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APPELLATE DIVISION

FIRST DIVISIONAL COURT. MAY 29TH, 1916.

*WILLOUGHBY v. CANADIAN ORDER OF FORESTERS.

Insurance—Life Insurance—Endowment Certificate—Proof of Age of Insured—Actual Admission—Statutory Admission—Pass-book—Receipts—Absence of Notices in Red Ink—Insurance Act, R.S.O. 1914 ch. 183, sec. 166, sub-secs. 7, 9, 10, 11—Defence to Action by Beneficiary—Premature Action—Mistake or Fraud not Alleged.

Appeal by the defendants from the judgment of BRITTON, J., ante 114.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. A. Hollinrake, K.C., for the appellants.

J. A. Hutcheson, K.C., for the plaintiff, respondent.

MAGEE, J.A., in a written judgment, referred to the endowment certificate issued to William R. Willoughby (now deceased) by the defendants on the 21st November, 1888, which stated that he had been regularly admitted a member of Court Thousand Islands, No. 6, located at Gananoque, on the 19th March "at the age of 33 years;" and said that, in view of the admission of age in the certificate, no further proof of age was necessary. On the 17th April, 1913, the plaintiff was made beneficiary by her husband, instead of the former beneficiary, his first wife. She should, therefore, recover the full amount with costs, and the appeal should be dismissed with costs.

This admission in the certificate, however, was not referred

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

to on the argument of the appeal nor at the trial; and, if the decision here were to rest solely on that ground, it would be proper that counsel should be heard as to it.

The learned Judge then referred to sec. 166 of the Ontario Insurance Act, 1912, which had six sub-sections; to the amendment made by the Act of 1913, 3 & 4 Geo. V. ch. 35, sec. 8, by which sub-secs. 7, 8, 9, and 10 were added; to sec. 166 as it appears in the revision of 1914, R.S.O. 1914 ch. 183, by which sub-sec. 1 was divided so that sub-sec. 6 would have become sub-sec. 7, but it was placed after sub-secs. 7, 8, 9, 10, and became sub-sec. 11; and to the further amendment (made since the judgment of BRITTON, J.), by the Ontario Insurance Amendment Act, 1916, sec. 4 of which repeals sub-sec. 11 and substitutes a new sub-sec. 11, whereby only sub-secs. 1 to 6 are made applicable to both past and future contracts, and it is declared that "this section shall be deemed to have been in force on and from the 16th day of April, 1912, but nothing in this section shall affect the disposition of any costs in any action now pending or heretofore determined," etc.

The effect of the change was merely to make sub-sec. 11 apply only to sub-secs. 1 to 6, instead of sub-secs. 1 to 10, and it left sub-secs. 7 to 10 as free as if in a separate section, or as if in the Act of 1913 they had not been added to sec. 166. The Legislature wished only to relieve the societies from having any doubt that they were not bound to call in old certificates and pass-books from all parts for the purpose of inserting the printed notice therein.

Upon both grounds, the plaintiff's action was not premature, and the judgment should stand for the full amount insured, with interest, and the appeal should be dismissed with costs.

MACLAREN, J.A., agreed in the result of the judgment of MAGEE, J.A.

HODGINS, J.A., read a judgment in which he said (after dealing with the facts and referring to the statute) that the contract and clause 59 of the defendants' constitution required only proof of death and that the insured was then in good standing. In these circumstances, it was not open to the defendants, without proving either mistake or fraud in regard to age, to refuse payment of the claim; they were bound, under clause 87, to shew that there was an initial error. The defence pleaded was effective for delay only (see sec. 165 (4) of the Act), as it did not charge error, mistake, or fraud.

The appeal should be dismissed with costs.

GARROW, J.A., read a dissenting judgment. He was of opinion that by the language of sub-secs. 7 and 9 the reference was only to insurances effected after the date of the introduction of those sub-sections in 1913. But, if this view were erroneous, the defendants were in this instance unaffected, because they were under no duty, in any view of the statute, to call in and re-issue, with notices printed in red ink, certificates and pass-books already issued. The entries in the pass-book were not "receipts" within the meaning of that word as used in sub-sec. 9.

The appeal should be allowed; but this should not prevent the plaintiff from supplying the best proof she can of her late husband's age, and bringing another action if the defendants still refuse to pay.

