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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 22ND, 1917.

GAGE v. REID.

Trial—Jury—Prejudice—Improper Course Taken by Counsel at Second Trial of Action—Verdict for Small Sum—Perverse Verdict—Application for New Trial—Refusal of Court to Order Third Trial—Costs.

Appeal by the plaintiff from the judgment of BRITTON, J., at the second trial of this action.

The second trial was ordered by a Divisional Court: see Gage v. Reid (1917), 38 O.L.R. 514.

At the second trial before BRITTON, J., and a jury, a general verdict was given for the plaintiff with $5 damages, and judgment was ordered to be entered for the plaintiff for $5 and Division Court costs of both trials without set-off.

The plaintiff asked for a new trial, upon the ground mainly of unfair allusion by counsel for the defendant to the plaintiff's nationality and to convictions had against him in criminal proceedings, and also upon the ground that the verdict was perverse.

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

D. O. Cameron and J. B. Mackenzie, for the appellant.

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

MEREDITH, C.J.C.P., delivering judgment at the conclusion of the argument, said that the appeal should be dismissed. The case had been tried twice, and it is seldom, if ever, that a case is set down for a third trial, where, as in a case of this kind, the jury might reasonably give $5 damages. The act of the de-

fendant in endeavouring to introduce evidence at the trial of the plaintiff's nationality could not be too severely condemned. It was inexcusable; and, by reason of that, there should be no costs of this appeal.

RIDDELL, J., said that he would be very glad if the authorities and the law would permit the Court to grant a new trial in this case. He was satisfied that the conduct of the defendant's counsel was inexcusable; but the authorities did not permit the Court to order a third trial.

LENNOX, J., reluctantly concurred in dismissing the appeal. The case was a peculiar one, and what was done should be marked as far as possible with disapproval.

There was some ground for saying that the verdict of the jury was perverse.

But the main point was, that counsel, who understood the matter thoroughly, and knew that he should not attempt to prove the nationality of the plaintiff, persisted in attempting to do so, or rather in making the suggestion to the jury. The effect upon the minds of the jurors was just as damaging as if counsel had succeeded in getting the evidence before the jury.

In attempting to prove that the plaintiff had been convicted upon many occasions, counsel accomplished as much or more than he would have accomplished if he had got the evidence in.

ROSE, J., concurred.

Appeal dismissed without costs.

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1917.

*NORTHERN LUMBER MILLS LIMITED v. RICE.

Mechanics' Liens—Action to Enforce Lien for Materials—Period of Credit not Expired as to Part of Claim—Premature Action—Right to Prove Claim for Immature Part of Claim in Action Properly Brought in Respect of Mature Claims—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, secs. 24, 25, 32, 37, 39.

Appeal by the defendant from the judgment of the Judge of the District Court of the District of Temiskaming in favour of

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

the plaintiffs in an action under the Mechanics and Wage-Earners Lien Act, to enforce a lien for lumber supplied for the erection of a house, and dismissing the defendant's counterclaim.

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

J. M. Ferguson, for the appellant.

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

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the questions involved in the appeal were: (1) whether the action was altogether premature; and (2), if not, whether it was premature in part.

The price of the materials was to be paid in three payments: before action the first two had become payable—the third had not.

A cause of action arose upon default in payment of each of these instalments; and so, apart from the provisions of the Act the action would have been properly brought as to the first two, but improperly as to the third.

It is quite plain, from sec. 37 of the Act, that immature claims of lien-holders are to be brought in and dealt with upon the trial of the action. The purpose of the enactment is, to "adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial"—in the one action and upon the one trial—a thing necessary in working out the purposes of the Act—and the persons to be served with the notice of trial are, among others, "all lien-holders who have registered their claims as required by this Act," not merely lien-holders whose claims are payable. See also sec. 39.

Sections 24 and 25 expressly deal with a case such as this, in which there is a "period of credit," but they leave the questions to be answered here unsolved; and sec. 32 is not very helpful—its provision is not that the action shall be taken to have been brought on behalf of the lien-holders, but "on behalf of the other lien-holders."

No provision of the Act gives a right of action when nothing is yet payable to the plaintiff; the contrary, rather, appears; and, on the other hand, it would be extraordinary if a plaintiff, having a right of action, upon a matured claim, could not get the benefit of the Act in respect of a claim not then matured, though every other lien-holder could.

Having regard to all the provisions of the Act, the plaintiffs might at the trial bring in their claim in respect of the lien for the

amount which was not payable when the action was commenced; and indeed that they were bound to do so if they brought it in at all, in order that the provisions of sec. 37, and the general purposes of the Act, might be complied with.

In short, when any claim is ripe for action, and the defendants fail to pay or settle it, an action lies, and in that action all claims, whether then payable or not, are to be dealt with at the trial, as provided for in sec. 37.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1917.

LAPOINTE v. ABITIBI POWER AND PAPER CO.

Water—Navigable River—Obstruction by Logs—Public Nuisance—Right of Traveller to Abate—Aggravation of Nuisance by Plaintiff—Loss Occasioned to Plaintiff not Recoverable—Unlawful Obstruction—Navigable Waters Protection Act, R.S.C. 1906 ch. 115, sec. 4—Question not Raised until Argument of Appeal.

Appeal by the defendants from the judgment of LATCHFORD, J., 12 O.W.N. 329.

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

G. H. Kilmer, K.C., for the appellants.

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

MEREDITH, C.J.C.P., read a judgment in which he said that the two main questions involved in the appeal were: whether the defendants had created in a highway a public nuisance which the plaintiff had a right to abate; and, if so, whether what the plaintiff did was a lawful abatement of the nuisance.

The finding of the trial Judge against the defendants upon the first question was right—the defendants' obstructions of the navigable waters of the river and lake were entirely selfish and unreasonable and unauthorised by law, even assuming that they had some right to "boom-dam" navigable waters.

The case was a plain one of a public nuisance created by the defendants in a highway, in holding logs for about three weeks at the mouth of the river, obstructing navigation—a nuisance

which any one of the travelling public, including the plaintiff, had a right to abate. But the plaintiff, instead of abating it, aggravated it—he did that which afterwards prevented navigation by every one until the wind changed and the logs were brought down again. In a strong adverse wind, he opened the boom and left it open so that the wind drove the logs up-stream, completely blocking the stream until they were brought down again. The plaintiff deliberately brought about the condition of the river of which he now complained.

For the general principles applicable to the abatement of nuisances, reference was made to Roberts v. Rose (1865), L.R. 1 Ex. 82, per Blackburn, J.

