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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 12TH, 1920.

*NOBLE v. TOWNSHIP OF ESQUESING.

Assessment and Taxes—Lands Acquired by Upper Canada College—Exemption from Taxation—Upper Canada College Act, R.S.O. 1914 ch. 280, sec. 10—Amending Act, 9 Geo. V. ch. 80—Substitution by Court of Revision of Tenant as Person Assessed—Assessment Act, sec. 69 (16)—Notice—Invalid Assessment—Curative Provisions of sec. 70—Land Made Assessable in Hands of Tenant—Construction of Statute—Declaration—Appeal—Costs.

Appeal by the defendants from the judgment of RIDDELL, J., ante 60.

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

W. N. Tilley, K.C., and E. Martin, for the appellants.

A. C. McMaster, for the plaintiff, respondent.

THE COURT allowed the appeal as to the declaration made in the judgment of RIDDELL, J., and dismissed the appeal as to the assessment of 1919; no costs of the appeal to either party; the plaintiff to have the costs of the action, exclusive of the appeal, fixed at $60.

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

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. MAY 12TH, 1920.

REX v. SMITH.

Ontario Temperance Act—Police Magistrate's Conviction for Offence against sec. 41 (1)—Having Intoxicating Liquor in Lodging-house—Sec. 2 (i) (i)—Liquor Procured on Prescription of Physician—Statutory Presumption of Guilt—Sec. 88—Evidence.

Motion on behalf of the defendant, upon the return of a writ of habeas corpus and certiorari in aid, for an order for the discharge of the defendant, who was convicted by one of the Police Magistrates for the City of Toronto of an offence against the Ontario Temperance Act, and committed to the custody of the keeper of the Toronto municipal farm, upon default in payment of the fine imposed.

James Haverson, K.C., for the defendant.
F. P. Brennan, for the Crown.

KELLY, J., in a written judgment, said that the defendant was convicted on an information charging him with unlawfully having liquor in a lodging-house, in the city of Toronto, where there were more than three lodgers or boarders in addition to the keeper and his family (6 Geo. V. ch. 50, sec. 2(*i*) (i) and sec. 41 (1)).

On the hearing before the magistrate the only evidence submitted by the prosecution was that of a witness who swore that he found in the room occupied by the defendant in the house mentioned a bottle of whisky, and that there were more than three lodgers or boarders in the house besides the keeper and his family.

On the argument it was admitted that the accused had properly procured the liquor on a prescription properly obtained from a physician; it was also conceded that at the hearing before the magistrate it was admitted by the prosecution that the accused, having so obtained the liquor and taken it to and having it in his boarding-house or lodging-house, was not guilty of any offence until he partook of such a quantity thereof as made him intoxicated, the contention being that on that happening he lost the protection of the prescription. That was the position taken by the prosecution on the argument of the present motion as well.

On that state of facts and admissions, there was no offence in the accused procuring the liquor or taking it to or having it in his room in his lodging-house. Ordinarily, under the Act, the mere having it in such a place constitutes an offence; but admittedly that was not so in this instance. He was not charged with any other offence than having the liquor in his lodging-house as above set out, and there is nothing in the evidence for the prosecution that anything else happened than the mere having it there, under circumstances which, the Crown had admitted, did not shew a contravention of the law. That evidence and the admissions excluded the statutory presumption of guilt (sec. 88), and he was under no obligation to prove his innocence. In his defence-evidence he stated that he took the liquor on an empty stomach, and it upset him; but that was no part of the Crown's case. Moreover, having the liquor innocently and rightfully in the place mentioned, his evidence of his use of what was then a medicine did not change the character of his act so as to make it an offence.

He should be discharged from custody, and he should have the costs of this motion. There should be the usual protection to the magistrate.

MIDDLETON, J. MAY 12TH, 1920.

RE VENN.

Will—Construction—Devise—Life-estate—Estate during Widowhood—Remainder.

Motion by the executors of the will of one Venn, deceased, for an order determining a question as to the meaning and effect of a devise to the testator's son.

The motion was heard in the Weekly Court, Toronto.
William Proudfoot, K.C., for the executors.
G. H. Gilday, for the son's wife.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, said that the devise to the testator's son of the house, "to be maintained by him as a home for himself and his children during the period of his life-time and so long as his wife shall remain a widow and from and after the death of himself and the death or remarriage of his wife . . . to the children of my said son in equal shares share and share alike," gave the son a life-estate only, and also gave

the widow an estate *durante viduitate* if she should survive her husband, with remainder to the children in equal shares.

