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APPELLATE DIVISION.

MAY 5TH, 1915.

McALLISTER v. DEFOE.

Title to Land—Action of Ejectment—Paper Title—Possession by one of the Heirs at law of Patentee from Crown—Tax Sale—Invalidity—Distress on Premises—Sufficiency — Assessment Act, R.S.O. 1897 *ch.* 224, *sec.* 156—*Title by Possession—Limitations Act.*

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 175.

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

Eric N. Armour, for the appellant.

F. E. O'Flynn, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

MAY 10TH, 1915.

RE DIXON.

Will—Construction—Legacy to Daughter—Settlement in Trust.

Appeal by Emilie Homer Dixon from the judgment of MIDDLETON, J., ante 294.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

C. A. Masten, K.C., for the appellant.

J. T. Small, K.C., for the executors.

G. L. Smith, for the adult children of the testator other than the appellant.

F. W. Harcourt, K.C., for the infants.

THE COURT dismissed the appeal; costs to all parties out of the estate.

MAY 10TH, 1915.

SOLOWAY v. GOW.

Boundaries—Ascertainment of Line between Adjoining Lots—Evidence—Finding of Trial Judge—Appeal—Easement—Light—Limitations Act, R.S.O. 1914 *ch.* 75, *sec.* 37—*Overhanging Cornice.*

Appeal by the plaintiffs from the judgment of COATSWORTH, Jun.Co.C.J., York, in favour of the defendant, after trial without a jury of an action and counterclaim in that Court.

The claim was for a declaration of the true boundary-line between the land of the plaintiffs and the adjoining land of the defendant, and for damages for the removal of a brick areaway erected by the plaintiffs and the removal of fences and other trespasses. The counterclaim was for the removal of a verandah erected by the plaintiffs, said to encroach upon the defendant's land, and for the cost of replacing a fence said to have been wrongfully taken down by the plaintiffs.

The trial Judge found the line in accordance with the defendant's contention.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

Gordon Waldron, for the appellants.

W. A. Henderson, for the defendant, respondent.

LATCHFORD, J., delivering judgment, said that the decision of the County Court Judge was arrived at upon conflicting testimony. East and west of the plaintiffs' house, the present fences occupied the same position as the old fences; and, as the posses-

sion of the defendant and her predecessors in title extended to the fences, the plaintiffs failed in their contention that the true boundary was south of the fences.

The areaway, about four feet long by fourteen inches wide, was put in to afford light to the cellar of the house now owned by the plaintiffs; and, by sec. 37 of the Limitations Act, R.S.O. 1914 ch. 75, no prescriptive right to light could arise.

As to the slight overhang of the cornice and the verandah, the plaintiffs were entitled only to an easement: Rooney v. Petry (1910), 22 O.L.R. 101.

Subject to that easement, the boundary-line found by the learned Judge appeared to be the proper line; the judgment should be varied by declaring that the line was subject to the easement; and, with that variation, the appeal should be dismissed, but without costs.

FALCONBRIDGE, C.J.K.B., RIDDELL and KELLY, JJ., agreed in the result.

Judgment accordingly.

MAY 11TH, 1915.

HAYES v. OTTAWA ELECTRIC R.W. CO.

Street Railway—Death of Person Struck by Car in Attempting to Cross Tracks—Negligence—Contributory Negligence — Ultimate Negligence—Findings of Jury—Appeal.

Action by the widow and children of John Patrick Hayes to recover damages for his death, caused by his being struck by an electric street railway car of the defendants.

The car was proceeding westerly on the northerly tracks on Somerset street, in the city of Ottawa; as it was crossing Bronson avenue, the deceased stepped off the north-west corner of these two thoroughfares, and proceeded in a south-westerly direction. As he came almost to the car tracks, the rounded portion of the exterior of the car at its front right hand side came in contact with him; he was thrown to the pavement and so injured that he died on the following day.

The action was tried by MULOCK, C.J.Ex., and a jury, at Ottawa.

Questions were left to the jury; these and the answers were as follows:—

1. Was the deceased guilty of any negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. Yes.

2. If yes, wherein did such negligence consist? A. By not using proper precaution in crossing the street.

3. Was the death caused by any negligence of the defendants prior to the negligence, if any, of the deceased? A. No.

4. If yes, wherein did such negligence consist?

5. Was the death caused by any negligence of the defendants? A. Yes.

6. If yes, wherein did such negligence consist? A. By not having their car equipped with up-to-date appliances.

7. Notwithstanding the negligence, if any, of the deceased, could the defendants, by the exercise of reasonable care, have prevented the accident? A. Yes.

8. If yes, state what they should have done, but omitted to do, which, if done, would have prevented the accident? A. (1) Should have had car properly equipped. (2) Motorman should have stopped when he first realised the danger.

9. Was the negligence, if any, of the deceased, a continuing act of negligence up to the very moment of the accident? A. No.

The jury assessed the damages at $3,500.

The jury, after making these findings, were further instructed by the Chief Justice, and again retired. Later they brought in additions to their answers:—

To the answer to question 6 they added: "Had the company's car been equipped with modern air-brakes, we think the accident might have been avoided."

And to the answer to question 8 they added: "According to evidence submitted, the motorman first realised the danger of an accident when at a distance of 40 or 50 feet. Instead of taking up the slack, as he stated, had he applied the brakes immediately, we think the accident would have been avoided."

And they further added: "The motorman in his evidence admitted that he realised that the man was going to cross the street, that he had in his hand the power to stop the car, either by brake or reverse. We find that, had the motorman acted more promptly, the accident would have been avoided."

The Chief Justice entered judgment for the plaintiffs upon these answers; and the defendants appealed.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley, for the appellants.

G. D. Kelley, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs, being of opinion that, upon the evidence, the case was not distinguishable from Long v. Toronto R.W. Co. (1914), 50 S.C.R. 224.

(Written reasons were given by RIDDELL and KELLY, JJ.)

MAY 11TH, 1915.

McCONNELL v. MURPHY.

PATTON v. MURPHY.

Company—Title to Shares—Contract—Trust—Parol Evidence —Collateral Transaction—Costs.

Appeal by the defendant Marshall in the two actions from the judgment of MIDDLETON, J., 7 O.W.N. 812.

The appeal was heard by MACLAREN, J.A., RIDDELL, LATCHFORD, and KELLY, JJ.

George Bell, K.C., for the appellant.

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

THE COURT dismissed the appeal with costs.

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*TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & CO. LIMITED.

Contract—Construction—Sale of Stock and Assets of Commercial Company—Ascertainment of Amount Payable — New Agreement—Authority of Solicitor—Estoppel.

Appeal by the plaintiffs from the judgment of RIDDELL, J., 33 O.L.R. 183, 7 O.W.N. 822.

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

The appeal was heard by MACLAREN, J.A., and RIDDELL, LATCHFORD, and KELLY, JJ.

C. J. Holman, K.C., and J. D. Bissett, for the appellants.

I. F. Hellmuth, K.C., and J. H. Fraser, for the defendants, respondents.

RIDDELL, J., delivering the judgment of the Court, said that the meaning of clause 5 of the agreement was not doubtful—there was no ambiguity. The stock in trade was to be taken and valued; 85 per cent. of that valuation was taken as part of the amount to be paid: add to that the $5,000 at which the fixtures were to be valued under clause 2. The sum of these was the purchase-price—payable $20,000 in stock guaranteed by the defendants, $20,000 cash, and the remainder in instalments of $1,000 per month. Neither the subsequent correspondence between the solicitors nor the transactions by the company could modify the plain contract or substitute a new contract in its place. The solicitor for the plaintiffs' testator was not shewn to have had authority to modify the contract or make a new one. There was nothing upon which an estoppel could be founded.

The appeal should be allowed with costs, and judgment entered for the plaintiffs with costs.

MIDDLETON, J. MAY 3RD, 1915.

WATSON v. JACKSON.

Contempt of Court—Breach of Injunction—Motion to Commit—Enforcement of Obedience—Stay of Order for Commitment to Permit of Obedience being Rendered—Terms—Undertaking—Apology—Costs.