Upon the argument of the appeal, it was contended by counsel for the plaintiff—for the first time—that by reason of sec. 4 of the Navigable Waters Protection Act, R.S.C. 1906 ch. 115, the defendants' booms were unlawful obstructions of the river and lake; but the position was taken too late: if the case were within the Act, and the plaintiff had relied on it at the trial, it might have been proved that the approval which the Act requires had been obtained.

The appeal should be allowed and the action dismissed.

LENNOX, J., and FERGUSON, J.A., agreed in the result.

ROSE, J., read a judgment in which he said, after a reference to the facts, that, whether or not the defendants created an unlawful obstruction by retaining the logs in the lake and at the mouth of the river, and whether or not the plaintiff would have had a cause of action for any loss that he might have sustained by waiting on the 23rd May for the wind to change or for the defendants to make a passage for him, the loss that he did in fact sustain was the direct consequence of his own act in letting the logs into the river, and that, in respect of it, he had no cause of action.

Appeal allowed with costs.

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1917.

*TESSIER v. CITY OF OTTAWA.

Negligence—Obstruction in Highway—Injury to Conductor of Street-car—Municipal Corporation—Contractors—Absence of Authority—Liability of Contractors—Contributory Negligence—Evidence—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Carleton dismissing an action brought in that Court, and tried without a jury, to recover damages for personal injuries sustained by the plaintiff by coming against an obstruction in a highway, said to have been placed there by the two individual defendants by the authority of the defendants the city corporation.

The appeal was heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

Taylor McVeity, for the appellant.

F. B. Proctor, for the defendants the city corporation, respondents.

G. F. Henderson, K.C., and A. C. Fleming, for the individual defendants, respondents.

LENNOX, J., in a written judgment, said that the appeal as against the city corporation was dismissed at the hearing, but the question of costs was reserved.

The defendants Neate and Wentzloff, desiring to construct a drain from their premises north of Creighton street to connect with the city sewer in that street, in the city of Ottawa, obtained a conditional permit from the defendant corporation, on the 9th February, 1916. They did not, however, go on with the work, and the permit expired on the 11th March. In June, 1916, these defendants, without again obtaining the sanction of the corporation, commenced to open up the ditch. They worked intermittently, and the work was not finished on the 21st June, but was at a standstill on that day. The street railway ran along Creighton street, double-tracked. These defendants had erected a barrier, 3½ feet high, constructed of trestles and planks, over or around their open drain, coming to within 2 or 2½ feet of the most northerly rail of the tracks. The planks were not fastened down, and no precaution was taken to keep them in place. Possibly they were moved closer to the track by school-children. There was nothing to prevent that, but it would not relieve these

defendants from liability for the condition of the structure at the time of the injury to the plaintiff: Rigby v. Hewitt (1850), 5 Ex. 240, and other cases.

The plaintiff was the conductor of a street-car, and upon the 21st June was upon an open car running westerly along Creighton street. Acting in the discharge of his duty as a conductor, and while attempting to pass along the foot-board of the car from rear to front, he came in contact with one of the planks forming part of the barrier referred to, and was seriously injured. He knew of the existence of the structure, but had momentarily forgotten it.

These defendants were wrongfully upon the highway, and their ditch and barrier were unauthorised. Their conduct amounted to malfeasance, there was actionable liability without proof of negligence, and they were liable for all the consequences: Clark v. Chambers (1878), 3 Q.B.D. 327. At all events negligence was established against the defendants, and they were liable for the injury, unless it was caused by the plaintiff's own negligence.

The onus of proving the plaintiff's negligence and that it was the cause of the injury was upon these defendants: Morrow v. Canadian Pacific R.W. Co. (1894), 21 A.R. 149. The trial Judge based his dismissal of the action mainly on contributory negligence. The finding turned upon the possibility of passing in safety, the doubt as to whether the plaintiff looked or not, and the evidence of one Kennedy that the plaintiff "swung out carelessly." But there was no evidence of negligence, much less of evidence occasioning the accident, to be charged against the plaintiff. Conjecture is not enough: Montreal Rolling Mills Co. v. Corcoran (1896), 26 S.C.R. 595; nor inadvertence: Denny v. Montreal Telegraph Co. (1878), 42 U.C.R. 577; nor that it would have been quite possible to pass the obstruction in safety: Rowan v. Toronto R.W. Co. (1899), 29 S.C.R. 717; nor knowledge per se: Gordon v. City of Belleville (1887), 15 O.R. 26; nor forgetfulness: Scriver v. Lowe (1900), 32 O.R. 290.

The appeal should be dismissed with costs and the action should stand dismissed as against the defendant corporation; but, as against the other defendants, the appeal should be allowed with costs, and judgment entered for the plaintiff for $175 with costs.

MACLAREN and FERGUSON, JJ.A., agreed with LENNOX, J.

ROSE, J., read a dissenting judgment. He was of opinion that there was evidence to sustain the trial Judge's finding in favour of the defendants Neate and Wentzloff, and the Court could not say he was wrong.

Appeal as against these defendants allowed; ROSE, J., *dissenting.*

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1917.

CYCLONE WOVEN WIRE FENCE CO. v. TOWN OF COBOURG.

Landlord and Tenant—Agreement—Construction—Lease—Option of Purchase—Relinquishment—Distress for Rent—Chattels Seized Bought in by Landlord — Property not Passing — Damages—Loss of Credit from Wrongful Seizure—Nominal Damages—Costs.

Appeal by the plaintiffs from the judgment of BRITTON, J., 12 O.W.N. 364.

The appeal was heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

J. T. Loftus, for the appellants.

F. M. Field, K.C., and W. F. Kerr, for the defendants, respondents.

LENNOX, J., read the judgment of the Court. After stating the facts, he said that the single issue in this case was, whether rent was due at the time of the seizure; and that issue was not dependent upon oral testimony, but upon the construction of the written agreement between the parties. It was not important whether the plaintiffs intended to relinquish their option of purchase of the demised premises, or not, until there was some evidence that they did in fact relinquish it; and there was no evidence to shew a relinquishment in fact; the evidence was to the contrary. The agreement might be treated as a lease: Halsbury's Laws of England, vol. 18, p. 366, para. 815. The plaintiffs entered into possession and occupied the premises under the agreement.