Appeal dismissed; GARROW, J.A., *dissenting.*

FIRST DIVISIONAL COURT. MAY 29TH, 1916.

TAYLOR v. MORIN.

Partnership—Agreement—Substituted Agreement—Fraud—Findings of Fact of Trial Judge—Appeal—Equal Division of Appellate Court.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 158.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

H. S. White, for the appellant.

G. J. Valin, for the defendant, respondent.

GARROW, J.A., in a written opinion, said that the action was brought to obtain the cancellation of an agreement in writing between the plaintiff and defendant dated the 17th July, 1914, as having been obtained by the fraud of the defendant, or, in the alternative, a declaration that an alleged partnership between the parties existing prior to the date of the agreement should be dissolved and an account taken. In opening the case at the trial, counsel for the plaintiff relied entirely upon the alleged agreement on foot prior to the agreement of the 17th July, 1914, to which counsel for the defendant answered that the earlier agreement had been superseded by the later, in reply to which counsel for

the plaintiff said that the later agreement was "substituted and palmed off on the plaintiff." This formulated the real issue between the parties; for, if the second agreement was valid, the first, whatever had been its terms, must necessarily be regarded as at an end.

The learned Judge said that he entirely agreed with the judgment of FALCONBRIDGE, C.J.K.B., and had little to add. He referred to Patmore v. Colburn (1834), 1 C.M. & R. 65; and said that how, in the circumstances, while adhering or being compelled to adhere to the second agreement, there could remain to the plaintiff any claim under the first, was beyond comprehension.

The appeal should be dismissed with costs.

HODGINS, J.A., agreed with the judgment of GARROW, J.A.

MAGEE, J.A., read a judgment in which he set forth the facts at length and referred to the evidence. He concluded by saying that the plaintiff voluntarily broke the new agreement, and so could not claim a full quarter share. He could not ask to have the partnership assets now realised, for the defendant was entitled to use them till July, 1916. But the plaintiff was and is entitled to an account of the partnership profit and the defendant's disposition thereof. The defendant denied and continued to deny his right to that. The plaintiff was, therefore, entitled to bring his action to have that account, and to have it declared that, subject to the defendant's right to the use of the plant and premises during the two years, he was entitled to an interest in the goods in common with the defendant, to the extent of their respective contributions to the capital, and to one fourth of the surplus realised.

There should be no costs up to judgment, but the plaintiff should get his costs of the appeal; and further directions and the costs of the reference should be reserved.

MACLAREN, J.A., agreed with the conclusion of MAGEE, J.A., for reasons briefly stated in writing.

The Court being divided, appeal dismissed.

FIRST DIVISIONAL COURT. MAY 29TH, 1916.

*RE SOLICITOR.

Solicitor—Investment of Money of Client—Undertaking—Enforcement—Order for Payment within Limited Time—Penalty on Default, of Striking Name from Roll, not Enforced—Costs.

Appeal by the solicitor from the order of CLUTE, J., ante 181.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

M. Wilkins, for the appellant.

Harcourt Ferguson, for the client, respondent.

GARROW, J.A., read a judgment in which, after stating the facts, he said that the terms of the solicitor's undertaking were too explicit to admit of doubt; and that he was in default in performance, was equally beyond question. There was no doubt as to the jurisdiction of the Court to enforce performance of such an undertaking on the part of a solicitor on a summary application: United Mining and Finance Corporation Limited v. Becher, [1910] 2 K.B. 296, and cases cited.

The real difficulty was as to the consequences to follow disobedience of the order to pay. With some hesitation, the learned Judge said, he had arrived at the conclusion, that the extreme measure, upon default, of removing the solicitor's name from the roll, was not warranted.

Failure to implement an undertaking has never in itself been held to be such misconduct as the Court will act upon in striking from the roll.

Reference to In re Pass (1887), 35 W.R. 410; In re Hilliard (1845), 2 D. & L. 919; Cordery's Law of Solicitors, 3rd ed., pp. 176 et seq.; In re Cooke (1889), 24 L. J. Notes of Cases 237; In re A Solicitor (1895), 11 Times L.R. 169.

