put to him upon his examination for discovery in this action relating to his secret process and the ingredients thereof and his disposal of or dealings in connection with the secret process. The Master held, that the said defendant could not upon examination before the trial be compelled to disclose his secret process; but he should attend for re-examination and state whether he used the formulas supplied by the plaintiffs or any of the ingredients thereof—whether they made any addition to these materials, and whether the addition made any difference in the process, but he was not compelled to disclose the nature and quantity of the additions. The affidavits filed on this motion could not be used at the trial. Costs of the motion to be costs in the cause. See Renard v. Levenstein (1864), 10 L.T.R. N.S. 94. Grayson Smith, for the plaintiffs. Casey Wood, for the defendants.