The defendants could not lawfully buy the goods seized and offered by them for sale. The goods which the defendants purported to buy, however, had not been removed from the premises, and the defendants had offered to surrender them to the plaintiffs, though on terms which they had no right to exact. Goods to the value of $23.50 were regularly, though illegally, sold. As to all the other goods which the auctioneer purported to sell, it was stated at the trial by the plaintiffs' witnesses that the goods had greatly increased in value, were still increasing in value, and were practically not to be obtained in the market. In the circumstances, it would be right to treat the supposed sale to the defendants as passing no title and in effect a nullity.

A landlord is not liable for loss of credit resulting from a wrongful seizure: Walker v. Olding (1862), 1 H. & C. 621; Walshaw v. Brighouse Corporation, [1899] 2 Q.B. 286 (C.A.)

No property in the goods bid in by the defendants vested in them by reason of what purported to be a sale: Williams v. Grey (1874), 23 U.C.C.P. 561; Burnham v. Waddell (1877), 28 U.C.C.P. 263; Barron and O'Brien on Chattel Mortgages, ed. of 1897, p. 91.

The appeal should be allowed, and judgment should be entered for the plaintiffs for $23.50 and nominal damages, $5, with a declaration that the plaintiffs are the owners of the goods which the defendants assumed to sell (other than those sold for cash, $23.50), and for delivery of the goods to the plaintiffs if they have been removed. The plaintiffs should have the costs of the action and appeal, both on the Supreme Court scale.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1917.

TOWNSEND'S AUTO LIVERY v. THORNTON.

Negligence—Collision of Automobiles in Highway — Claim and Counterclaim—Trial—Jury—Verdict—Statement of Foreman—Jury Sent back to Answer Questions—Findings—Judge's Charge—Damages.

Appeal by the defendant from the judgment of DENTON, Jun. Co.C.J., upon the findings of a jury, in favour of the plaintiffs, in an action in the County Court of the County of York, brought to recover damages for injury to the plaintiffs' automobile in a collision with the defendant's automobile, in the Queen's Park, Toronto, by reason, as the plaintiffs alleged, of the negligence of the defendant. The judgment was for the recovery of $300.35 and costs, and dismissing the defendant's counterclaim.

The appeal was heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

J. H. Fraser, for the appellant.

J. M. Godfrey, for the plaintiffs, respondents.

ROSE, J., in a written judgment, said that, at the close of the evidence, the learned trial Judge, probably thinking that, upon

the evidence, the only reasonable verdict was one in favour of the plaintiffs, charged the jury very briefly, but quite correctly, and asked them to bring in a general verdict for the plaintiffs upon their claim or for the defendant upon his counterclaim. There was no exception to the charge, except that counsel for the defendant asked that the jury be instructed as to what their duty was in case they found that both parties were to blame. The Judge complied with this request.

The jury retired, and in half an hour came back with a written verdict as follows: "We find that the defendant was negligent in cutting the corner, and we award the plaintiffs the actual damage to the car as $135." Counsel for the plaintiffs said: "Our actual damages were more than that. They should allow us a fair amount for depreciation and a fair amount for loss of services." The Judge asked the jury whether they had sufficiently considered that question, and the foreman answered: "We looked at it that there was so much fault on both sides. We considered there were faults on both sides. They were both approaching that curve at too fast a clip, we think."

Some discussion ensued, counsel for the plaintiffs suggesting that the jury be "sent back to say whose negligence was the cause of the accident," and counsel for the defendant moving for judgment upon the foreman's answer as being the finding of the jury. The Judge did not accept the answer as such a finding, but sent the jury back to reconsider the matter, this time submitting questions to them, and again explaining what the result must be if both parties were negligent; telling them, at the request of counsel for the plaintiffs, what was meant by negligence causing the accident; and, upon the request of counsel for the defendant for an instruction that the defendant's being on the wrong side of the street might not have been the cause of the accident, telling them that they might conclude that "that had nothing to do with the accident."

On the argument of the appeal, much complaint was made as to the form of the charge in this last particular. It was not as full as it might have been, but it was not misleading; certainly it could not, in view of all the discussion, leave the jury with the impression that, if the defendant was on the wrong side of the road, the plaintiffs were at liberty to run him down.

The jury, in answer to the questions, found that the plaintiffs' damages were caused by the defendant's negligence, such negligence consisting in being on the wrong side of the street. They did not adopt the foreman's former statement that both parties were to blame, but found specifically that "there was no negligence

on the part of the plaintiffs." They also made a detailed assessment of damages, stating their reason for moderating the plaintiffs' claim in some particulars.

The charge was not misleading; and it followed that the plaintiffs were entitled to judgment, unless, instead of sending the jury back to answer questions, the Judge was bound to accept the foreman's statement as equivalent to the finding of the jury. There was nothing to suggest that the other jurors indicated their concurrence in that statement; and, unless the Judge had been very sure that it represented the considered opinion of the jury, he could not have accepted it. Instead of accepting it, he adopted what was said in Gray v. Wabash R.R. Co. (1916), 35 O.L.R. 510, 515, to be the better course—he "made plain to the jury the meaning attributed to the foreman's statement . . . and how it seemed to him to conflict with their written verdict; and . . . sent them back to consider the matter, and to alter their written verdict, if it were proper to do so."

The appeal should be dismissed.

LENNOX, J., was of the same opinion, for reasons stated in writing.

MACLAREN and FERGUSON, JJ.A., agreed in the result.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1917.

*APPELBE v. WINDSOR SECURITY CO. OF CANADA LIMITED.

Mortgage—Action for Foreclosure—Mortgage Made in 1915—Renewal of Extension of Mortgage Made in 1911—Interest and Taxes not in Arrear—Principal Overdue—Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, sec. 2 (1)—Sec. 4 as Amended by 6 Geo. V. ch. 27, sec. 1.

Appeal by the plaintiff from the order of SUTHERLAND, J., in Chambers, ante 139.

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

J. H. Rodd, for the appellant.
W. E. Raney, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the only question upon the appeal was, whether the prosecution, without the leave of a Judge, of such an action as this, was prohibited by the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, as amended by (1916) 6 Geo. V. ch. 27 and (1917) 7 Geo. V. ch. 27, sec. 59.

As to mortgages, the prohibition against proceedings for the recovery of the principal moneys secured by them is expressly confined to mortgages made or executed prior to the 4th August, 1914; and, even in regard to them, the prohibition is, by sec. 4 of the original Act, further curtailed so as to exclude mortgages made before that day which have been extended or renewed after it. But, by the amending Act of 1916, this further curtailment was reduced so that it now covered such mortgages only when "the extension or renewal is for less than three years, and the rate of interest provided for in the original mortgage is not increased by such extension or renewal."