Upon the whole, while there was reason to be suspicious, there was also justification for regarding the solicitor as dupe rather than knave. When the negotiations began, he may quite honestly have considered that he was proposing to the applicant a reasonably safe and sound investment, which would considerably increase her income; and he, therefore, has incurred only the minor penalty of being summarily ordered to perform his undertaking, which in the end may even be more beneficial to the applicant than if the

order to pay was to be followed by an order taking away his means of earning money with which to pay.

The order should be amended accordingly, and there should be no costs of the appeal.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., also agreed, for reasons briefly stated in writing.

Order below varied.

FIRST DIVISIONAL COURT. MAY 29TH, 1916.

HELWIG v. SIEMON.

Contract—Specific Performance—Undertaking to Repurchase Company-shares—Enforcement—Distinction between Corporeal and Incorporeal Personal Property in Regard to Remedy.

Appeal by the defendant Siemon from the judgment of the Judge of the County Court of the County of Grey in an action to recover $251.06 upon an agreement. The judgment was in favour of the plaintiff against the appellant for $219.06, but dismissed the action as against the defendant company without costs.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A

H. H. Davis, for the appellant.

W. H. Wright, for the plaintiff, respondent.

MACLAREN, J.A., reading the judgment of the Court, said that the defendant the Siemon Company Limited issued to the plaintiff certain shares of seven per cent. and profit-sharing stock. Attached to each certificate was a writing signed by the company, and by the defendant J. C. Siemon, the president, personally agreeing to guarantee the principal and interest, and that at the end of any year, upon receiving sixty days' notice in writing from the plaintiff, they would resell or repurchase the shares at $100 a share, and seven per cent. interest from date of investment to date of withdrawal. This action was brought on two shares after due notice, and was dismissed as against the company, without costs, on the ground that the agreement was *ultra vires* of the company, as it had no power to repurchase its own shares or to bind itself to resell them. The president was held personally

liable on his agreement. The only ground urged in support of his appeal was, that, the defendants having repudiated the contract, the only remedy of the plaintiff was in damages, and that he should have proved his damage, either by selling the stock and suing for the difference or by shewing that it was not saleable or was of no value.

It is quite true, the learned Judge said, that, where a purchaser refuses to accept goods or other corporeal personal property, the proper measure of damages which the vendor can recover, in case the property has not passed, is the difference between the market price at the time of the breach and the price named in the contract: Benjamin on Sale, 7th Am. ed., para. 758; Mayne on Damages, 8th ed., p. 202. Where, however, the subject of the contract is not goods or other corporeal property, but shares in a company, mere choses in action, and the purchaser refuses to accept, the vendor is not limited to the remedy above pointed out in the case of goods; but he is entitled at his option to specific performance of the contract: Fry on Specific Performance, 5th ed., para. 77; McGregor v. Curry (1914), 31 O.L.R. 261, affirmed in the Privy Council on the 14th December, 1915.

The judgment appealed from, ordering specific performance of the contract, must be affirmed, and the appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 31ST, 1916.

PRUDENTIAL SECURITIES LIMITED v. SWEITZER.

Vendor and Purchaser—Agreement for Sale of Land in Alberta—Vendors' Guaranty of Rise in Value—Construction—Fulfilment—Default in Payment of Instalments of Purchase-money—Recovery of Default Judgment in Alberta Court—Jurisdiction—Action Subsequently Brought in Ontario—Merger—Interest—Damages for Breach of Guaranty.

Appeal by the defendant from the judgment of SUTHERLAND, J., ante 200.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Moss, K.C., for the appellant.

J. B. Clarke, K.C., for the plaintiffs, respondents.

THE COURT varied the judgment as to the computation of interest, and, with that variation, dismissed the appeal, but without prejudice to the right of the defendant to bring an action for damages for breach of guaranty as to increase in value of land.

HIGH COURT DIVISION

LATCHFORD, J. MAY 29TH, 1916.

*FINDLAY v. PAE.

Will—Codicils—Revocation—Revival—Evidence—Intention.

Action by the executors named in the will of James Hylands, deceased, dated the 28th May, 1909, to establish that will, as affected by certain codicils.

The defendants Henry and Coulson set up another will made by the deceased, dated the 29th April, 1913, as affected by certain codicils.

There were four codicils, dated respectively the 18th December, 1909, the 2nd September, 1910, the 24th February, 1915, and the 6th December, 1915.

The testator died on the 18th January, 1916.