Motion by the plaintiff to commit the defendants for breach of the injunction granted by the judgment in this action: see 5 O.W.N. 845, 6 O.W.N. 509, 30 O.L.R. 517, 31 O.L.R. 481.

The motion was heard in the Weekly Court at Toronto.

I. F. Hellmuth, K.C., and Grayson Smith, for the plaintiff.

J. W. McCullough, for the defendants.

MIDDLETON, J.:—That there has been breach of the injunc-

tion cannot be denied, so far as I can see. The real attitude of the defendants can only be surmised, as their counsel declined to discuss the case.

In view of this, and of the opinion that I entertain that the power of the Court to punish for breach of injunction should be used primarily to force obedience, I think the proper order is to commit the defendants to the common gaol for 6 months—the order not to issue for a week, and not then if the defendants in the meantime file an apology and undertaking not again to use their dam so as to restrain in any way the flow of the waters of the stream, and within the same time open the sluices of the dam in such a way as to empty the pond without doing damage to the plaintiff's lands, and also assent to pay the plaintiff his full costs of the motion as between solicitor and client.

If this is not assented to, the order, in addition to providing for the committal, will direct the defendants to allow the waters of the stream penned back to escape within one week from the service of the order upon them, and will further provide that, in default, the Sheriff, at the cost of the defendants, shall do all that is necessary to restore uninterrupted flow of the stream and allow the waters now penned back to escape; the amount of the Sheriff's expenses to be ascertained by the Taxing Officer and to be paid, with the costs of ascertainment, so soon as the amount shall be certified. In this case the defendants must also pay the costs of and incidental to the motion.

MIDDLETON, J. MAY 4TH, 1915.

STONEY POINT CANNING CO. v. BARRY.

Principal and Agent—Contract for Purchase of Goods Made by Supposed Agent of Defendant—Failure of Plaintiff to Prove Agency—Ratification—Holding out—Secret Commission—Fraud—Storage Charges—Recovery of Small Sum—Costs.

Action by a vendor of goods to recover the difference between the contract price and the price realised upon a resale, the defendant, the alleged purchaser, having refused to accept delivery.

The action was tried without a jury at Chatham.

J. G. Kerr, for the plaintiff company.

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

MIDDLETON, J.:—This is one of those unfortunate cases in which a serious loss must be borne by one of two innocent parties, owing to the misconduct of a third person who is financially worthless. . . .

The real issues in this action relate to two supposed contracts for the purchase of canned tomatoes.

There is a minor issue arising out of an earlier contract. . . . Upon this contract tomatoes were sold, but the purchaser was unable to accept delivery. He requested the vendor to arrange for storage. There was no place readily available, and the vendor finally arranged to have the tomatoes cared for in the basement of a church. . . . Naturally this has occasioned a good deal of expense, greater than the ordinary charge for warehousing canned goods. The ordinary charge would amount in round figures to $100. The claim made amounts to $400. I cannot say that this is unreasonable, and the plaintiff company should in any event have judgment for this amount.

The first transaction concerning which there is dispute relates to the purchase on the 12th October, 1914, of 11,000 cases of canned tomatoes, three dozen to the case, at the price of $16,879.50. The second transaction relates to the purchase of 12,000 cases of tomatoes by the acceptance of an option dated the 1st October, 1914, at the price of $18,000, the acceptance said to have been by letter of the 7th November, 1914.

The controversy in both cases is as to the authority of one Durocher, who purported to make the contracts in the name of the defendant. It may be taken for granted, I think, that Durocher had not in fact any authority to make the contracts; and the question really is, whether the defendant is precluded from denying Durocher's authority because of having held him out as his agent under such circumstances that authority would be presumed. . . .

The situation seems to me plain upon the facts. Durocher never had authority; there never was any ratification; and there never was any holding out by the defendant. This being so, the plaintiff company must fail.

In scrutinising the documents produced, the real question must be kept clearly in mind. The correspondence between Barry and Durocher may justly be looked at carefully, to ascertain whether credence should be given to the statements made by both that Durocher had no authority; but documents which were never communicated to the plaintiff company must not be

looked at with a view of seeing whether possible inferences might be drawn if these were evidence upon the holding-out branch of the case. That branch of the case must rest on holding out to the plaintiff company, either directly or indirectly.

Upon another branch of the defence, the plaintiff company must, I think, also fail. Mr. Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendor's broker would be entitled to receive. Mr. Millman seeks to shew that that division was not to be with Durocher, but between Millman and Barry & Sons. I cannot so find upon the evidence.

In Hitchcock v. Sykes (1913), 29 O.L.R. 6, I stated my view (p. 14) that the payment of any sum to any person occupying any fiduciary position, by way of secret commission, is fraudulent and cannot be permitted to be explained away, and that, as held in Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co. (1875), L.R. 10 Ch. 515, any surreptitious dealing between one party to a contract and the agent of the other party is a fraud in equity, and invalidates the agreement. Although this was said in a dissenting opinion, that view was subsequently sustained (see the judgment of the Court of Appeal, p. 17 et seq., and Hitchcock v. Sykes (1914), 49 S.C.R. 403); and I am informed by counsel who presented a petition to the Privy Council for leave to appeal, that their Lordships expressly assented to this view.

The action therefore fails, save as to the $400 for storage. This forms a very small portion of the controversy, and ought not substantially to affect the incidence of costs. The plaintiff will have judgment for $400 and costs fixed at $75. The defendant will have the costs of the action, save any that relate solely to the $400, these amounts to be set off pro tanto.

At the trial I gave leave to amend by setting up the payment of the commission. This amendment ought to be made before the judgment issues.

SUTHERLAND, J. MAY 4TH, 1915.

MYERS v. TELLER.

Alien Enemy—Right to Money in Hands of Trustee—Proposed Withdrawal from Province — Naturalisation in United States since Action Begun—Review of Former Order—Rule 523.

Motion by the plaintiff Saenger for an order for payment by the defendant to the applicant's solicitors in Ontario of the money sued for in this action.

The motion was heard in the Weekly Court at Toronto.

J. M. Godfrey, for the applicant.

L. F. Heyd, K.C., for the defendant.

SUTHERLAND, J.:—The subject-matter of this motion was before me in February last (7 O.W.N. 834), and the disposition thereof then made is found at p. 836.

On the present application, Saenger asks that, in place of the money in question being paid to him personally, it be paid to his Ontario solicitors, on the understanding that it be sent by them to one Marius Perrot, at Lyons, France (Perrot is said to be the attorney there for Saenger), with instructions to him to use it for the purpose of paying for goods purchased from citizens of the French Republic on behalf of "Rudolph Saenger Incorporated," a company said in the material to be incorporated according to the "law in the city of New York."

In an affidavit filed in support of the motion, Saenger says that the business carried on by the company is purchasing and selling silks, etc., and that in order to carry on the business in New York it is necessary for him to purchase goods in the Republic of France, and he has been making considerable purchases therefrom; that, owing to conditions caused by the war, it is necessary for him to send cash to France, and the goods have to be paid for in cash before they are shipped to the company in America, and for this purpose he has been sending money to the said Perrot, who purchases goods for him and pays for them in cash. . . . He says that he has not been a resident of Germany since the war, and has not been and is not now carrying on business with Germany. He also says that he has taken a declaration to become a citizen of the United States, and

therein has stated it to be his "bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to William II., German Emperor, of whom I am now a subject," and that it is his "intention in good faith to become a citizen of the United States of America and to permanently reside therein."

If this is an application, under Rule 523, to review my former order, I am not at all sure that I have any power to do so: Synod v. DeBlaquière (1883), 10 P.R. 11; Bank of British North America v. Western Assurance Co. (1886), 11 P.R. 434; Charles Bright & Co. Limited v. Sellar, [1904] 1 K.B. 6.

I do not attach, under the circumstances, much importance to the fact that the plaintiff Saenger now wants the money for the use of a company incorporated in the United States and operating from the city of New York, where he now appears to reside, and of the capital stock of which company he is the sole owner; and I regret to say that, under existing circumstances and in the light of recent events, I attach less importance to his statement that he has taken a declaration with the intention to become a citizen of the United States and has withdrawn his allegiance to the German Emperor. It seems to me that this motion is an attempt to get indirectly the relief which was sought directly upon the former motion.