The mortgage upon which the plaintiff was proceeding having been made after the 4th August, 1914, how was it possible to bring this case within the prohibitory words of the enactments? To say that it is in substance only a renewal of a mortgage made before that day could not help the defendants—it was none the less a mortgage made after that day, and so expressly without the enactments. To the words "made or executed prior to the 4th day of August, 1914," the Court could not add such words as "or remade or re-executed after that day."

This case could be brought within the provisions of the enactments only (1) by ignoring the fact that they affect only mortgages made or executed after the 4th August, 1914, or (2) by turning the curtailing section, 4, into an enlarging provision, and then holding that by implication a mortgage made after the 4th August, 1914, is brought within the enactments if it can be called an extension or renewal of one made before that day.

But, if that were not so, how could it be found that the mortgage was only an extension or renewal of another mortgage? Another mortgage which had long since ceased to exist and had long since been formally discharged, and a mortgage made by a different mortgagor—a different mortgage in all respects save that the lands were the same in both and that both were made by purchasers to secure payment of parts of their purchase-moneys.

There may be an extension or renewal of a mortgage without

making a new one, and to such an extension or renewal the Act is applicable.

The appeal should be allowed and the order below set aside.

ROSE, J., was of the same opinion, for reasons stated in writing, in which he referred to Guardians of West Derby Union v. Metropolitan Life Assurance Society, [1897] 1 Ch. 335, [1897] A.C. 647.

RIDDELL, J., agreed in the result.

LENNOX, J., dissented, giving written reasons.

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

HIGH COURT DIVISION.

MIDDLETON, J. DECEMBER 3RD, 1917.

GODSON CONTRACTING CO. v. GRAND TRUNK R.W. CO.

Limitation of Actions—Adverse Possession of Land—Acts of Possession—Evidence—Finding of Fact of Trial Judge.

Action for a declaration of the plaintiffs' title to a small parcel of land situate south of the Toronto Belt Line Railway, and forming part of the original road-allowance east of townhip lot 21 in the 3rd concession from the bay of the township of York.

The plaintiffs claimed by a paper-title, and the defendants by an alleged possessory title acquired by one John Lander, now deceased.

The action was tried without a jury at Toronto.

E. D. Armour, K.C., and W. S. Montgomery, for the plaintiffs.

D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

MIDDLETON, J., after setting out the facts in a written judgment, said that the possession shewn by the defendant was sufficient to establish a possessory title. The enclosing lands as part of the entire estate and the asserting of dominion over them and using them as they were used—cultivating where capable of cultivation, caring for and pruning trees in the ravine, cutting timber for fuel, drawing gravel from a gravel-pit, and other acts

deposed to—all went to shew that kind of possession which the statute contemplates—an actual, continuous, and exclusive possession. According to the decided cases, it is largely a question of fact in each case, and in each case due regard must be had to the exact nature and situation of the land in question. Here all was done that could be done by an owner residing in the main dwelling-house, who had paper-title to the land. All within the main fences was his holding, and he used it in accordance with its fitness for various purposes.

Action dismissed with costs.

MULOCK, C.J. EX., IN CHAMBERS. DECEMBER 5TH, 1917.

*FULTON v. MERCANTILE TRUST CO.

Costs—Taxation—Defendants Severing in their Defence—Two Sets of Costs—Trustee and Cestuis que Trust—Rule 669—Trustee Confined to Costs of Watching Case.

Appeal by the plaintiff from the ruling of a local taxing officer, upon taxation of the defendants' costs, that the plaintiff was liable for two sets of costs.

W. S. MacBrayne, for the plaintiff.
G. C. Thomson, for the defendant company.
J. E. Jones, for the other defendants.

MULOCK, C.J. EX., in a written judgment, said that the action was brought by John W. Fulton against the trust company as administrator of the estate of Annie Fulton, his deceased wife, to obtain a declaration that certain lands conveyed to her were held by her in trust for herself and himself as joint tenants.

On the application of the defendant company, three of the heirs of Annie Fulton were added as defendants to represent and bind all her heirs. In their statement of defence they set up that she was the sole beneficial owner of the lands at the time of her death. The defendant company submitted its rights to the Court, taking issue with neither party. The company defended by a solicitor, and the other three defendants jointly by a different solicitor.

The judgment of the Court was, that Annie Fulton held the lands in trust for the plaintiff and herself as joint tenants, and that

the plaintiff became entitled thereto by survivorship, and that the defendants were "entitled to their costs of defence, under the circumstances, if no appeal."

Under Rule 669, the defendants were entitled to two sets of costs, unless there were circumstances entitling them to but one set.

Where a person finds himself trustee of property, and there is litigation as to who are the cestuis que trust, the trustee's proper course is, as a general rule, to endeavour to make the claimants themselves assume the burden of the litigation; if they do so, the trustee should thereafter merely watch the proceedings.

It was argued that the defendants should have united in a common defence, or that the company alone should have defended. But there existed a substantial doubt as to who were the cestuis que trust, and, until the Court decided the question, the trustee was not aware for whom it held the property. There was no identity or community of interest between the company and the heirs, and therefore the defendants were not by the practice required to unite in a common defence. It would have been unfair to compel the added defendants to entrust their defence to the company—a stranger to them.

Further, the judgment, as above quoted, should be taken to mean that the defendants were entitled to sever in their defence; and the trial Judge's disposition of the costs could not be reviewed. But, on the taxation, the costs of the trustee, after the heirs were added, should be limited to costs of watching the case.

Appeal dismissed without costs.

MIDDLETON, J. DECEMBER 6TH, 1917.

TORONTO GENERAL TRUSTS CORPORATION v. LACKIE.

Gift—Evidence of—Property Standing in Names of Mother, Son, and Daughter—Death of Son—Action by Executors—Property Found to Belong to Mother only—Absence of Evidence to Establish Gift to Son and Daughter—Confidential Relationship—Mother under Influence of Son.

Action by the executors of Donald J. Sellers, deceased, for a declaration as to the rights in respect of certain property standing in the name of the deceased and his mother and sister.

The action was tried without a jury at Toronto.

J. M. Ferguson and J. P. Walsh, for the plaintiffs and the defendant the widow of the deceased.

J. A. Macintosh, for the defendant Mary Lackie, the mother of the deceased, and the defendant Edith Ritchie, the sister of the deceased.