The action was tried without a jury at Barrie.

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

Ross Duncan, for the defendants Pae and Lennox.

W. A. J. Bell, K.C., for the defendants Henry and Coulson.

D. C. Ross, for the defendant Allen.

LATCHFORD, J., in a written opinion, said, after stating the facts, that the only question arising was, whether the will of 1909, with its codicils of 1909 and 1910—having been revoked by the will of 1913—was revived by the codicils of 1915, which confirmed in express terms the will of 1909, the codicil of February, 1915, referring to it by date, and the codicil of December, 1915, speaking of it as "my will with three codicils made thereto," while making no mention of the will of 1913.

The will of 1913 was signed by the testator when of sound and disposing mind, and was attested as prescribed by the Wills Act, 10 Edw. VII. ch. 57, now R.S.O. 1914 ch. 120. It purported to revoke all prior wills, and therefore had the effect of revoking

the will of 1909, and with it the codicils of 1909 and 1910. The testator afterwards acted as if he had absolutely forgotten that he made the will of 1913 or any will subsequent to that of 1909. The codicils of 1915 contained no express revocation of the will of 1913.

Reference to secs. 2 (*e*), 23, 25 of the Wills Act; Theobald on Wills, 6th ed., p. 64; Williams on Executors, 9th ed., p. 164; Jarman on Wills, 6th ed., p. 195; In the Goods of May (1868), L.R. 1 P. & D. 581; In the Goods of Wilson (1868), ib. 582; McLeod v. McNab, [1891] A.C. 471, at p. 476.

The two codicils of 1915 manifested a clear intention on the part of the testator—and nothing more was necessary in a properly executed codicil—to revoke the intermediate will, as well as to establish the earlier one.

Judgment declaring that probate should be granted of the will of 1909 and its four codicils.

Costs of all parties out of the estate—those of the executors as between solicitor and client.

SUTHERLAND, J. MAY 31ST, 1916.

RE WRIGHT AND FOWLER.

Will—Construction—Devise—Life Estate to Widow—Remainder to Daughter "or her Heirs"—"Or" Read as "and"—Words of Limitation, not Substitution—Vendor and Purchaser—Title to Land—Conveyance of Fee Simple by Widow and Daughter.

Application by Alice Hamilton Wright and Harriet Marion Fife, executrices of the will of John T. Wright, as vendors, for an order, under the Vendors and Purchasers Act, declaring that they could make a good title in fee simple to certain land sold to Albert Fowler, the purchaser; and application by the vendors, upon originating notice, for an order declaring the true construction of the will of John T. Wright.

The testator devised the use of the land in question to Alice Hamilton Wright, his wife, "as long as she lives or remains my widow," and to his "daughter Harriet Marion Fife *or her heirs* . . . the above mentioned property at the marriage or death of my wife;" and he appointed the wife and daughter executrices.

The wife not having remarried, and the daughter being the mother of several children, they proposed to convey jointly, upon the theory that the whole estate in fee simple was in them; but

the purchaser raised the question whether the daughter's children were substituted as devisees, under the words "or her heirs," in the event of the daughter's death before the death or marriage of the widow.

The motion was heard in the Weekly Court at Toronto.

Grayson Smith, for the vendors.

J. A. Macintosh, for the purchaser.

F. W. Harcourt, K.C., for the children of Harriet Marion Fyfe.

SUTHERLAND, J., dealt with the facts and law in a written opinion. His view was, that the words "or her heirs" should be read as "and her heirs," and that the will must be construed to give Alice Hamilton Wright a life estate and Harriet Marion Fife an estate in fee simple subject thereto, and that the two joining in a conveyance could give a good title in fee simple to the purchaser.

Reference to Jarman on Wills, 6th ed., vol. 1, pp. 611, 612, 1316; Theobald on Wills, 7th (Can.) ed., p. 676; In re Clerke, [1915] 2 Ch. 301; W. Gardiner & Co. Limited v. Dessaix, [1915] A.C. 1096.

Order declaring accordingly; no order as to costs.

SUTHERLAND, J., IN CHAMBERS. MAY 31ST, 1916.

RE CRONAN.