The rule in Shelley's case could not apply, as the technical words "heirs" or "heirs of his body" were not used. There was nothing to indicate that the word "children" was not used in its ordinary sense, and much to shew that it was.

The wife takes her life-interest by implication—there is no direct gift to her.

The existence of a power of sale was another indication that there was no intention to give the son more than a life-estate.

The intention seemed plain, and the testator had not defeated it by the accidental use of technical terms.

Costs out of the estate.

MIDDLETON, J. MAY 12TH, 1920.

RE HOWARD AND JACOBS.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Previous Agreement for Sale—Registration of Assignment thereof—Application under Vendors and Purchasers Act—Earlier Vendee and Assignee Served with Notice—Rule 602—Earlier Agreement Properly Terminated for Default—Failure to Establish Waiver—Order Barring Claims of First Vendee and Assignee—Costs.

Motion by a vendor of land for an order, under the Vendors and Purchasers Act, declaring that the vendor was able to make a good title.

The motion was heard in the Weekly Court, Toronto.

Helen Beatrice Palen, for the vendor.

J. W. Broudy, for the purchaser.

G. T. Walsh, for Shier and Sonshine, claimants served with notice under Rule 602.

MIDDLETON, J., in a written judgment, said that the objection to the vendor's title arose from the fact that on the 10th November, 1919, a contract of sale was made with the claimant Shier, who paid a sale-deposit of $200 on account of the price, $6,300, agreeing to pay the balance, $1,100 cash on the 1st December and $5,000 by giving a mortgage. Time was of the essence of this agreement. An objection was taken to the vendor's title, but on motion this was declared not to be well-founded. This delayed the matter

beyond the day fixed for completion. On the 19th January a letter was written by the vendor stating that, unless the transaction was closed by the 27th, the contract would be considered at an end and the deposit forfeited. A request was made by the purchaser that the time be extended to the 3rd February—the request was granted on the terms that interest be paid from the 1st December. A request by the purchaser that the matter stand a day or so was granted, but no money was forthcoming. On the 23rd February notice of intention to sell was given, followed by a request for a few days' indulgence, but this produced nothing; and the land had now been resold. The agreement was not in such shape that it could be registered, and the fraudulent scheme, all too common, of an assignment of the agreement from Shier to Sonshine, the assignment being capable of registration and being registered, was adopted. These men now attempted to block the sale by the pretence of readiness to carry out the agreement. In truth they wanted to be bought off. They had no right. The original time may have been waived by the delay, but a reasonable time was fixed, and the purchaser was unready. There was an agreement to extend for "a day or so," but this was conditional upon readineess to carry out, and was not an unconditional waiver of the notice given.

There should be an order declaring that a good title can now be made, notwithstanding this claim, and barring all rights of the claimants under the agreement, and ordering them to pay the costs of both vendor and purchaser.

KELLY, J. MAY 12TH, 1920.

RE McCONAGHY.

Will—Construction—Charitable Bequest—Determination of Object of Testator's Bounty—Home for Aged and Infirm Persons of Protestant Faith.

Motion by the administrator de bonis non with the will annexed of William McConaghy, deceased, for an order determining a question arising upon the will.

The motion was heard in the Weekly Court, Toronto.

D. C. Ross, for the applicant.

E. W. M. Flock, for the Women's Christian Association of London.

G. G. McPherson, K.C., for the Corporation of the County of Perth, representing the County House of Refuge.

KELLY, J., in a written judgment, said that the question was, which of the two claimants, namely, the House of Refuge at Stratford and the Women's Christian Association at London, was entitled to what passed under a bequest to "the trustees or managers of the Home or Hospital for Aged and Infirm Persons of the Protestant faith nearest to the said Town of St. Mary's, the share of said trustees or managers to be used by them for the benefit of the aged and infirm persons of the Protestant faith."