E. C. Cattanach, for the Official Guardian, representing Verva Sellers, the infant daughter of the deceased.

MIDDLETON, J., in a written judgment, said that the question was, whether certain mortgage-securities standing in the name of Mrs. Lackie, her son Donald J. Sellers, and her daughter Edith Ritchie, were the property of Mrs. Lackie alone or belonged to her and her daughter and the executors of her son, as tenants in common.

The money all came from property owned by Donald Sellers, the first husband of Mrs. Lackie. On the 2nd April, 1872, he conveyed this property to one Trebilcock in trust for his wife for life, and after her death in trust for the heirs of his body by him begotten—but with the right and power to the wife to sell and convey in fee simple. She sold, and it was clear that the purchase-money became hers, and that it did not become impressed by any trust.

Donald J. Sellers, the son, was an able and successful business-man, and his mother placed every confidence in him, and relied upon him in all ways to look after her business for her. He placed the money in an account to the joint credit of his mother and his sister and himself, and, when investments were made, the securities were taken in the names of the three.

The mother never understood exactly why this was done. She said that she understood nothing of business, and thought that all he did was right, and so signed any and all documents placed before her. The sister was in much the same situation.

In these circumstances, the money and the securities representing it remained the mother's, for two reasons.

First, there never was any gift at all. The mother never intended to part with her property, nor did the son or the daughter ever intend to acquire any right in it. Whatever the transaction was and whatever the motive behind it, it was not a gift.

Second, if it amounted to a gift, it could not stand, in the circumstances disclosed. There was the highly confidential relationship between the mother and the son, and there was the greatest disparity between them—he a keen, vigorous, and aggressive business-man—she an old lady, with no business-

knowledge and little ability, and quite incapable of realising the effect of her actions, without the fullest and most careful explanation. There could be no transaction between her and her son, because her will was completely submerged in his. In all such cases it is essential that the parties should be brought to a condition of equality by independent advice. Unless the donee shews this, the gift cannot stand. Vanzant v. Coates (1917), ante 153, not yet reported in the Ontario Law Reports, is the latest judgment on the question. The son did not regard the property as his, and he would have been the last to assert any claim against his mother.

Judgment declaring that the property in question belongs to the defendant Mary Lackie, free from any claim on the part of the plaintiffs or the defendant Edith Ritchie. Costs of all parties out of the estate of Donald J. Sellers.

MASTEN, J. DECEMBER 6TH, 1917.

*HARRISON v. HARRISON.

Husband and Wife—Alimony—Action for—Defence—Award of Alimony by Arbitrators—Written Submission—Award Carried out by Payment and Acceptance of Weekly Allownace—Alimony Proper Subject of Reference to Arbitration—Award not Made within Time Fixed by Submission—No Provision for Enlargement of Time—Arbitration Act, R.S.O. 1914 ch. 65, sched. A., cl. (f), sec. 11—Time not Enlarged by Order—Parties Proceeding with Arbitration after Time for Award Expired—Parol Submission—Award not Signed by Arbitrators in Presence of each other—Objection not Taken in Pleadings—Refusal to Amend—Validity of Award—Dismissal of Action.

An action for alimony.

The defence was, that all matters in difference between the plaintiff and defendant and the making of provision for the maintenance of the plaintiff were left to the determination of a board of arbitrators, who made their award; that the award was final, and that the defendant had paid to the plaintiff or her agent the alimony awarded to her.

In reply, the plaintiff said that the matters in question in this action were not a proper subject for arbitration, and were not property within the scope of the Arbitration Act, R.S.O. 1914

ch. 65; that the award was not made in the time provided by the agreement under which the arbitration was held; and that the award was null and void.

The submission (25th May, 1916), provided: (1) that the parties agree to leave all matters in difference between them, and the making of provision, if any, for the future maintenance of the wife, to the determination of three persons, etc.; (2) that the parties agree to abide by the determination of such questions by the award of the majority of the three persons; (3) that the parties agree that neither one shall resort to any proceedings at law unless default is made by either in carrying out any award made; (4) that the arbitrators are to make the award on or before the 5th June, 1916; and are to have all the powers of arbitrators under the Arbitration Act, and shall be governed by its provisions.

The award was dated the 20th June, 1916, and was, "that the said party of the first part" (defendant) "do pay to the said party of the second part" (plaintiff) "weekly the sum of $9 as maintenance."

The action was tried without a jury at Toronto.

Gideon Grant, for the plaintiff.

Daniel O'Connell, for the defendant.

MASTEN, J., in a written judgment, after setting out the facts, said that at the trial it was admitted by counsel for the defendant that the plaintiff, if not barred by the arbitration proceedings or by the covenant not to sue, was entitled to alimony.

The learned Judge found, upon the evidence, that there had been no default in payment of the $9 per week awarded by the arbitrators.

Upon the second point raised, the learned Judge said that there was no reason and no authority for holding that the question of liability for alimony and the amount of alimony should not be referred to arbitration.

As to the time within which the award should have been made, there was no provision in the submission for the enlargement by the arbitrators of the time. Clause (*f*) of the "Provisions to be Implied in Submissions" (schedule A., Arbitration Act) did not apply because there was by the submission manifested an intention contrary to the provisions of that clause, namely, that the award should be made before the 5th June, 1916. Even if the arbitrators had power to extend the time, there was no evidence that they had done so; and the time had not been extended by the Court under sec. 11 of the Act. There was, therefore, no award under the original written submission.

But the arbitrators proceeded, both parties appeared before them and went on with the arbitration; the award was made on the 20th June, and was not moved against or appealed from, and had been acted on by the defendant paying and the plaintiff accepting the weekly payments. The act of the parties in proceeding after the 5th June amounted to a parol submission: Ryan v. Patriarche (1906), 13 O.L.R. 94, and cases cited; the award was made pursuant to that parol submission; and was binding so far as the point as to time was concerned.

The plaintiff contended further that there was no award because the arbitrators did not meet together and sign the document called the award in the presence of each other; citing Wade v. Dowling (1854), 4 E. & B. 44; Lord v. Lord (1855), 5 E. & B. 404. See also Nott v. Nott (1884), 5 O.R. 283. But this contention was not open to the plaintiff, not being raised in her reply; and an amendment should not be allowed for the purpose of raising it.

The award should be maintained and the action dismissed; costs as usual in alimony actions.

LATCHFORD, J. DECEMBER 8TH, 1917.

*ATTORNEY-GENERAL FOR ONTARIO v. RAILWAY PASSENGERS ASSURANCE CO.