Administration Order—Rule 610—Order Obtained by Executor—Application to Set aside—Lateness of Application—Stay of Proceedings—Executor's Personal Claim against Estate—Application to Surrogate Judge to Direct Action to be Brought in Supreme Court—Surrogate Courts Act, R.S.O. 1914 ch. 62, sec. 69 (7).

Motion by Edward Cronan to set aside, as improper and unnecessary, an order for the administration of the estate of Michael Cronan, deceased, made by the Local Master at Barrie, on the 21st June, 1915, upon the ex parte application of Patrick J. Murphy, executor of the will of the deceased.

J. W. Bain, K.C., for Edward Cronan.

J. H. Moss, K.C., for the executor.

SUTHERLAND, J., read a judgment in which he stated the facts, and said that, under Rule 610, an executor may, upon summary application, obtain a judgment for administration; but there must be substantial reason for his doing so. In this case, the executor obtained the order not so much to have a point disposed of for the benefit of the estate as to enable him more readily to deal with a personal claim against the estate: Barry v. Barry (1872), 19 Gr. 458, 461. The executor should not have applied for the order except on notice to Cronan. If such notice had been given, and the facts fully explained to the Master, the order would probably not have been made.

It was objected that the motion was made too late; but, the learned Judge said, he had power to stay proceedings under it so as to permit a motion made before the Judge of the Surrogate Court of the County of Simcoe to be renewed. Under sec. 69 (7) of the Surrogate Courts Act, R.S.O. 1914 ch. 62, where a claim against an estate amounts to more than $800, any person entrusted with the estate may apply to the Judge for an order directing the creditors to bring an action in the Supreme Court; and the executor's claim in this case was one that should be disposed of in the Supreme Court.

The learned Judge, therefore, directed a stay of proceedings under the administration order pending the renewal and disposition of the application to the Surrogate Court Judge; costs of this application to be disposed of in connection with the final disposition of the claim.

SUTHERLAND, J., IN CHAMBERS. JUNE 1ST, 1916.

REX v. BOSAK.

Liquor License Act—Selling Intoxicating Liquor without License—Magistrate's Conviction—Motion to Quash—R.S.O. 1914 ch. 215, sec. 87—Magistrate's Conduct of Trial—Taking down Evidence—Noting Objections—Refusal to Allow Questions of Counsel—Bias—Stenographer not Sworn—Jurisdiction—Form of Conviction.

Motion to quash a conviction of the defendant by the Police Magistrate for the Town of Welland for selling intoxicating liquor without a license, contrary to the Liquor License Act, R.S.O. 1914 ch. 215.

J. Singer, for the defendant.
J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J., after setting out the grounds of the motion in a written opinion, said that there was evidence which, if believed by the magistrate, as it apparently was, would justify the conviction of the defendant, who was the occupant of the premises where the liquor was alleged to have been sold.

The first objection was, that the magistrate failed to observe the provisions of sec. 87 (1) of the Act in that he did not take down all the evidence. The second and third objections related to the failure of the magistrate to note objections of counsel and his erroneous rulings as to evidence. As to those three grounds, the learned Judge said that the magistrate had certified as to the evidence taken by himself, and his notes seemed to be reasonably full and definite. The affidavits filed in support of the motion did not set out any specific and relevant evidence not taken down, nor the questions and objections asked and raised by counsel. No effect could be given to any of these objections.

The fourth and fifth grounds related to the conduct of the magistrate during the hearing. The learned Judge said that, on the material filed in support of the motion, he was not able to conclude that the magistrate was guilty of any bias towards the accused which could be said to affect his disposition of the case.

Grounds 6 and 7 were directed to the point that the stenographer who took down the evidence was not sworn, as required by sec. 87 (2) of the Act; but that did not affect the jurisdiction of the magistrate to make a conviction: Ex p. Doherty (1894), 3 Can. Crim. Cas. 310; Rex v. Leach (1908), 17 O.L.R. 643, 653. It was not suggested that the stenographer did not "truthfully and faithfully report" the evidence, and she certified it as correct.

The conviction appeared to be in due form; and no facts were disclosed which would justify quashing the conviction.

Motion dismissed with costs.

[In REX v. VASELOVITCH, a similar motion, on like grounds, was dismissed by SUTHERLAND, J., on the same day.]

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. JUNE 2ND, 1916.

REX v. ROHER.