It appeared that only these two institutions had made claim to this bequest: the Court was therefore not called upon to decide between them, or either of them, and any other institution or institutions, but simply to declare which of these two answered the class or kind of institution intended by the testator. If, in other respects than proximity to the Town of St. Mary's, both of these institutions should be held to be within the class or kind intended, then the House of Refuge at Stratford would be entitled, it being nearer to the Town of St. Mary's than the other claimant. But the testator intended that his benefaction should go to an institution conducted under Protestant auspices and management, and not merely a non-denominational institution, where Protestants are received and cared for along with persons of other religious beliefs. Both of the claimant institutions admit and care for Protestants as well as persons of other faiths. Inmates of the House of Refuge who are Protestant predominate in number; but that institution cannot, merely on that account, be called a Protestant institution, it being non-denominational, and its establishment, maintenance, and control being by and for the public generally. The other claimant, while it admits persons not of the Protestant faith, has clearly been established on Protestant denominational lines; it is conducted under Protestant auspices, and openly professes the promotion of that faith. It is in evidence that it has charge, control, and management of the Home for Aged People at London, an institution established for the care of aged and infirm persons. As between these two claimants, the latter answers to the class of institution which the testator intended to benefit.

There should be an order declaring accordingly; and the costs of the application should be paid out of the share of the estate in question; those of the administrator between solicitor and client.

MIDDLETON, J. MAY 13TH, 1920.

*RE SOLICITOR.

Solicitor—Taxation of Bill of Costs Rendered to Client—Services in County Court Actions—Rule 676—Tariff of Costs—Allowances over and above Party and Party Costs—Discretion of Taxing Officer—Assessment on Quantum Meruit Basis—Appeal—Examinations for Discovery—Charge for Fees of Examiner not Paid when Bill Rendered—Liability of Solicitor—Mistake in Item of Bill—Correction of Clerical Error.

An appeal by the client from the taxation of the solicitor's bill of costs by the Taxing Officer at Toronto.

The appeal was heard in the Weekly Court, Toronto.

T. Hislop, for the appellant.

G. T. Walsh, for the solicitor.

MIDDLETON, J., in a written judgment, said that the bill covered the proceedings in two County Court actions and certain general matters.

Under Rule 676, dealing with party and party taxations, costs are to be allowed and taxed according to the tariff, and no other fees or costs are to be allowed than those provided in respect of the matters thereby provided for. The tariff provides certain fixed charges for named services, and provides that other charges may be increased by the Taxing Officer, i.e., the officer taxing the costs, and other fees may be increased only by the Taxing Officer at Toronto.

Unless some error of principle is shewn, no discretionary allowance will be interfered with upon appeal.

In County Court cases, "the Judge" is given the discretion to allow increased fees—that means the Judge of the County Court; and, in certain County Courts, the Clerk has the discretion, subject to an appeal to the Judge.

In the present tariff (1913), the provision is made that "additional allowances may be made in the discretion of the officer taxing, but the exercise of such discretion shall be subject to review upon any appeal," in a taxation between a solicitor and his client. The effect of this is that, while the party and party tariff remains a guide in all taxations between the solicitor and his client, the officer taxing may make further allowances—which may take the form of increases in the allowances provided by the tariff or of allowances for work set forth in detail in the

bill, but which might be in part covered by some general heading in the party and party bill.

The discretion given to the Taxing Officer at Toronto in cases in the Supreme Court and to the Judge of the County Court in County Court cases, in party and party taxations, has no place in a taxation between the solicitor and his client. The officer taxing must deal with all questions that arise.

As between solicitor and client, outside of the formal matters as to which the party and party tariff forms a guide, only to be departed from in exceptional cases, the taxation between the solicitor and his client resolves itself into an assessment on the quantum meruit basis, into which all factors essential to fair play and justice enter.

Examination for discovery were had in the County Court actions covered by the bill, and the bill contained, in the disbursement column, the examiner's fees. These were properly allowed, though they were not paid at the time the bill was rendered—they were paid before the taxation. Sadd v. Griffin, [1908] 2 K.B. 510, distinguished. In any case where there is liability on the part of the solicitor and no dishonesty, the mere fact that the amount has not been paid ought not to preclude recovery.

The solicitor intended an item in his bill to be, "Counsel fee at trial—lasted all day, 10.30-5—$50." By a clerical error, the words "counsel fee at" were omitted. The fee charged was recovered from the opposite party in one of the actions, and was brought into account. The error was properly corrected—and the item allowed—no case determines that a clerical error cannot be corrected.

The appeal should be dismissed with costs.

KELLY, J. MAY 14TH, 1920.

*ELLIS v. HAMILTON STREET R.W. CO.