Company—Insolvency of Trust Company Incorporated by Dominion Statute—Winding-up Order—Company Licensed to Do Business in Ontario under Loan and Trust Corporations Act—Security-bond Made to Provincial Minister for Benefit of Creditors of Company in Ontario—Company Indebted to Estate in its Hands as Executor—Action on Bond—Power of Provincial Legislature to Require Dominion Company to Obtain License to Do Business in Province—Question not Open in Action on Bond—Election of Company to Give Bond—Liability of Surety—Validity of Bond—Proof of Default by Company or Liquidator.

Action upon a bond made by the defendants as sureties for the Dominion Trust Company, a company incorporated by a Dominion statute. By the bond, the defendants bound themselves to the Minister under whose direction the Loan and Trust Corporations Act, R.S.O. 1914 ch. 184, is administered, in the sum of $100,000, on the condition that, if the Dominion Trust Company shoud duly perform each and all of the duties to which it might be appointed under the said Act and by the order in

council admitting the said trust company to registry under the said Act, the obligation should be void, but otherwise should be and remain in full force and virtue. All moneys paid to the obligee by virtue of the bond were to be received by him and held in trust for the creditors of the trust company who had become such by reason of business done by the trust company in Ontario.

After its admission to registry, the trust company and one Dennistoun were appointed executors of the will of the late G. S. Beck, of Port Arthur, and probate was granted to them in June, 1914. With the concurrence or acquiescence of Dennistoun, the trust company assumed the active administration of the estate, took possession of the securities held by the testator, and collected large amounts due thereon.

In November, 1914, the Supreme Court of British Columbia made an order declaring the trust company insolvent and directing a winding-up under the Dominion Winding-up Act. A subsequent order of the same Court authorised the trust company to retire from its position as executor.

On the 20th February, 1915, the liquidator obtained an order from the Supreme Court of Ontario directing the trust company and Dennistoun to bring in and pass their accounts, and providing that, upon the fixing of the compensation to be paid to the company in respect of its services as executor, it should pay over and transfer to the Toronto General Trusts Corporation (then appointed executors in substitution for the insolvent company) and to Dennistoun all moneys and securities in its possession or control.

Upon the accounts being taken, the insolvent company was found indebted to the Beck estate in the sum of $2,170.32 and interest. The executors were ordered to pay out of the Beck estate certain costs to the liquidator, and the Beck estate was also put to heavy costs by reason of the insolvency of the trust company. Nothing had been paid to the executors by the liquidator.

For the benefit of the executors as creditors of the insolvent company, the plaintiff claimed judgment against the defendants under the condition of their bond.

The action was tried without a jury at Toronto.

H. T. Beck, for the plaintiff.

W. N. Tilley, K.C., for the defendants.

LATCHFORD, J., in a written judgment, after setting out the facts and stating the defences raised, said that the ground upon which the bond was alleged to be illegal and void was, that the provisions of the Loan and Trust Corporations Act, requiring a

company incorporated by or under a statute of Canada to obtain registration and a license in order to do business in Ontario, were ultra vires of the Provincial Legislature. This question was now before the Ontario Courts, and had been argued in the Appellate Division, upon appeal from the judgment of Masten, J., in Currie v Harris Lithographing Co. Limited (1917), 12 O.W.N. 6, but judgment had not been given upon the appeal.

In the opinion of LATCHFORD, J., that question could not be raised in this case. When the insolvent company acquiesced in the requirements of the Provincial authorities, and procured the bond now sued upon, it either recognised the right of the Province as existing, or, regarding it as doubtful, decided not to dispute it. If the insolvent company relied on the powers conferred upon it by its Act of incorporation, it, in the most formal manner, decided to supplement them by obtaining the added powers conferred by registration under the Provincial Act. Even where principals are not bound, sureties may be liable.

Reference to Yorkshire Railway Wagon Co. v. Maclure (1881), 19 Ch. D. 478, 21 Ch. D. 309; In re German Mining Co., Ex p. Chippendale (1854), 4 DeG.M. & G. 19.

Whether the Provincial Act is or is not ultra vires, there is no defect or illegality established in regard to the bond itself. It has no inherent vice; and no evidence has been submitted that the insolvent company had not power to give security.

The proof of default was ample; and it was immaterial whether that default was attributable to the insolvent company or its liquidator.

Judgment for the plaintiff as prayed, with costs; reference to the Master in Ordinary.

BRITTON, J. DECEMBER 8TH, 1917.

BASIL v. SPRATT.

Malicious Arrest—Assault—Evidence for Jury—Findings of Jury—Liability of Roman Catholic Episcopal Corporation—Corporation Sole—Incorporating Act, 7 & 8 Vict. (Can.) ch. 82, sec. 6—Damages—Costs.

Action for damages for assault and malicious arrest.

The action was tried with a special jury at Kingston.

The questions left to the jury and their answers were as follows:—

(1) For what purpose was the plaintiff being taken from Kingston to Montreal? A. To confine her in an insane asylum.

(2) Which, if any, of the defendants authorised her removal? A. M. J. Spratt and the Roman Catholic Episcopal Corporation of the Dicoese of Kingston and Mary Frances Regis and the Sisters of Charity of the House of Providence.

(3) Was there any justification or excuse for such removal? A. No.

(4) If so, what was the justification or excuse? A. None.

(5) Was the defendant Phelan in any way responsible for the attempted removal of the plaintiff? A. Yes.

(6) If so, in what way did he make himself responsible? A. As an accomplice, by issuing the alleged authority and arranging with Chief of Police to have Constable Naylon on hand when the time came for the removal of plaintiff to the asylum.

(7) Did the defendant Naylon, at the time he entered the plaintiff's room, have reasonable grounds for believing the plaintiff was insane? A. Yes. If so, did he later know or should he have known that she was not insane? A. Yes. If so, when? A. After she quieted down in her room on the promise of being allowed to see Father Mea.

(8) How do you assess the damages? A. $20,000 on the defendants as named in answer (2); $4,000 on the defendant Dr. Phelan; Policeman Naylon, nil.

A motion was made at the trial on behalf of the defendants, at the close of the plaintiff's case for a nonsuit, and was renewed at the close of the whole case, judgment thereon being reserved.