Criminal Law—Selling Newspaper Containing Racing Information —Intent to Assist in Betting—Criminal Code, sec. 235 (f)— Magistrate's Conviction—Motion to Quash—Intention of Purchaser.

Motion to quash the conviction of the defendant by Rupert E. Kingsford, Police Magistrate for the City of Toronto, for that the defendant "unlawfully did advertise, publish, sell, supply, and offer to sell and supply information intended for use in connection with book-making, betting, and wagering upon a horse-race," etc., contrary to the statute (Criminal Code, sec. 235 (*f*), as amended by 9 & 10 Edw. VII. ch. 10, sec. 3).

T. N. Phelan, for the defendant.
Edward Bayly, K.C., for the Crown.

FALCONBRIDGE, C.J.K.B., in a written opinion, said that the learned magistrate was right in distinguishing this case from Rex v. Luttrell (1911), 2 O.W.N. 729. The defendant there was a mere newsboy; the defendant here was announced on the front page of Collier's "Eye," the newspaper sold by him, as having been appointed "distributor" for the publication, which contained "entries and selections for to-day's races," couched in the highly technical language of the race-track, but plainly suggesting "tips" for the events.

The intention of the purchaser, according to the learned Chief Justice's reading of Rex v. Luttrell, was quite immaterial.

Motion dismissed with costs.

KELLY, J., IN CHAMBERS. JUNE 2ND, 1916.

UNITED ELECTRIC CO. v. CLEMENTS MANUFACTURING CO.

Security for Costs—Corporation-plaintiff—"Resides out of Ontario"—Rule 373(a).

Appeal by the plaintiffs from an order of the Master in Chambers requiring them to give security for the defendants' costs of

the action, on the ground that they were resident out of the jurisdiction.

A. C. McMaster, for the plaintiffs.
R. C. H. Cassels, for the defendants.

KELLY, J., held that the plaintiffs, an incorporated company, having their head office out of Ontario, but having an office of their own in Ontario and doing business in Ontario, did not "reside out of Ontario" within the meaning of Rule 373 (*a*); and allowed the appeal; costs in the cause.

MIDDLETON, J. JUNE 2ND, 1916.

BALDWIN v. O'BRIEN.

Highway—Public Lane—Establishment of—Evidence—Dedication—Time when Effectually Made, by Owner of Land in Fee Simple.

Action for a declaration that the whole of town lot No. 7 on the north side of King street west, in the city of Toronto, and especially the lands demised by the plaintiffs to the defendants the North American Life Assurance Company, including the westerly 13 feet thereof, are vested in fee simple in the plaintiffs, and that the said defendant company are entitled to possession of the same as lessees of the plaintiffs; for an injunction restraining the other defendants from trespassing on the 13 feet; and for other relief.

The question arising in the action was, whether the 13-foot strip referred to, running from King street to Pearl street, immediately west of the defendant company's building, and a little east of York street, was or was not a public lane.

The action was tried without a jury at Toronto.

E. D. Armour, K.C., and J. W. Carrick, for the plaintiffs.

J. A. Paterson, K.C., for the defendant company.

W. N. Tilley, K.C., and Strachan Johnston, K.C., for the defendant O'Brien.

J. H. Moss, K.C., for the defendants the trustees of the Ross estate.

MIDDLETON, J., read a judgment in which he summarised the documentary and oral evidence with great care. He said that the contention of the defendant O'Brien was that the lane in question was dedicated to the public and became a highway. The

argument for the plaintiffs was, that, to establish the lane as a highway, not only must an intention to dedicate be shewn, but the intention must be found in one who had the right to dedicate effectually; and that, as the property had been practically throughout the whole critical period in the possession of tenants for life and tenants for years, no dedication could be shewn which would be binding upon the remaindermen. The validity of this argument depended upon the time when the dedication took place.

Upon the evidence, the learned Judge said, he had arrived at the conclusion that the dedication took place even earlier than 1832, which was the date found in an action of Hughes v. United Empire Club, in 1877. The plan referred to in the Cushman lease in 1819, when the whole 6-acre block was first subdivided, and lands were leased, indicated that this lane was then part of the scheme of subdivision; and that, when W. A. Baldwin became the owner in fee simple in possession, he must be taken to have adopted that which was done by his father long before. Not only was there no dissent by him during his long life (he died in 1883), but upon the registration of the plan D.32 in 1866 he expressly assented to the representation of this lane as a highway; and, once dedicated, the public rights could not be extinguished by the erection of gates in 1888 nor by the subsequent acts of the Baldwins and their tenants. To be effective, Mr. Baldwin's assent must have been before 1852, when he made the settlement; and he did assent before that date.