So long as Saenger's apparently hurried departure from France at or about the time of the outbreak of the war, as referred to in the material filed on the original application, remains unexplained in any satisfactory way, I see no reason for varying the former order or for facilitating Saenger in withdrawing the money in question from the Province. I am not sure that he has any locus standi in our Courts at all.

There seems to have been no particular reason why the defendant's solicitors should have been notified of the motion; but, as they were, and attended thereon, they should have costs, which, in the circumstances, I fix at the nominal sum of $10.

The motion will be dismissed.

HODGINS, J.A. MAY 4TH, 1915.

*TRUSTS AND GUARANTEE CO. LIMITED v. GRAND VALLEY R.W. CO.

Receiver—Appointment of, on Behalf of Trustee for Holders of Mortgage Bonds of Railway Company — Remuneration Fixed by Master on Passing Accounts—Bondholders not Represented—Relationship of Receiver to Trustee—Leave to Bondholders to Appeal from Master's Reports after Time Expired—Re-opening Accounts—Practice—Costs.

Motion by holders of bonds of the defendant railway company to open up the question of the remuneration of the receiver of the defendant railway company, which remuneration was fixed by the Master in Ordinary in October, 1913, and December, 1914, upon occasions when the receiver's accounts were passed; or, in the alternative, to extend the time for appealing and for leave to appeal against the Master's reports of October, 1913, and December, 1914, and against the ruling of the Master on the 21st January, 1915, that he would not re-open the question of remuneration.

On the 29th May, 1912, an order was made by LATCHFORD, J., appointing Mr. Bennett, manager of the plaintiff company, receiver on behalf of the plaintiff company, as trustee for the holders of mortgage bonds issued by the defendant company, of all the defendant company's railways and undertakings and of the revenues and property comprised in or subject to the security created by the bonds and the bond mortgages made by the defendant company to the plaintiff company dated the 30th May, 1902, and the 27th August, 1907, with power to manage and operate the railways and undertakings of the defendant company, and to pay all necessary outgoings.

Pursuant to that order, the receiver managed the defendant company and operated the railway until its sale in 1915, and performed various services thereunder, said to be onerous and important.

The complaint now was against the amounts allowed him as remuneration, viz.: in October, 1913, $11,362.85; in December, 1914, $10,911.58.

In 1913, Mr. J. G. Wallace acted as solicitor and counsel for the defendant railway company, and in October, 1914, was appointed by the Master to represent bondholders, the defendant

railway company, and the Thames Valley and Ingersoll Railway Company. Before the accounts were passed in December, 1914, Mr. Wallace was appointed Judge of the County Court of the County of Oxford, but his agents appeared and took part in the passing of the accounts, and he himself was present also, and went over the items of receipts and expenditures. He was himself a bondholder, and, since the appointment of the receiver, represented more than $100,000 worth of bonds; and he said that in 1913, while he was solicitor for the defendant railway company, he attended "to represent all parties in any way interested in the passing of the accounts and the remuneration to be allowed."

The receiver was the manager of the plaintiff company; by the order of the 29th May, 1912, he was appointed receiver *on behalf of the plaintiff company as trustee for the holders* of mortgage bonds, etc.

The motion was heard in the Weekly Court at Toronto.

W. S. Brewster, K.C., and J. H. Fraser, for the applicants.

G. H. Watson, K.C., for the receiver.

HODGINS, J.A., after setting out the facts in a written opinion, said that the receiver's position was analogous to that of a receiver of property and franchises included in the security, appointed by the mortgagee himself, whose appointment is sanctioned by an order of the Court authorising him to take possession; while usually the receiver appointed by the Court is an officer of the Court, and represents neither the plaintiff nor the defendant: Moss Steamship Co. Limited v. Whinney, [1912] A.C. 254; Parsons v. Sovereign Bank of Canada, [1913] A.C. 160.

By the order . . . the receiver, while appointed on behalf of the plaintiff company and accountable to it, is also authorised to pay debts which have priority over the bondholders, and the moneys necessary to provide for electric power, as well as to repair and improve the mortgaged property, and it is further provided that he is to be allowed these payments in his account. These are somewhat unusual powers to be given except on notice to the bondholders, who were not represented on the motion for this order. The direction that the payments made in pursuance thereof were to be allowed in the receiver's account, gives point to the objection that the bondholders should,

some time or other, have the right to be present on the passing of the receiver's accounts.

The plaintiff company, as mortgagee, does not, as between it and its receiver, represent the bondholders, and hence in passing the accounts and fixing remuneration the latter are entitled to be heard. Indeed, this seems to have been recognised in 1914, when the appointment of Mr. Wallace was made as representing the bondholders.

But in 1913 no representation was ordered; and, while Mr. Wallace was no doubt a bondholder, he had no status or authority, when appearing for the defendant company, to bind his fellow-creditors.

In 1914 his appointment must be taken to have lapsed on his appointment as County Court Judge. A Judge cannot, no matter how well qualified, appear for or represent any litigant in a Court of Justice. Judge Wallace's request to other solicitors to appear for him did not cure this defect, but indicates that he properly recognised this inherent disability.

This leaves the bondholders without representation on the two occasions when the accounts were being passed. These included payments authority for which was given by the order, but the amounts and propriety of which were of much interest to those holding securities.

When the receiver's remuneration was being fixed, another consideration was bound to arise, having regard to the terms of the order to which I have referred. The duty of the plaintiff's solicitors in regard to the receiver is very clearly pointed out in In re Lloyd (1879), 12 Ch. D. 447, and the rule dates at least from Lord Eldon's time. See Sykes v. Hastings (1805), 11 Ves. 363. Here, owing to the fact that the receiver was in effect the hand of the mortgagee to enforce its remedies and was its own general manager, that duty could perhaps hardly be expected of its solicitors. It was therefore doubly necessary that some one really interested should be heard on the question of remuneration, especially as that remuneration or part of it might be claimed by the plaintiff company as being received by its manager on its behalf, and the fees and charges of the plaintiff company itself as trustee for bondholders must be settled in the mortgage-deed, or, if not, might be reduced by the amount of the receiver's remuneration.

For these reasons, I think the objecting bondholders were entitled to be heard before the Master in Ordinary: . . .

Wildridge v. McKane (1827), 2 Moll. 545; In re Browne's Estate (1887), 19 L.R. Ir. 183, 423. . . .

Whether the receiver's remuneration was, in view of his relation to the plaintiff company, claimed by or divided with the plaintiff company . . . is, I think, a matter which is open to the bondholders to inquire into, if they desire to do so, as it may affect the quantum, having regard to the mortgage-deed, which, no doubt, will be before the Master. . . .

I give leave to appeal as to the passing of the accounts and fixing the receiver's remuneration in 1913 and 1914, and also from the ruling or decision of the Master in Ordinary in 1915, declining to re-open them; or, if the parties prefer it, these matters may be referred back to the Master in Ordinary, with leave to the bondholders to surcharge or falsify, confined to the payments referred to in paragraph 5 of the order of the 29th May, 1912, and the quantum of remuneration and its propriety, having regard to the provisions of the mortgage-deed and the relations of the plaintiff company and the receiver.

With regard to the ruling or decision of the Master in 1915, declining to re-open, the applicants should have procured and filed his certificate thereof before the motion was heard. They should now do so; and, upon that being done, the order may issue. Their procedure being defective, I can give them no costs of this application. I do not think the receiver should have opposed the motion, in view of the considerations I have mentioned; so that he should also bear his own costs. No doubt, his opposition was prompted by what he thought was an attack on his management; but, if that was intended, it was not pressed. He is, however, an officer of the Court, and the review of the accounts, to the extent I have mentioned, will tend to satisfy those who are chiefly interested in the balance left and avoid any feeling of possible injustice—a consideration which I deem of much importance.

LENNOX, J. MAY 8TH, 1915.

SCHARF v. GENERAL ANIMALS INSURANCE CO. OF CANADA.