W. N. Tilley, K.C., and A. B. Cunningham, for the plaintiff.
D. L. McCarthy, K.C., and T. J. Rigney, for the defendants.

Britton, J., in a written judgment, said that the main legal objection was based upon the statute incorporating the Roman Catholic Bishop of Kingston and his successors, by the name of "The Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada," as a corporation sole, 7 & 8 Vict. (Can.) ch. 82 (1845). It was contended that, the Act having been passed for the purpose of enabling the corporation to hold, buy, sell, lease, and otherwise deal with land, there was no power on the part of the Archbishop to do anything with reference to such matters as the plaintiff complained of, so as to bind the corporation. Section 6 of the Act was referred to.

The learned Judge said that, upon the whole case, but in reference only to the right of action for an assault, he was of

opinion that there was evidence to go to the jury of such action by the Archbishop as would bind the corporation sole. The plaintiff had unquestionably a right of action against any one who joined or assisted in the assault committed, and there was evidence that the Archbishop (the defendant Spratt) had taken part in it. He might, as the administrator of the affairs of the diocese, in dealing with the plaintiff, have been asserting rights of the corporation itself, and in so asserting rights have incurred liabilities. A mere holding corporation could not successfully put forward the proposition of non-liability for acts of wrongdoing, when such acts had been performed with the sanction of the corporation, although beyond the express powers of the corporate body. All this was covered by the answers of the jury.

There was some evidence to submit to the jury, and the case could not properly have been withdrawn from the jury.

Judgment for the plaintiff against the defendants M. J. Spratt, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Frances Regis, the Sisters of Charity of the House of Providence, Mary Vincent, Mary Magdalene, and Mary Alice, for $20,000 with costs.

Judgment for the plaintiff against the defendant Phelan for $4,000, without costs.

Action as against the defendant Naylon dismissed without costs.

BRITTON, J. DECEMBER 8TH, 1917.

FAYE v. ROUMEGOUS.

Husband and Wife—Claim of Executrices of Deceased Wife to Interest in Property of Husband—Evidence—Failure to Establish Partnership or Trust—Claim for Money Lent—Dismissal of Action—Costs.

Action by the executrices of the will of Susan Roumegous, deceased, against the husband of the deceased, for a declaration that she was the owner of an undivided half interest in certain property near Cooksville, purchased by the defendant, and in other property, and to recover money lent by the deceased to the defendant, and for other relief.

The action was tried without a jury at Brampton.

D. L. McCarthy, K.C., and T. L. Monahan, for the plaintiffs.

H. J. Scott, K.C., and T. R. Ferguson, K.C., for the defendants.

BRITTON, J., in a written judgment, after stating the facts, said that the evidence shewed conclusively that the deceased wife aided largely in the hotel business carried on by the defendant in the city of Toronto; but also that she was liberally and generously dealt with by him. It appeared that the deceased had saved a considerable sum of money; she had a large sum to dispose of at her death; and on one occasion her husband allowed her to take $5,000. It did not appear that any question arose between the husband and wife as to partnership or that there was any business arrangement between them.

It would require evidence of a most cogent character to establish a partnership between husband and wife who had always lived amicably together without any known arrangement between them. Where business is being carried on by husband and wife in such a way that the public doing business with the concern would not know who was the proprietor, the presumption, if any, would be that the business was that of the husband; and, in the absence of any proof to the contrary, an attempt on the part of the wife to establish ownership as a partner would fail.

In the present case there was no proof to the contrary of what the defendant asserted.

Upon the evidence, the learned Judge was unable to find that the wife was entitled to an undivided half interest in the land purchased by the defendant at or near Cooksville; nor that she was entitled to a half share of the profits of the hotel business carried on in Toronto; nor that she had lent the defendant $2,200 and $500.

The learned Judge was unable to hold the defendant liable as trustee for his wife of any money or property, or that the defendants were entitled to charge the defendant as trustee in regard to either property or money.

Action dismissed without costs.

MIDDLETON, J. DECEMBER 8TH, 1917.

*KINGSMILL v. KINGSMILL.

Husband and Wife—Gift of Furniture in House by Husband to Wife—Devise of House to Wife for Life—Bequest of Personal Property to Son—Failure to Prove Gift of Chattels—Evidence—Intention.

Action to recover personal property in a house and premises in the city of London.

The action was tried without a jury at London.
Peter White, K.C., for the plaintiff.
W. R. Meredith, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff, a son of the late Thomas Fraser Kingsmill, who died at London on the 21st August, 1915, claimed, as the executor of his father and the legatee of all his personal property, to recover certain goods and chattels, being generally the furniture in the residence of the deceased, from the defendant, the widow of the deceased and the step-mother of the defendant. Under the will of the deceased, the residence was given to the defendant for life, with remainder to the plaintiff.

The defendant relied upon what she alleged that the deceased said to her when he first shewed her the house, "The furniture is yours to do as you like with and make such use of as you can." Even accepting this evidence as true, the learned Judge said that he could not find an intention to give—a husband may well use such words without intending that the property in the goods shall pass to the wife. They meant no more than, "You are mistress of my house. Make such use of it and of my furniture as you see fit."

The learned Judge referred to many authorities as to alleged gifts from husband to wife, parent to child, etc., delivery and symbolic delivery of chattels.

He said that the difficulty which at one time existed by reason of the supposed unity of husband and wife was a thing of the past. Unless creditors assert the provisions of the Bills of Sale Act, there is no reason why a gift cannot be made by a husband to his wife.

The reasoning as to the alleged gift to the wife shewed that the alleged gift of the piano in the house to the defendant's daughter also failed.

The automobile now with the defendant was purchased by her, the old automobile bought by the deceased being given in part payment. The old one was of little value, and could not now be returned, so it should not be included in the judgment.

The judgment should be for the plaintiff for the recovery of the remainder of the chattels, with costs, if exacted by the plaintiff.

DOMINION NATURAL GAS CO. LIMITED AND UNITED GAS AND FUEL CO. OF HAMILTON LIMITED v. NATIONAL GAS CO. LIMITED—MIDDLETON, J.—DEC. 6.