It was unnecessary to discuss the other grounds; and the action should be dismissed with costs.

FLEXLUME SIGN CO. LIMITED v. MACEY SIGN CO. LIMITED—SUTHERLAND, J.—MAY 29.

Patent for Invention—Electric Signs—Known Device—Action for Infringement—Finding of Fact of Trial Judge.]—The plaintiffs, the owners of letters patent covering two alleged inventions of new and useful improvements in electric signs, brought this action to restrain the defendants from infringing those patents by manufacturing articles similar to those covered by the patents or only colourably differing therefrom, and for damages. The defendants alleged that the construction or device used by them had been for a great many years disclosed to and used by the public, and was not patentable, nor new nor useful; and the letters patent of the plaintiffs, if they covered the defendants'

construction or device, were void. The action was tried without a jury at Toronto. SUTHERLAND, J., in a written opinion, in which he stated the facts and the contentions of counsel, said that, while the evidence was somewhat confused and conflicting, it seemed on the whole to disclose that, before the date of either of the plaintiffs' patents, signs embodying all the main and essential features of the plaintiffs' signs had been known to the trade and in more or less general use. The action should be dismissed with costs. F. B. Fetherstonhaugh, K.C., and A. C. Heighington, for the plaintiffs. Frank Arnoldi, K.C., for the defendants.

RE SYKES—KELLY, J.—MAY 29.

Will—Construction—Devise of House and Land to Widow for Life—Repairs and Renewals—Payment for, out of Estate—Monthly Payments to Son—Death of Son—Continuance of Payments to Estate of Son during Lifetime of Widow.]—Motion by the executor of John Sykes, deceased, for an order determining certain questions arising upon his will. The motion was heard in the Weekly Court at Toronto.—The first question was, whether the language of the will authorised the executor to expend estate funds in renewing and repairing the dwelling-house and premises devised to the testator's wife during her life or widowhood. The learned Judge said that, in the absence of specific directions by the testator, the tenant for life must pay the usual outgoings on the property, such as taxes, etc.: Jarman on Wills, 6th ed., p. 1214. Here the testator had expressly directed the executor to pay certain outgoings which usually must be borne by the life-tenant, and to this direction had added, "which may be required for the comfortable accommodation of my said wife." This shewed a desire on his part that her enjoyment of the premises should not be limited by the obligation to pay outgoings usually charged against a life-tenant; and the intention of the testator appeared to be that the exemption his wife should have from payment personally of outgoings was to extend so as to include outgoings for making repairs and renewals necessary to keep the premises in reasonably tenantable and habitable condition.—Alfred Sykes, son of the testator, died on the 28th November, 1915, leaving him surviving his widow and five children, all of whom but one were of full age. By the will the testator had directed that a payment of $80 should be made every four weeks to this son. The learned Judge said that, reading the will as a whole, he was of opinion that the tes-

tator had sufficiently indicated his intention that the $80 payments should continue during the life or widowhood of the testator's wife, and that Alfred's estate was entitled to receive these payments: In re Cannon (1915), 32 Times, L.R. 51.—Costs of all parties should be paid out of the estate—those of the executor as between solicitor and client. J. F. Hollis, for the executor and all adult parties. F. W. Harcourt, K.C., for the infants.

CAMPBELL FLOUR MILLS CO. LIMITED v. ELLIS—BRITTON, J.—MAY 30.