Insurance—Live Stock Insurance—Statutory Contract—Statutory Conditions — Agent — Answers in Application for Policy—Insurance Act, sec. 193—Variation of Conditions—"Not Just and Reasonable"—Ownership—Proofs of Loss—Value of Animal Insured—Deduction from Amount Insured.

Action to recover $1,000 on a policy of insurance for that amount on the plaintiff's stallion.

The defence was based upon alleged misrepresentations in the application for the policy.

The action was tried without a jury at Ottawa.

G. F. Henderson, K.C., for the plaintiff.

George Wilkie, for the defendants, referred to Anderson v. Fitzgerald (1853), 4 H.L.C. 484, and Fitzrandolph v. Mutual Relief Society of Nova Scotia (1890), 17 S.C.R. 333, and argued that the statements in the application were warranties, and estopped the plaintiff, whether material or immaterial or fraudulent or honest; and that the plaintiff, being literate and signing the application, was bound, whether he read it or not: Biggar v. Rock Life Assurance Co., [1902] 1 K.B. 516.

LENNOX, J., said that the plaintiff had convinced him, by his manner of giving evidence, that he was not asked the questions which he swore he was not asked upon the making out of the application. In this case the statute made the contract: Insurance Act, R.S.O. 1914 ch. 183. Subject to such variations as the Court holds to be just and reasonable, the liability of the company is to be measured by the provisions of sec. 193, and such of the statutory conditions as were made applicable to live stock insurance contracts by sec. 235.

The learned Judge held, as authorised by sub-sec. 3 of sec. 193, that a stipulation in the body of the policy (not set out in the judgment) was "not just and reasonable" and was "not binding on the assured." By the statute, the agent was the company for the purposes of the contract.

Contentions were made by the defendants as to the value of the horse, the ownership, proofs of loss, etc.; these issues were all found in favour of the plaintiff.

The horse should not have been insured for more than $900, and $100 should be deducted from the $1,000, less the premium paid on this sum.

Judgment for the plaintiff for $907, with interest from the day of the expiration of 60 days from the receipt of proof of loss, and with costs.

BOYD, C. MAY 8TH, 1915.

*LESLIE v. STEVENSON.

Contract—Judicial Sale of Land by Tender to Satisfy Liens—Threat of Proceedings to Set aside Sale—Promise of Purchaser to Pay Profit on Resale to Lien-holders — Enforcement—Consideration—Forbearance — Statute of Frauds—Interest in Land—Action for Money — Reference — Ascertainment of Profit.

Action to recover the difference between the price at which the defendant bought land and the price at which he sold it, pursuant to an alleged promise or agreement made by the defendant in the following circumstances.

Land covered by mechanics' liens was offered for sale under the direction of the Court to satisfy these liens. After an abortive public sale, the land was again offered for sale by tender. The plaintiff, who had the conduct of the sale, put in a tender in the name of one of the subsequent lien-holders, and the defendant put in a higher—in fact the highest—tender, $2,100, and was declared to be the purchaser. The defendant had been in confidential communication with lien-holders, and so obtained information which he used, as alleged, in his tender. Next day, the plaintiff (the chief lien-holder) instructed his lawyer to take proceedings to set aside the sale to the defendant; and, this being communicated to the defendant, he said: "If you drop the proceedings, when I sell the land whatever difference there is between what I get for it and what I pay I'll hand over to the lien-holders."

The sale was on the 16th September, and a vesting order was obtained on the 11th October, 1909; the defendant held and rented the land till, in January, 1915, it was sold for $3,000.

The action was tried without a jury at Stratford.

R. S. Robertson and J. J. Coughlin, for the plaintiff.

Sir George Gibbons, K.C., and G. G. McPherson, K.C., for the defendant.

Boyd, C., found that the defendant undertook and promised as alleged, and that upon the faith of that the attack upon his conduct was abandoned. The inducement for the defendant's promise was the immediate forbearance, at a critical moment, of the prosecution of the plaintiff's claim, and, whether the attack was likely to succeed or not, was sufficient consideration; and, in that view, the Statute of Frauds had no application, though the sale of the land out of which payment was promised might not happen for many years: Miles v. New Zealand Alford Estate Co. (1886), 34 W.R. 669, 32 Ch.D. 266.

In another view, the arrangement as to acquisition of the land being executed and completed, it was open to the plaintiff to sue on the promise to pay, which related only to money: Green v. Saddington (1857), 7 E. & B. 503; but the decision should not be rested on that ground.

Another line of cases leads to the conclusion that the Statute of Frauds, so far as it relates to an interest in land, has no bearing on a promise of this kind: Trowbridge v. Wetherbee (1865), 93 Mass. (11 Allen) 361; Stuart v. Mott (1894), 23 S.C.R. 153, 384; Smith v. Watson (1824), 2 B. & C. 401; Poulter v. Killingbeck (1799), 1 B. & P. 397; Crosby v. Wadsworth (1805), 6 East 602, 612.

The judgment is to be for the plaintiff for $900. If the defendant thinks this figure can be reduced, he may have a reference. If the parties cannot agree after disclosure of what the defendant has received for rents and profits and what he has expended, with interest properly allowable, the Master will fix the sum payable, and will also deal with and dispose of the costs of the reference. Meanwhile judgment is for the plaintiff, with costs of action. The $900 or whatever sum is found by the Master is to be applied first in payment of what is owing to the lien-holders in order of priority upon the principal money, and thereafter any surplus to be applied in payment of interest upon the amount of such liens according to priority.

BOYD, C. MAY 11TH, 1915.

DEPATIE v. BEDARD.

Will — Construction — Devise to Children on Remarriage of Widow—One Child Subscribing Will as Witness—Wills Act, R.S.O. 1914 *ch.* 120, *sec.* 17—*Devise to Class—Failure of Gift to one of Class—Partition among Remaining Children —Costs—Allowance for Reduction of Mortgage by Widow before Remarriage.*

Motion by the plaintiff for judgment on the pleadings in an action for construction of the will of David Bédard, who died on the 27th April, 1909; and for partition of the lands devised.

By the will, all the testator's real and personal estate was given to his widow, provided she did not marry again. She made a deed, subject to the conditions of the will, to her son Benjamin Bédard, on the 4th September, 1914, and on the 18th of that month she married again. By the terms of the will, on her remarriage the property was to be divided equally among the testator's children for their own use forever.

The testator left six children at his death, of whom two died while yet infants, before the second marriage of their mother. Of the four surviving children, one, Sévére Bédard, was a subscribing witness to his father's will, and he died, after the remarriage, leaving four infant children him surviving.

The motion was heard in the Weekly Court at Toronto.

J. F. Boland, for the plaintiff.

G. A. Stiles, for the defendant Benjamin Bédard.

F. W. Harcourt, K.C., for the infant defendants, the children of Sévére Bédard.

BOYD, C., said that Sévére Bédard would have taken a share of the estate on his mother's death but for his having been an attesting witness to the father's will. The effect of the Ontario statute (the Wills Act, R.S.O. 1914 ch. 120, sec. 17) in such a case is to make the gift to the attesting witness "utterly null and void." The class of children to take upon the remarriage was thus limited to three; the infant children of Sévére took no interest: Fell v. Biddolph (1875), L.R. 10 C.P. 701.

The Judge dealing with the reference as to partition will dispose of the costs as in the cause before him.

Under the deed made by the widow to Benjamin, the Judge or Master should have regard to and allow the grantee money expended in the reduction of the mortgage on the property by the widow.

MIDDLETON, J. MAY 11TH, 1915.

*RE HUNT AND BELL.

Covenant—Conveyance of Land—Building Restriction—Effect of Tax Sale—Assessment Act, R.S.O. 1914 *ch.* 195, *sec.* 94—*Vendor and Purchaser—Objection to Title.*

Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that an objection made by the purchaser of land to the title was not valid.

Upon a sale in 1891 of a large tract of land, including the land the subject of the agreement between the parties, the deed contained a covenant by the purchaser that every house, building, or erection placed upon the land should be placed at a distance of not less than 30 feet back from the street-line. This was a covenant which would run with the land.