Contract—Supply of Gas—Covenant—Exceptions—Breach—Injunction—Damages.]—Action to restrain the defendants from selling gas in violation of a covenant to sell no gas, save in a certain restricted area, to any one other than the plaintiffs the Dominion Natural Gas Company Limited. The action was tried without a jury at Hamilton. MIDDLETON, J., in a written judgment, after stating the facts, said that the defendants sought to justify what they had done by reference to a clause in the contract excepting from the gas which they were bound to supply: (1) gas which under the terms of their leases they were bound to supply to their lessors; (2) gas which they were "bound to furnish under the terms of their franchises;" (3) gas required for the purpose of drilling other wells. The contention was, that, under a by-law of the City of Hamilton, the defendants obtained a franchise to supply gas to the inhabitants of that city, and undertook, as a condition of that franchise, to supply gas to the inhabitants of the city, and that, by reason of their failure to do so, their rights may be lost. Assent cannot be given to this contention, for the exception in no ways cuts down the absolute covenant not to supply gas in the city. It is not a modification of this covenant at all, but is a cutting down of the obligation found in another part of the agreement, which calls for delivery of all gas produced save that mentioned in the exceptions. In addition to that, the exception does not refer to this so-called franchise for the city at all, but deals only with gas that the defendants may be bound to supply to individuals or municipalities, where the defendants' pipe-lines run over the lands of such individuals or municipalities. The parties never understood the agreement to authorise what was now being done, or the defendants would not have made the agreements referred to and have lost 15 cents per thousand for so long. The injunction sought should be granted, but it should not be allowed to operate so as to interfere with the supplying of gas to the National Machinery and Supply Company Limited, so long as their rights under the present contract continue; but as to all such gas the plaintiffs are entitled to recover by way of damages the difference between 20 cents and the plaintiffs' market-price of all gas supplied in the past or which may be supplied in the future, in violation of the covenant—to be from time to time determined by the Master, if not agreed between the parties. George Lynch-Staunton, K.C., and A. M. Harley, for the plaintiffs. George S. Kerr, K.C., for the defendants.

BLACK v. CANADIAN COPPER CO.—MASTEN, J., IN CHAMBERS —DEC. 8.

Affidavits—Scandalous Statements—Affidavits Ordered to be Removed from Files of Court—Costs.]—Judgment was given in this action and several others on the 31st May, 1917: see 12 O.W.N. 243. The plaintiffs in the actions served notice of a motion for the 4th December, 1917, returnable before a Judge in Chambers, for an order directing an issue and for prohibition. Certain of the defendants moved for orders striking the notice of motion and the affidavits filed in support of it off the files of the Court, on the ground that the same were scandalous, impertinent, and irrelevant. The defendants' motion was heard in Chambers by MASTEN, J., who, in a short memorandum in writing, ordered that the affidavits and an exhibit should be stricken off the files as scandalous, impertinent, and immaterial. The affidavits and exhibit are to be removed from the files and delivered to the Senior Registrar of the Court, to be by him sealed up and not to be opened except by direction of the learned Judge, and after six months to be destroyed. The respondents (not including the plaintiff Belanger, whose name was used without his consent) are to pay the costs of the applications to the applicants forthwith after taxation. D. L. McCarthy, K.C., and Britton Osler, for the defendants the Canadian Copper Company. J. M. Clark, K.C., and R. U. McPherson, for the defendants the Mond Nickel Company. J. H. Clary, for certain of the plaintiffs. T. M. Mulligan, for the plaintiff Belanger.

BRUCE v. KELCEY—FALCONBRIDGE, C.J.K.B.—DEC. 8.

Contract—Dispute as to Subject-matter—Sale and Purchase of Land or of Locatees' Rights—Evidence—Laches.]—Action to recover with interest $1,500, the purchase-money of land alleged to have been sold by the defendant to the plaintiff, or, in the alternative, damages for breach of the agreement of sale and purchase. The plaintiff complained that the land which he alleged he had bought had not been conveyed to him. The defendant's answer was, that the agreement was not for the sale of land but to procure assignments to the plaintiff of certain certificates of locations under the Veterans Land Grants Act, and that he had procured the assignments and done everything to fulfill his obligations. The action was tried without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, referred to the evidence of the plaintiff and defendant as contradictory, but said that he did not

pass on their demeanour in the witness-box—both appeared to be very decent men. The pivotal point of the case, in the Chief Justice's view, was the acceptance by the plaintiff of the paper given to him by the defendant and the signing by the plaintiff of a receipt on the 18th December, 1912—without the vigorous protest which he said that he made. Then he waited a year and a half, and caused a solicitor's letter to be written. Then he waited more than two years, and began this action on the 9th September, 1916. Meanwhile the Government had cancelled the locations even as to money paid for overplus. If he had made up his mind once for all and acted promptly, instead of "backing and filling," he might have been in a position to restore the property. Action dismissed with costs. R. McKay, K.C., for the plaintiff. W. E. Raney, K.C., and H. E. Stone, for the defendant.

SUPREME COURT OF ONTARIO.

On the 1st October, 1917, Rule 773 (*e*) was made, amending several Rules as follows:—

(1) Rule 544 is amended so as to read as follows:—

544.—(1) Where a judgment directs the recovery of specific goods, chattels, deeds, securities, documents, or any property other than land or money, a writ of delivery may issue directing the sheriff to cause such goods or property to be delivered up in accordance with the judgment.

(2) If the goods and property are not delivered up by the judgment debtor and cannot be found and taken by the sheriff, the judgment creditor may apply for an order directing the sheriff to take goods and chattels of the judgment debtor to double the value of the property in question to be kept until the further order of the Court to enforce obedience to the judgment.

(3) By leave of the Court such judgment may also be enforced by attachment, committal, or sequestration.

(2) Form 118 is amended so as to read as follows:—

No. 118.

Writ of Delivery.

We command you that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment*] to be returned to A.B., which chattels the said A.B. by a judgment in this action dated recovered against C.D. [or C.D. was ordered to deliver to the said A.B.]

(3) Rule 722 (3) is amended by inserting "5 per cent." in lieu of "4½ per cent."

(4) Rule 268 is amended by adding clauses (2) and (3) as follows:—

(2) The Court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

(3) Unless all parties are *sui juris* and consent, the powers conferred by this Rule shall only be exercised by or by leave of a Judge.

(5) Rule 735 is amended by adding clauses (2) and (3) as follows:—

(2) All money paid into a Surrogate or County Court and unclaimed for two years shall be transmitted by the registrar or clerk to the Accountant together with a statement shewing when the money was paid in and a certified copy of all judgments or orders affecting the same.

(3) Such money shall be paid out to any person found entitled thereto upon the production of a judgment or order of the Surrogate or County Court Judge and shall in the meantime be dealt with as other money in the Supreme Court.

On the 7th December, 1917, Rule 773 (*f*) was made as follows:—

Rule 492 is amended by adding clause 6 as follows:—

(6) Notwithstanding the provisions of Rule 176, the time limited by this Rule may, either before or after its expiry, be extended only by a Judge of the Appellate Division. An application to extend time may be referred to a Divisional Court.