Fraudulent Conveyance—Husband and Wife—Voluntary Conveyance—Intent—Rights of Execution Creditors.]—Action by unsatisfied execution creditors of the defendant J. A. Ellis to set aside as fraudulent a conveyance of land made by that defendant to his co-defendant, his wife. The action was tried without a jury at Toronto. The defendant Mary A. Ellis set up that she advanced $2,000 to her husband by way of a loan, and that the conveyance was made to protect her to the extent of $2,000 and interest thereon, and she offered to reconvey to her husband upon being paid the $2,000 and interest. There stood in the way of the plaintiffs a mortgage for $6,000 executed by both defendants, bearing the same date as the conveyance, in favour of one Dunn, who, it was said, advanced the $6,000 to the husband and wife. The learned Judge (in a written opinion) said that there was no doubt that it was the intention of both defendants to prevent, if possible, the realisation of the plaintiffs' claim. The finding upon the undisputed facts must be that the impeached conveyance was voluntary, and that it was made with the fraudulent intent and design of defeating, delaying, and hindering the plaintiffs in the recovery of their debt. Judgment for the plaintiffs declaring the conveyance void and of no effect as against the plaintiffs. The mortgagee, not being a party to the action, would not be affected. H. H. Dewart, K.C., for the plaintiffs. W. E. Raney, K.C., for the defendants.

SEAGRAM v. HALBERSTADT—SUTHERLAND, J.—MAY 30.

Trusts and Trustees—Conveyance of Land—Alleged Trust for Execution Debtor—Action by Execution Creditors for Declaration—Evidence—Bona Fide Sale for Value.]—Action by unsatisfied execution creditors of the defendant George Halberstadt for a declaration that conveyances of land made to the defendants Max Halberstadt and Mary Halberstadt were in trust for the defendant George Halberstadt, and that the land conveyed should, subject to a certain mortgage, be sold to satisfy the plaintiffs' judgment. The action was tried without a jury at Hamilton. The learned Judge, in a written opinion, after setting out the facts, said that there was no evidence upon which he could find that the defendant Max Halberstadt had any notice or knowledge of the existence of the plaintiffs' judgment at the time the land was conveyed to him. While the transaction on the face of it was somewhat suspicious, there was nothing in the evidence from which it could be concluded that the sale to the defendant Max Halberstadt was not bona fide and for the price mentioned. The defendant Max Halberstadt was entitled to demand from the defendant Mary Halberstadt a conveyance of her interest in the land free from any claim on the part of the plaintiffs. Action dismissed with costs. W. S. MacBrayne, for the plaintiffs. J. L. Counsell, for the defendants.

WALTZ v. KREIT—KELLY, J.—MAY 31.

Title to Land—Mistake as to Number of Lot on Plan—Removal of Cloud on Title—Declaration of Title—Deed—Costs.]—Action for a declaration of the plaintiff's title to lot 9 upon a registered plan of part of farm lot 146 in the 1st concession of the township of Sandwich East, and for the removal from the register of a conveyance thereof to the defendant Schadt. It appeared that, through no fault of the plaintiff, he had accepted a conveyance of another lot than that which he had purchased from the defendant Kreit, and that he had gone into possession and made improvements; and afterwards found that a conveyance of his lot to the defendant Schadt had been registered, though Schadt was actually in possession of the adjoining lot. The action was tried without a jury at Sandwich. The learned Judge, in a written opinion, after stating the facts, said that the trouble was caused by a change in the numbers on the plan, and that the plaintiff's at-

tention was not directed to the change, nor was the defendant Schadt's deed registered, until long after he had gone into occupation, made his improvements, and paid his purchase-money. No issue was raised between the defendants; but in the issue raised on the claim put forth by the plaintiff there could be but one conclusion, namely, that the plaintiff was entitled to hold lot 9 freed from any claim of the defendants or any of them, and that the registration of the conveyance to Schadt should not prevail against the plaintiff's title, and that the counterclaim should be dismissed, with costs of the action and counterclaim to the plaintiff. F. D. Davis, for the plaintiff. T. G. McHugh, for the defendants.

BALDRY YERBURGH & HUTCHINSON LIMITED v. WILLIAMS—MIDDLETON, J.—JUNE 2.

Contract—Indemnity and Guaranty—Action to Enforce—Defence—Fraud and Misrepresentation—Failure to Prove.]—Action to recover $10,371.92, said to be due under an agreement of indemnity and guaranty executed by the defendants. The action was tried without a jury at Toronto. The learned Judge said that the only defence argued was, that the defendants were induced to enter into the agreement by the fraud and misrepresentation of the plaintiffs; and that he had come to the conclusion that this defence was entirely unfounded. The defendants could not escape liability. Judgment for the plaintiffs for the amount claimed with costs. W. N. Tilley, K.C., for the plaintiffs. S. F. Washington, K.C., and J. G. Gauld, K.C., for the defendants.