In 1898 the lands were sold for taxes, and the sale was confirmed by statute. The tax-deed purported to grant the land in fee simple, and made no mention of the building restrictions.

The house erected upon the land now in question did not comply with the covenant.

The question was, whether the effect of the tax-sale was to render the covenant no longer binding.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

Merritt A. Brown, for the vendor.

J. H. Bone, for the purchaser.

MIDDLETON, J., referred to the provision of the Assessment Act, R.S.O. 1914 ch. 195, sec. 94, that taxes are "a special lien on the land in priority to every claim, privilege, lien, or incumbrance of every person except the Crown," and to Tomlinson v. Hill (1855), 5 Gr. 231; Essery v. Bell (1909), 18 O.L.R. 76; Soper v. City of Windsor (1914), 32 O.L.R. 352; and said that none of the decided cases determined the point now arising. He was of opinion that the words of the statute should not be extended beyond their literal meaning; and that the right based upon a restrictive covenant was not a lien or incumbrance on the land nor a claim or privilege within the meaning of the statute; it is not a claim or privilege quoad the land, but a personal right against the owner of the land.

In re Nisbet & Potts' Contract, [1905] 1 Ch. 391, [1906] 1 Ch. 386, was referred to as analogous.

The objection to the title was well taken.

A suggestion was made that a release might be obtained from the adjoining owners, or a modification of the covenant obtained under sec. 99 of the Land Titles Act.

BOYD, C. MAY 13TH, 1915.

*RE HISLOP AND STRATFORD PARK BOARD.

Municipal Corporations — Expropriation of Land by Public Parks Board of City—Public Parks Act, R.S.O. 1914 ch. 175, sec. 17—Municipal Act, R.S.O. 1914 ch. 192, secs. 344, 347—Compensation—Arbitration and Award—Quantum of Allowance—Evidence—Appeal—Interest — Possession not Given—Costs.

Appeal by Elizabeth and Margaret Hislop from an award of three arbitrators fixing at $1,400 the compensation to be paid by the Board to the appellants for land expropriated by the Board for park purposes, and directing that each party should pay half the arbitrators' fees, and that there should be no costs of the arbitration to either party.

The appeal was on three grounds: (1) that the compensation awarded was insufficient; (2) that costs should have been allowed to the appellants; (3) that interest should have been allowed on the amount awarded for the value of the land, $1,200.

The appeal was heard in the Weekly Court at Toronto.

T. Hislop, for the appellants.

R. S. Robertson, for the Board.

BOYD, C., dealt first with the question of interest, referring to the Public Parks Act, R.S.O. 1914 ch. 203, sec. 17 of which incorporates in that Act the provisions of sec. 347 of the Municipal Act, R.S.O. 1914 ch. 192. He pointed out the effect of that section in this case—the possession of the appellants not having been disturbed and not being liable to be disturbed unless and until the Board should determine to adopt the award within the time limited by the section. Having regard to this, decided cases such as Re Macpherson and City of Toronto (1895), 26 O.R. 558, where interest was allowed on the sum awarded from the date of the by-law, are not applicable.

As to costs, sec. 344 of the Municipal Act, also incorporated in the Public Parks Act, gave the arbitrators a discretionary power, which they might well exercise by disallowing costs, there being a great discrepancy between what was claimed—$5,000—and what was awarded.

And, upon the evidence, the amount allowed by the arbitrators as compensation could not be disturbed.

Appeal dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 13TH, 1915.

*AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Libel—Newspaper—Security for Costs—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 12 — Affidavit — Statement as to Means of Plaintiff Based on Inquiry—Sufficiency — Onus Probandi where Negative Required to be Proved.

Appeal by the defendant company, in an action for libel contained in a newspaper, from an order of the Master in Chambers dismissing the defendant company's motion for an order for security for costs, under sec. 12 of the Libel and Slander Act, R.S.O. 1914 ch. 71, which requires in support of a motion for such an order "an affidavit . . . shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith. . . ."

The affidavit filed by the defendant company stated that the deponent was "satisfied, after diligent inquiry, that the plaintiff is not possessed of property sufficient," etc.

G. M. Clark, for the defendant company.
W. J. Elliott, for the plaintiff company.

MIDDLETON, J., was of opinion that the affidavit complied with the statute, and was sufficient to shift the onus probandi.

He discussed the general question as to the onus probandi where the matter to be proved is negative, and the truth is

peculiarly within the knowledge of the other party; referring to Best on Evidence, para. 274, and cases cited; Wigmore on Evidence, para. 1623, and an apposite case there cited, Nininger v. Knox (1863), 8 Minn. 140.

Appeal allowed and order made for security for costs. Costs of the motion before the Master to be costs in the cause; costs of the appeal to the defendant company in any event.

KENNEDY v. MARTIN—MIDDLETON, J.—MAY 3.

Fraud and Misrepresentation—Sale of Land—Rescission of Contract—Agent for both Parties—Reckless Statements—Secret Commission—Deceit—Damages.]—Action against H. L. Martin, J. P. Martin, and Trites Limited, to rescind a contract, made by the plaintiffs within Ontario, to purchase lands in British Columbia from the defendants Trites Limited, to recover moneys paid thereunder, and for damages. The action was tried without a jury at Chatham. The defendants J. P. Martin and Trites Limited did not appear; the pleadings had been noted against them for default. The learned Judge finds that the lands are worthless, and the whole transaction fraudulent on the part of the vendors. Misrepresentations were fraudulently made by the vendors and recklessly by the defendant H. L. Martin, who was their agent, and also the agent of the purchasers, the plaintiffs, and was paid a secret commission by the vendors. Judgment declaring the contract rescinded and directing repayment by Trites Limited of $22,500, and for recovery from the defendants H. L. Martin and J. P. Martin jointly of $5,000 damages for deceit, with costs. O. L. Lewis, K.C., and R. L. Brackin, for the plaintiffs. J. M. Pike, K.C., for the defendant H. L. Martin.

TREPANNIER v. LALONDE—MIDDLETON, J.—MAY 3.

Fraud and Misrepresentation — Sale of Land — Fraudulent Scheme — Promissory Notes — Cancellation.]—This action was brought to rescind certain agreements in connection with the sale of land and for the cancellation of certain promissory notes; and, in the alternative, against the defendant La Banque Provinciale and the defendant St. Denis, its local agent, for improper delivery over to the payee of promissory notes deposited, as was

alleged, in escrow. The action was tried without a jury at Chatham, and with it were tried seven actions brought upon the promissory notes of the several plaintiffs in the main action respectively. The plaintiffs in the main action (defendants in the cross-actions) were French Canadians residing near the village of St. Joachim, in the county of Essex, in Ontario, and the lands which they agreed to buy were in Dorval, Quebec. The learned Judge, in a written judgment of some length, set out the facts, as he found them, and stated his conclusion in these words: Upon all the evidence it appears to me amply made out that neither the defendant Guilmette nor the defendant La Cie. Guilmette Limitée—who must be taken to have had all the knowledge Guilmette had—can in any sense be regarded as a holder in due course of the notes. The whole transaction, from its inception, was not only tainted but saturated with fraud. There was a conspiracy to ensnare all those who could be induced to become members of the syndicate. Guilmette and his business associates, Lalonde and Dubuque, were parties to this. It is impossible rightly to apportion the blame. Guilmette knew that Lalonde and Dubuque, who owed him much money, could not pay him, unless they succeeded in the flotation of their scheme. He supplied the funds, expecting to be recouped and more than recouped by the result. . . . I am inclined to think . . . that the notes were improperly given up by the bank, and that the bank officials are now trying to evade the responsibility which would otherwise rest upon them. This matter is, in the view I have taken of the main question, of no great importance; but I would accept the evidence of the plaintiffs Levesque and Laporte in preference to that of the defendant St. Denis, and would deal with the case upon that footing if the question became important. As the case is now determined, there should be judgment in the main action declaring that the notes were obtained by fraud, and that the defendants are not entitled to recover thereon, and directing the notes to be cancelled, with costs against all the defendants. The actions upon the promissory notes should all be dismissed with costs. J. G. Kerr, for the plaintiffs in the main action and the defendants in the cross-actions. G. A. Urquhart, for the defendants Guilmette and La Cie. Guilmette in the main action, and for the plaintiffs in four of the cross-actions. J. M. Pike, K.C., for the defendant La Banque Provinciale. P. E. Panet, for the defendant St. Denis. The defendants Lalonde and Dubuque appeared in person. T. Mercer Morton, for the plaintiffs in three of the cross-actions.