Street Railway—Injury to Passenger Alighting in Highway between Stopping Places—Street-car Stopped at Point between Stopping Places—Duty of Company to Safeguard Passenger—Passenger Injured by Motor-vehicle—Municipal By-law—Motor Vehicles Act, sec. 15—Findings of Jury—Negligence—Contributory Negligence—Evidence.

Action against the street railway company and one Stiles to recover damages for injury sustained by the plaintiff by being struck by a motor-car owned and driven by the defendant Stiles

after she had alighted from a street-car of the defendant company upon a highway in the city of Hamilton. The plaintiff alleged negligence on the part of the defendants or one of them.

The action was tried with a jury at Hamilton.

M. J. O'Reilly, K.C., for the plaintiff.

George Lynch-Staunton, K.C., and A. Hope Gibson, for the defendant company.

S. F. Washington, K.C., and C. V. Langs, for the defendant Stiles.

KELLY, J., in a written judgment, said that on the evening of the 9th April, 1919, the plaintiff was a passenger on one of the defendant company's cars which was proceeding westerly along King street. The car stopped when it reached Arthur avenue, a street running north from King street, presumably for the purpose of taking on or discharging passengers. Just after it had again started, the plaintiff, who had intended to alight at Arthur avenue, and who swore that the crowd was too great to permit of her getting off there, walked to the front vestibule of the car and asked the motorman to let her get off the car. The motorman at once stopped the car, not waiting until the next street intersection was reached. The outer door of the vestibule was then opened, and the plaintiff passed out of the car upon the pavement. As she was proceeding in a somewhat north-westerly direction towards the north side of the street, she was struck by the motor-car of the defendant Stiles, which was also moving westerly along King street.

The jury found that her injuries were due to the negligence of the defendant company, in that the "motorman should not have stopped car between regular stops to discharge passengers." They also found that there was no negligence on the part of Stiles and no contributory negligence of the plaintiff.

By-law 2139 of the City of Hamilton provides that the street railway company, when any of its cars operating on the streets of the city are stopped at the intersections of streets for the purpose of taking on or letting off passengers, shall stop such cars before passing such intersections instead of stopping after passing the intersections.

This, taken with sec. 15 of the Motor Vehicles Act, R.S.O. 1914 ch. 207, prohibiting motor-vehicles from passing street-cars which are stationary for the purpose of taking on or discharging passengers, affords some ground for assuming that there is, to persons in the street, a greater danger from street-cars stopping elsewhere than at the usual stopping places than from their stopping where persons who may be relying on the above provisions may reason-

ably expect them to stop. Correspondingly, persons operating street-cars should realise that there is such greater danger and take reasonable precautions against possible consequences. The stopping of a street-car between the usual stopping places may not be in itself an act of negligence; but there is a duty on those operating a street-car to take reasonable means to safeguard one who, by their act, may be exposed to such danger. It is likewise incumbent on persons in the position in which the plaintiff placed herself or was placed to take reasonable means to avoid such danger. But the jury had exonerated this plaintiff from negligence in that respect. They had also determined that, in the circumstances, the motorman was remiss in his duty.

There was in the evidence for the plaintiff something for the jury's consideration, and the case could not properly have been withdrawn from them.

There should be judgment for the plaintiff against the defendant company for the damages assessed and costs, and dismissing the action as against Stiles with costs.

MIDDLETON, J. MAY 14TH, 1920.

CORRIGAN v. CITY OF TORONTO.

LEE v. CITY OF TORONTO.

Water—Interference with Natural Flow of Stream into Pond by Municipal System of Drainage—Lowering of Level of Pond—Defilement of Water—Nuisance—Powers of City Corporation—Compensation—Claim for Mandatory Injunction and Damages.

Actions by the owners of lands adjacent to and underlying "Small's pond" to restrain the defendant the Corporation of the City of Toronto from intercepting by its drainage system water which would otherwise reach the pond and for damages, and against the defendants Jennings and Ross for damages sustained by the lowering of the level of the pond by reason of an opening made in the dam, and for a mandatory order compelling the restoration of the water to its former level.

The action was tried without a jury at a Toronto sittings.
W. J. Elliott and R. D. Hume, for the plaintiff Corrigan.
G. E. Newman, for the plaintiff Lee.
G. R. Geary, K.C., for the defendant corporation.
John Jennings, for the defendants Jennings and Ross.