KIRTON v. DILLMAN—BRITTON, J.—MAY 4.

Deed—Conveyance of Land by Parent to Child—Reservation of Life Estate—Evidence—Want of Understanding of Grantor—Improvidence—Undue Influence—Lack of Independent Advice—Estoppel.]—Action to set aside a conveyance executed by the plaintiff on the 10th June, 1911, of three lots of land in Newmarket, to the plaintiff's daughter, since deceased, and to vacate the registration of the conveyance, and to have the defendant, the husband and executor of the daughter, declared a trustee of the lots for the plaintiff. The consideration stated in the conveyance was $1 and covenants on the part of the daughter. The conveyance reserved a life interest to the plaintiff. The action was tried without a jury at Toronto. BRITTON, J., was of opinion, for reasons stated in writing, that the conveyance could be sustained only by such evidence as would sustain a gift; that the plaintiff did not know and did not fully understand the nature and effect of what she signed; that the alleged bargain was an improvident one for the plaintiff to make; that there was undue influence on the part of the daughter; that the plaintiff had no independent advice; that the assent of the plaintiff to a conveyance by the daughter to her brother of a fourth lot, also conveyed by the plaintiff to the daughter, did not confirm the conveyance as to the other three lots and did not operate as an estoppel against the plaintiff. Judgment for the plaintiff, with costs, setting aside the conveyance to the wife of the defendant, vacating the registration of it, and declaring that the plaintiff was and is, as against the defendant, both as executor and in his individual right, the owner of the three lots. Gideon Grant, for the plaintiff. W. D. McPherson, K.C., for the defendant.

TUTTY v. HELLER—SUTHERLAND, J., IN CHAMBERS—MAY 5.

Mortgage—Action for Foreclosure—Entry of Judgment—Application for Stay of Proceedings — Mortgagors and Purchasers Relief Act, 1915—*Proceedings Stayed on Payment of Interest in Arrear.*]—Motion by the defendants, under the Mortgagors and Purchasers Relief Act, for an order staying proceedings in the action. On the 2nd February, 1915, the plaintiff commenced this action against the defendants for foreclosure in respect of a mortgage, and entered judgment against them. At the time the writ of summons was issued, there was apparently

$200 overdue for principal moneys, and the taxes for the year 1914 were also in arrear. One of the defendants in an affidavit filed in support of the motion stated that on the 21st January, 1915, he made an arrangment with the plaintiff's solicitor by which the principal in arrear should be paid within fourteen days, the interest having already been paid, and he further stated that the solicitor made a note of the arrangement in a book. It was stated in an affidavit in answer that no promise was made to the said defendant by the plaintiff's solicitor other than that he would not propose taking proceedings until after the 1st February, and that no definite arrangement was made whereby proceedings were not to be commenced. Certain correspondence between the solicitors for the defendants and the solicitor for the plaintiff was filed on the motion, which indicated that the position taken by the said defendant in his affidavit was communicated to the plaintiff's solicitor as early as the 4th February, 1915. Little attention seemed to have been paid to the letters of the defendants' solicitors, and there was no denial, under oath, of the statement of the said defendant as to the entry in the book of the plaintiff's solicitor about the arrangement mentioned. With their letter of the 4th February the defendants' solicitors sent to the plaintiff's solicitor a cheque for the $200 principal money, together with $5.15 added interest. Notwithstanding this, the judgment was apparently signed against the defendants. Since the defendants served the notice of this motion, the plaintiff had paid the taxes for 1914, amounting to $55.37. It was also said that an instalment of interest came due on the 1st March, 1915, on the mortgage in question, and had not been paid. The learned Judge said that if the defendants would now pay up the interest in arrear, further proceedings should be stayed. As to the taxes paid by the plaintiff, these might well be deducted from the $200 of principal money, leaving that amount still unpaid on that account. In the circumstances, no order as to costs. J. C. McRuer, for the defendants. Frank Denton, K.C., for the plaintiff.

DOLGOFF v. KENEN—SUTHERLAND, J., IN CHAMBERS—MAY 5.

Mortgage—Action for Foreclosure—Application for Leave to Continue—Mortgagors and Purchasers Relief Act, 1915—*Stay of Proceedings on Payment of Arrears and Costs.*]—Motion by the plaintiff for an order permitting her to continue foreclosure proceedings (Mortgagors and Purchasers Relief Act, 1915), and for an order that the affidavit and appearance by the defendant be struck out and the plaintiff granted judgment as claimed by the writ of summons. At the time the writ was issued there were taxes in arrear. An affidavit made by the defendant's husband was filed in opposition to the motion, in which he said that the amount due for interest and taxes was tendered to the plaintiff prior to the commencement of the action, and the plaintiff refused to accept the same, and demanded payment of the mortgage in full, and that the defendant now brought into Court the sum of $45.83, being the amount due for interest and taxes. The plaintiff's son, in an affidavit made by him and filed in support of the motion, stated that he was informed by his mother and verily believed that no tender of the interest and taxes was ever made to her; but, on the contrary, before the commencement of the action, he had seen the defendant's husband and asked him to pay the moneys then due on the mortgage, and to pay the interest, taxes, and insurance premium due and unpaid both on the mortgage in question, which was a second mortgage, and the first mortgage, but that he had refused to do so. There was no affidavit filed on the part of the defendant to the effect that she was unable to pay in consequence of the war or otherwise. The learned Judge said that if the defendant would, within one week, pay all taxes in arrear, the interest in arrear on this mortgage, and the costs of the motion, further proceedings should be stayed in the meantime. L. C. Smith, for the plaintiff. W. J. McLarty, for the defendant.

PATERSON v. GROSS—SUTHERLAND, J., IN CHAMBERS—MAY 5.

Mortgage—Actions for Foreclosure — Mortgagors and Purchasers Relief Act, 1915—*Validation of Proceedings—Leave to Proceed—Costs.*]—Motions by the plaintiff in five mortgage foreclosure actions for orders validating the proceedings taken therein up to date and for leave to proceed: Mortgagors and Purchasers Relief Act, 1915. The actions were commenced on

the 11th February, 1915. Judgments for references to the Master in Ordinary were obtained on the 8th March, 1915, in default of appearance. On the return of the motions an order was made in each case as asked, and only the question of costs was reserved. In four of the actions the claims were against the same defendant, and upon all five motions the material was practically the same. The learned Judge said that the four actions might well have been consolidated; and, so far as they were concerned, only one motion would have been necessary. In these circumstances, the costs in each of the four cases against the same defendant should be fixed at $5, and the costs in the other case at $10, which sums should be added to the mortgage-debts. A. A. Macdonald, for the plaintiff. No one appeared for the defendants.

COLLINS v. DOMINION BANK—CLUTE, J.—MAY 7.

Banks and Banking—Deposit by Customer—Entry in Pass-book—Mistake—Estoppel—Evidence—Finding of Fact of Trial Judge.]—Action to recover $1,100 which, the plaintiff alleged, he deposited in the branch office of the defendants at Welland on the 8th August, 1914, to his own credit in a savings bank account. The action was tried without a jury at Welland. The plaintiff's pass-book, being produced, shewed an entry between the 24th July and the 14th August, the exact date not being given, of $1,100, initialled "B." This was proved to be the initial of one Burrows, a clerk in the branch office, whose duty it was to initial deposits in the pass-book. The plaintiff swore positively that he made the deposit. Burrows swore that he made the entry in the book; that it was a mistake; that he did not get the $1,100; that he was unable to say how the mistake arose. The ledger was produced; it did not contain the entry. There was admittedly another mistake made in the plaintiff's book between the 24th July and the 14th August. The learned Judge said that the question was one of fact. The entry in the pass-book did not operate as an estoppel against the bank, and was not conclusive—it did not bar the bank from shewing the nature of the transaction: Hart's Law of Banking, 2nd ed., p. 201; Gaden v. Newfoundland Savings Bank, [1899] A.C. 281, 286; Commercial Bank of Scotland v. Rhind (1860), 3 Macq. H.L. Sc. 643; Paget's Law of Banking, 2nd ed.,

p. 151. Upon an examination and weighing of the evidence, the learned Judge found that the $1,100 was paid into the bank by the plaintiff as he alleged. Judgment for the plaintiff for $1,100 with interest from the 8th August, 1914, and the costs of the action. W. M. German, K.C., for the plaintiff. E. F. B. Johnston, K.C., for the defendants.

RE BAILEY COBALT MINES LIMITED—MIDDLETON, J.—MAY 7.

Company—Winding-up—Leave to Bring Action in Name of Liquidators — Indemnity—Costs — Proposed Sale of Assets — Adjournment of Consideration—Order of Master—Appeal.]—An appeal by the Profit-Sharing Construction Company from an order of the Master in Ordinary, in the course of a reference in a winding-up matter, permitting a class of shareholders to take proceedings in the name of the liquidators against the appellant company and others, and adjourning the consideration of a proposed sale. The learned Judge said that, in the circumstances disclosed, he did not think he should interfere with the permission given by the Master to the class to take any proceedings they might desire against the appellants; but it should be made perfectly plain that all proceedings initiated by the class referred to were at their risk as to costs, and that the right to use the name of the liquidators for the purpose of this litigation was granted to them upon the terms that they indemnify the liquidators, to their satisfaction, against costs. It was premature to discuss the merits of the proposed action or its chances of success; but it would not be right that the order made should be taken to justify litigation at the expense of the estate. It should, therefore, be now provided that, before any action was taken under the order, the persons proposing to take proceedings should indemnify the liquidators against all liability for costs; if the liquidators could not agree, the indemnity to be to the satisfaction of the Master. If, in the result, the litigation should turn out to be for the benefit of the estate, an application for indemnity for costs out of the assets of the estate or out of the proceeds of the litigation would, no doubt, be favourably listened to. If the experiment should be unsuccessful, the experimenters ought to bear the risk. The Master's order simply adjourned the consideration of the proposed sale, and it should not be interfered with. It was open to the Master to consider

any offer at any time. There was no visible connection between realisation upon the assets and the proposed investigation of charges of misfeasance. No costs of this appeal. H. E. Rose, K.C., for the appellants. W. Laidlaw, K.C., for the liquidators and the class moving the proceedings. W. N. Ferguson, K.C., and J. A. McEvoy, for some of the shareholders.

GILBERT v. REYNOLDS—MIDDLETON, J.—MAY 7.

Mortgage—Foreclosure—Redemption—Mortgagors and Purchasers Relief Act, 1915—*Confirmation of Proceedings in Master's Office.*]—Application by the defendant Carlaw, second mortgagee, under the Mortgagors and Purchasers Relief Act, 1915, to confirm proceedings in the Master's office in a mortgage action, commenced in 1913. The Master's report was dated the 10th February, 1914, and he found a first mortgage to the plaintiff, with interest long in arrear; a second mortgage to Carlaw; a third mortgage to the Imperial Bank, with interest in arrear. The defendants Reynolds were the owners of the equity of redemption. Matters dragged so that there was no redemption; and on the 24th March, 1915, an order fixing a new day for redemption was made by the Master. All the mortgages were in arrear for both principal and interest. The day fixed for redemption was one month from the date of the order. The Act came in force on the 8th April, 1915. The learned Judge said that he was not certain that any order was necessary to confirm the proceedings; but, as it was necessary to fix a new day for redemption, the proceedings might as well be confirmed. The second mortgagee had tendered and was ready to pay the interest, taxes, insurance, and costs, and he asked that the first mortgagee be now restrained from enforcing payment of the principal. The second mortgagee was in no way unable to pay, and did not so contend, but feared that, having paid and then seeking to consolidate his mortgage with the first mortgage, the third mortgagee might set up inability to pay. As the third mortgagee was the Imperial Bank, and as its counsel, although seeking to have a stay of proceedings, was reluctantly compelled to admit that it could not set up that it was unable immediately to pay off the two mortgages, it was clear that this fear was groundless. The mortgagor, on the other hand, had made no case upon the material; and, as the mortgagor was in

possession and did not tender payment of the arrears of interest, taxes, etc., but apparently sought to remain in possession rent-free, no case was made for the relief of the mortgagor. Order allowing the original mortgagee to proceed to foreclose, unless the second mortgagee at once redeems, and providing that, upon the second mortgagee redeeming, he may foreclose unless the bank in its turn redeems. If the bank redeems, it may then proceed with the foreclosure, unless all arrears mentioned in clause 4, sub-clause 3, of interest, taxes, costs, etc., are paid, when an application by the mortgagor for relief will be in order. All the incumbrancers may add their costs to their respective claims. The Registrar will make the necessary computations if the parties cannot agree. D. L. Constable, for the defendant Carlaw. R. B. Henderson, for the plaintiff. A. McLean Macdonell, K.C., for the defendant the Imperial Bank of Canada. The defendant E. R. Reynolds in person and for his co-mortgagor.

ADAMS v. HUDSON BAY INSURANCE CO.—MIDDLETON, J.—MAY 7.

Fire Insurance—Several Policies Issued by Different Companies—Apportionment of Loss—Mistake—Payment according to Apportionment Made—Action for Balance—Summary Dismissal as against two out of five Companies—Costs.]—This action was brought against five insurance companies to recover the balance of the amount due in respect of the plaintiff's loss by the destruction by fire of property insured. The loss was adjusted at $3,345, and no question arose as to that. There were five policies, the amounts of which aggregated $5,500. A sixth policy, for $1,000, issued by the Hudson Bay Insurance Company, expired on the 23rd April, 1914; the fire took place five days later. The adjuster thought that there was a right to reinstate this policy by paying the premium after the fire; he apportioned the loss on the basis of an aggregate insurance of $6,500, instead of $5,500; the Hudson Bay Insurance Company declined to receive the premium or revive its policy; the other sums were paid according to the adjustment; and the plaintiff sued for $514.62, the amount which the adjuster attributed to the lapsed policy. The plaintiff sued all the insurance companies, upon the theory that the other companies ought to have the Hudson Bay Insurance Company before the Court, in order

that they might argue that the policy had become reinstated. No one so contended, however; and, upon a motion by that company in the Weekly Court, a summary judgment was pronounced dismissing the action as against it, on the ground that no cause of action was disclosed.—Upon the motion it was admitted that the plaintiff was mistaken in bringing the action against another of the companies, the North-Western National Insurance Company; and the action was dismissed as against that company also.—It was determined that the issues between the plaintiff and the other three companies could not be disposed of before the trial.—Judgment dismissing the action as against the Hudson Bay Insurance Company with costs; the judgment is to contain a recital of that company's undertaking to pay its proportion of the plaintiff's losses in respect of two policies issued by it, as to which it effected a re-insurance with the North-Western National Insurance Company. Action dismissed with costs as against the latter company. The question whether the plaintiff can be relieved as regards these costs by an order over against the other three insurance companies, and the question of the costs of the motion as between the plaintiff and these three companies, reserved till the trial. E. E. A. DuVernet, K.C., for the defendant the Hudson Bay Insurance Company. J. D. Falconbridge, for the defendant the North-Western National Insurance Company. A. C. Heighington, for the other defendants. J. M. Forgie, for the plaintiff.

STREET v. MURRAY—LENNOX, J.—MAY 10.