MIDDLETON, J., in a written judgment, said, after stating the facts and giving a short history of the pond, that it had in 1912 become practically a stagnant pool and an offensive nuisance, besides being a breeding place for mosquitoes.

The learned Judge was unable to see any foundation for legal liability of the city corporation. The work done by the corporation in the construction of drains and sewers was within its authority; and compensation, if any injury were sustained, should have been sought under the appropriate provisions of the Municipal Act.

The learned Judge did not overlook the fact that the corporation may have in some degree contributed to the defilement of the water by the dumping of ash and refuse in the filling in of Ashbridge avenue. But any water so defiled is taken in the sewer and does not reach the pond.

The condition found in 1912 was not the result of anything for which the corporation was responsible. Much that was done by individuals was improper. Much of the defilement of the water was inevitable from the occupancy of the district.

The plaintiffs placed their claim upon their right as landowners to the free flow of the stream without impairment, and suggested that the corporation had not the power to drain away the water until proper expropriation proceedings had been taken. In the learned Judge's opinion, the stream had become so foul and such a source of danger that the corporation had the right to conduct it to a place of safety in the public interest. The health of the city was of more importance than the right of the plaintiffs to maintain this nuisance.

He declined to grant a mandatory order to restore the condition of affairs in 1912. His only wonder was that proceedings had not been taken to fill in this pond at the expense of those who maintained it or to remove the dam so that the water might flow away. The site might then be made of value.

Action dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 15TH, 1920.

REX v. PUNNITT.

REX v. LERMAN.

REX v. DAVIS.

Ontario Temperance Act—Police Magistrates' Convictions for Offences against sec. 40—Keeping Intoxicating Liquor for Sale—Liquor Found in Possession of Defendants—Presumption under sec. 88—Evidence to Rebut—Findings of Magistrate not Reviewable by Court—Dismissal of Motions to Quash.

Motions to quash three convictions by Police Magistrates for offences against the Ontario Temperance Act—keeping intoxicating liquor for sale, contrary to sec. 40.

R. L. Brackin, for the defendants.
F. P. Brennan, for the magistrates.

MIDDLETON, J., in a written judgment, said that when once intoxicating liquor is found in the possession of the accused he is, by virtue of the statute, presumed guilty of a breach, unless he can satisfy the magistrate that he is not guilty: 6 Geo. V. ch. 50, sec. 88.

In ordinary cases, on a motion to quash, the Court cannot act upon the view that the magistrate has decided against the weight of evidence. Under this Act, the magistrate must determine whether the evidence tendered is sufficient to displace the presumption of guilt raised by the finding of liquor; and any attempt to review the finding would be a usurpation of an appellate jurisdiction not conferred.

The presumption of innocence till guilt is proved is displaced by the express provision of the statute. It is not the province of a Judge of the Supreme Court to discuss the wisdom of the enactment. It may be regarded as harsh, but it may well be that without some such provision this Act could not be enforced at all.

A perusal of the evidence failed to indicate that any injustice had been done. The saying that Justice should be blind does not mean that a Justice of the Peace must be unable to see through a somewhat clumsy device to conceal an actual sale, merely because the accused sticks to his story, or that the Justice should be too stupid to see that circumstances and facts speak louder than protestations of innocence.

It is obvious that when a temperate man purchases several score of cases of whisky for his personal use, and in a few days the number of cases has been largely reduced, the story of the armed burglar who kept the owner bound while he carried out the raid requires careful scrutiny, and when too often repeated the magistrate may become incredulous—particularly when the facilities for the export of liquor are so good as they are said to be at Windsor.

In Punnitt's case there is no suspicion of a wholesale trade, but ample to warrant the idea of a fair retail business.

The motions should be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 15TH, 1920.

HYDRO-ELECTRIC POWER COMMISSION OF WELLAND v. HILL.

Judgment—Trial of Action—Reference to County Court Judge—Judicature Act, secs. 45, 65—Judgment or Report.

Motion by the defendant to set aside the judgment of the Judge of the County Court of the County of Welland in an action in the Supreme Court of Ontario, which was referred to him by the Judge of the Supreme Court before whom the action came for trial.

D. C. Ross, for the defendant.
H. S. White, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that he had consulted the Judge who directed the reference, and that Judge thought that, as the cause was "referred" to the County Court Judge, a report should be made, upon the theory that the case fell under sec. 65 of the Judicature Act. That section provides that an action may be referred to an official referee or a special referee.

Section 45 of the Judicature Act contemplates a request from the Supreme Court Judge to the County Court Judge to preside at the sittings or some part of the sittings, and the idea of a reference is quite foreign to the section.

The matter was not before the learned Judge (MIDDLETON, J.) in any such form as to warrant the making of any order.

No order; no costs.

MIDDLETON, J. MAY 15TH, 1920.

RE HODGINS.

Husband and Wife—Dower—Divorce.

Motion by the executors of one Hodgins, deceased, for an order determining a question arising in the administration of his estate, viz., whether his widow is entitled to dower out of his lands.

The motion was heard in the Weekly Court, Toronto.
George Bell, K.C., for the executors.
Gideon Grant, for the widow.

MIDDLETON, J., in a written judgment, said that the case seemed to be concluded against the widow by the decision in In re Williams and Ancient Order of United Workmen (1907), 14 O.L.R. 482. She had sought and obtained a divorce, and it did not lie in her mouth to say that she was still the wife of the deceased. See also Swaizie v. Swaizie (1899), 31 O.R. 324, 330.

A divorce obtained by a wife by reason of her husband's misconduct will bar her dower: Frampton v. Stephens (1882), 21 Ch. D. 164.

Order declaring accordingly; costs out of the estate.

BEGG LIMITED v. EDWARDS—CAMERON, MASTER IN CHAMBERS—MAY 6.

Security for Costs—Application by Defendants for Increased Security—Increase of Costs by Reason of Counterclaim—Distinction between Counterclaim Proper and Set-off.]—Motion by the defendants for an order for increased security for costs. THE MASTER, in a written judgment, said that the action was commenced by a specially endorsed writ of summons, the claim being to recover $7,740.54 from the defendants as acceptors of three bills of exchange. The defendants counterclaimed for $44,649.36 damages arising out of the breach of an alleged agreement entered into between the plaintiffs and defendants in 1912. In the defendants' affidavit of merits, filed with their appearance, the plaintiffs' claim was admitted with the trivial exception of about 40 cents' interest. The plaintiffs being out of the jurisdiction, the usual præcipe order for security for costs was issued by the defendants, upon which the plaintiffs paid $200 into Court. It was stated by the defendants that the costs of defending the action would exceed $1,000. It seemed clear to the Master that the contest at the trial would be on the defendants' counterclaim, and that the increased costs of the trial would be occasioned by the counterclaim. In the matter of costs, a counterclaim which is not a set-off is treated as a cross-action, whereas a set-off remains a statutory defence to the action. A plaintiff who brings an action and is met by a set-off equal in amount to his claim must pay the defendant his costs of the whole action. Where, however, the defendant pleads a counterclaim and recovers an amount equal to or greater than the plaintiff's claim, the plaintiff will recover his costs of the claim, and the defendant only his costs of the counterclaim. Reference to Atlas Metal Co. v. Miller, [1898] 2 Q.B.

500; Stooke v. Taylor (1880), 5 Q.B.D. 569; Girardot v. Welton (1900), 19 P.R. 162, 165. The increase in costs would be by reason of the counterclaim. The application should be dismissed with costs to the plaintiffs in the cause. P. E. F. Smily, for the defendants. P. W. Beatty, for the plaintiffs.

SCHARIO v. JACKSON—KELLY, J.—MAY 7.

Mortgage—Power of Sale—Notice of Exercising—Default in Payment of Mortgage-moneys—Interim Injunction Restraining Mortgagee from Proceeding—Motion to Continue—Alleged Variation in Terms of Payment—Oral Agreement—Statute of Frauds—Notice of Exercising Power of Sale—Mistake in Stating Amount of Principal Due—Power to Remedy—Power of Sale Exercisable without Notice.]—Motion by the plaintiff to continue until the trial an interim injunction restraining the defendant, a mortgagee, from proceeding to sell the mortgaged land. The motion was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the grounds on which the plaintiff sought to restrain the defendant were untenable; no reason for continuing the injunction was shewn. In so far as the plaintiff relied on any agreement or proposed agreement for a variation of the terms of payment of the mortgage, any such arrangement, if it ever was made, was wholly oral, and there was no performance of it or any part of it. The Statute of Frauds was a complete answer to this part of the plaintiff's case. The other ground, that the notice of exercising the power of sale was invalid because of the error therein in stating the principal unpaid to be $4,300 instead of $4,200, was likewise unavailing. It was argued that this error has the effect of invalidating the whole notice. That was not so; the error could easily have been remedied, and the defendant stated that it would have been remedied immediately had his attention been drawn to it. Moreover, it seemed to have been overlooked that the mortgage-deed contained a provision that, on default continuing for two months, the powers of sale, etc., might be exercised without any notice. Default had continued for more than two months prior to the institution of proceedings for sale. The attitude of the plaintiff was unreasonable: he had permitted large arrears to accumulate while enjoying the benefits of the mortgaged property. The motion to continue the injunction should be dismissed with costs. W. R. Meredith, for the plaintiff. C. St. Clair Leitch, for the defendant.

MATTHEW-ADDY CO. v. CANADIAN MALLEABLE IRON CO. LIMITED—CAMERON, MASTER IN CHAMBERS—MAY 11.

Discovery—Production of Documents—Correspondence—Order for Better Affidavit.]—Motion by the defendants for an order requiring the plaintiffs to file a further and better affidavit on production of documents. THE MASTER, in a written judgment, said that the action was brought to recover $16,236.47 as damages for breach of warranty, or, in the alternative, for the return of that sum with interest, upon the ground that the goods delivered did not correspond with the description. The plaintiffs bought from the defendents 500 tons of reclaimed iron, and directed the defendants to ship it to the Inland Malleable Iron and Steel Company, at Terre Haute, Indiana. Part of the iron, approximately 365 tons, was shipped as directed. In the statement of claim it was alleged that the Inland company refused to accept the iron because, when it arrived at Terre Haute, it was covered with a thick coating of rust, and a large part of it could not be smelted in ordinary blast furnaces. In the statement of defence it was said that, if the Inland company refused to accept the iron, the refusal was on account of a change in conditions following upon the Armistice, and was not by reason of any failure on the part of the defendants to deliver iron of the description contracted for. The Master said that this was an issue which must be disposed of at the trial. On the examination of the president of the plaintiff company for discovery, counsel for the plaintiffs refused to produce the correspondence between the plaintiff company and the Inland company. Every document which will throw light on any part of the case is material and must be disclosed. Reference to Compagnie Financière du Pacifique v. Peruvian Guano Co. (1882), 11 Q.B.D. 55, 63. There should be an order requiring the plaintiffs to file a further affidavit of documents; costs to the defendants in any event. G. H. Sedgewick, for the defendants. M. L. Gordon, for the plaintiffs.

FULLER v. STORMS—KELLY, J.—MAY 12.

Contract—Sale of Farm, Implements, and Stock—Claim of Purchaser that all Chattels not Delivered—Items of Claim—Success as to one only—Counterclaim—Mortgage — Waste—Injunction—Removal of Timber — Damages—Account—Reference—Costs.]—The plaintiff's claim arose out of a contract of the 26th March, 1919, for the sale to him by the defendant of a farm, at the price of $5,800, and certain implements, live stock, and other goods and chattels, at the price of $2,349. The action was brought to recover the value of certain of the articles agreed to be sold, which, the plaintiff alleged, were not delivered. The defendant, being mortgagee of the farm, counterclaimed for an injunction restraining the plaintiff from committing waste and for damages for waste already committed and payment to the defendant of all moneys received by the plaintiff from the sale of wood and timber cut on or removed from the lands and for an account. The action and counterclaim were tried without a jury at Belleville. KELLY, J., in a written judgment, made a careful examination of the evidence, and decided against the plaintiff upon all the items of his claim except one, viz., a claim for an allowance for the removal of a tree, the value of which was admitted to be $8. The learned Judge was of opinion that the defendant was entitled to succeed upon his counterclaim: that there should be an injunction as prayed; and judgment for payment over to the defendant, to be applied on his mortgage, of all moneys received by the plaintiff from the sale of wood and timber cut or removed from the lands and not already accounted for, and payment also of the market-value of the timber so cut and removed for which the plaintiff had not yet received payment, against which the plaintiff should receive a credit of $8 in respect of the tree above mentioned, and for an account to ascertain the amount to which the defendant was entitled and a reference to the Local Master at Picton for that purpose and to ascertain the damages. The defendant should have the costs of the action and counterclaim. Further directions and subsequent costs reserved until after report. E. G. Porter, K.C., for the plaintiff. Gideon Grant and M.L. Allison, for the defendant.