Fraud and Misrepresentation—Money Paid for Assignment of Interest in Patented Invention—False Representations of Assignor's Agent—Rescission—Return of Money Paid—Damages for Detention.]—Action to rescind an agreement and for recovery of $1,000 paid by the plaintiff for an assignment of an interest in a patented invention, on the ground of false and fraudulent representations made to the plaintiff by the defendant's agent. The learned Judge finds that material misrepresentations were made to the plaintiff by the defendant's agent. Judgment declaring that the impeached transaction is fraudulent and void as against the plaintiff; directing that the assignment be delivered up to the defendant to be cancelled, unless he prefers a re-assignment of it to him; for $75 damages for detention of the $1,000 and for the return of that sum. Costs to be paid by the defendant. W. M. Douglas, K.C., and G. H. Shaver, for the plaintiff. R. S. Robertson, for the defendant.

RE SOLICITOR—MIDDLETON, J.—MAY 10.

Solicitor—Taxation of Bill of Costs against Client—Appeal—Discretion of Taxing Officer—Extraordinary Charges—Quantum of Fees — Retaining Fees in Actions.]—An appeal by the solicitor from the certificate of the Senior Taxing Officer at Toronto upon the taxation against the solicitor's client of a bill of costs in respect of two actions brought by the solicitor on behalf of the client. The learned Judge said that, after careful consideration, he had come to the conclusion that he could not interfere with what had been done by the able and experienced officer. If there was an error in addition, it should be corrected.—There were some extraordinary items in the bill, for services alleged to have been rendered such as no solicitor should undertake, and these were properly disallowed.—With regard to the services rendered, the officer had exercised his discretion—the complaint in most instances was as to the quantum of the fee charged. On well settled principles, the Court could not interfere.—In respect of each action, in addition to all charges for services rendered, $100 was charged as a general retainer. There was no evidence of the kind necessary to warrant the allowance of a retaining fee; and these items were properly disallowed.—The appeal was dismissed with costs. The solicitor in person. E. W. Wright, for the client.

STEWART v. CALBERT—LENNOX, J.—MAY 11.

Goodwill—Sale of Business—Canvassing Customers—Injunction—Damages.]—Action by the purchasers of the defendant's insurance business to restrain him from soliciting business from former customers, and for damages. LENNOX, J., held, upon the authority of Trego v. Hunt, [1896] A.C. 7, and Jennings v. Jennings, [1898] 1 Ch. 378, that the sale of a business implies the sale of the goodwill, and the vendor may be restrained even in the absence of express stipulation. Judgment for the plaintiffs for an injunction, upon the lines directed in Trego v. Hunt, restraining the defendant, his servants and agents, from personally or by letter or circular applying for or soliciting insurance business from any person or persons or firm or corporation with whom the defendant, in his own name or otherwise, transacted insurance business prior to the 1st April, 1910, with $25 damages and costs. T. A. Beament, for the plaintiffs. George McLaurin, for the defendant.

RE EDWARDS—MIDDLETON, J., IN CHAMBERS—MAY 11.

Life Insurance—Death of Sole Preferred Designated Beneficiary in Lifetime of Insured—Right of Widow where no Children—Insurance Act, R.S.O. 1914 *ch.* 183, *sec.* 178(7)—*Opposition of Executor of Deceased Beneficiary—Costs.*]—Motion by Laura B. Edwards for payment out of Court of insurance moneys paid into Court by the insurers of the life of Percival James Edwards. The policy or certificate was made payable to the late Charlotte Edwards, mother of the insured. She predeceased him, leaving a will, of which the father, Charles Henry Edwards, was appointed executor. The insured left him surviving his widow, Laura B. Edwards; he had no children. The widow claimed to be entitled to the money under the provision of sec. 178(7) of the Insurance Act, R.S.O. 1914 ch. 183, that, upon the death of a sole preferred designated beneficiary during the lifetime of the insured, in the absence of any declaration by the insured (save in cases which do not arise here), the insurance shall be for the benefit of the wife and children in equal shares. Held, that, as there is the wife, and no child, the wife takes the whole. The whole trouble having been occasioned by the unfounded claim of the father, he ought to bear the costs occasioned by the payment of the money into Court and of this motion for payment out. Unless the widow is willing, for the sake of harmony in the family, to waive this, the order will so provide. R. C. Le Vesconte, for the applicant. H. H. Shaver, for Charles H. Edwards.

WALLACE V. CLAPP—MIDDLETON, J.—MAY 12.

Chattel Mortgage—Injunction—Terms.] — Motion by the plaintiffs for an injunction restraining the defendant from assigning or dealing with or taking proceedings upon a chattel mortgage of a stock of goods, executed by the plaintiffs in favour of the defendant. The learned Judge granted an injunction as asked until the trial, upon the plaintiffs undertaking not to deplete the stock below its present value and not to sell otherwise than in the usual course of trade, and to give (on oath) to the defendant a monthly statement of the sales and purchases and other outgoings; the defendant to be at liberty to move at any time to dissolve or vary the injunction. Costs in the cause. McGregor Young, K.C., for the plaintiffs. C. A. Moss, for the defendant.

LAVINE v. SONSHINE—LENNOX, J.—MAY 13.

Mortgage — Excessive Rate of Interest—Ontario Money-Lenders Act, R.S.O. 1914 *ch.* 175, *sec.* 4—"*Harsh and Unconscionable Transaction*"—*Reduction of Interest — Judgment — Account—Foreclosure.*]—There were two actions; the first by Harry Lavine and Isaac Lavine against Benjamin Sonshine and others; the second by Isaac Lavine against Benjamin Sonshine and others. The actions were brought for foreclosure and other relief in respect of two mortgages. In the mortgage sued upon in the first action, the rate of interest reserved was $46\frac{2}{3}$ per cent. per annum; in the other, 50 per cent. per annum. As empowered by sec. 4 of the Ontario Money-Lenders Act, R.S.O. 1914 ch. 175, the learned Judge finds that the rate of interest in each case is excessive and that the transactions are harsh and unconscionable; and directs that interest shall be charged and recover at the rate of 20 per cent. per annum from the date of the mortgage until the entry of judgment, instead of the rate reserved in the mortgage; if the entry of judgment in the first action should be delayed beyond 15 days, the interest thereafter will be at the rate of 5 per cent. per annum. In the first action, judgment for the plaintiffs for the balance owing upon the mortgage, upon the new footing as to interest, against the defendants Benjamin Sonshine and Samuel Shukyn, with the costs of the action; judgment for foreclosure against all the defendants; judgment for possession against the defendant Clyne, but, except incidentally, in the event of redemption, this defendant will not be charged with costs. In the second action, judgment for the plaintiff for $967.80, with interest up to the date of the entry of judgment, against the defendants Benjamin Sonshine and Samuel Shukyn, with costs, and for foreclosure and possession against all the defendants. The defendants Rebecca Sonshine and Sarah Shukyn will be liable to pay costs only if they redeem. C. M. Garvey, for the plaintiffs. G. W. Holmes, for the defendants.

BESWETHERICK v. GRIESMAN—MIDDLETON, J., IN CHAMBERS—MAY 13.

Mortgage—Action on Mortgagor's Covenant for Payment—Motion under Mortgagors and Purchasers Relief Act, 1915, *for Leave to Proceed—Scope and Meaning of Act—Ability of Mortgagor to Pay—Right of Mortgagor to Indemnity from Purchaser*

Subject to Mortgage — Apprehension as to Solvency of Purchaser.]—Motion by the plaintiff for leave to prosecute this action under the provisions of the Mortgagors and Purchasers Relief Act, 1915. The defendant made a mortgage on the 22nd March, 1910. He afterwards conveyed the mortgage lands to a company, which, as part of its purchase-price, assumed and agreed to pay off the mortgage-debt; but there was no novation. Upon this mortgage the principal was payable by instalments. The instalments of $500 due on the 22nd September, 1914, and 22nd March, 1915, were not paid. The interest falling due had been paid. It was conceded that, if an application were made for leave to proceed against the owner of the equity of redemption, a case would be made out for relief under the statute. But the plaintiff did not desire to proceed against the land, and sought only to recover the two overdue instalments from the mortgagor, upon his covenant. Upon this application the mortgagor did not attempt to shew anything which would entitle him to delay, under the Act mentioned, by reason of any inability to pay upon his own part, but he objected to the action proceeding against him, because he in his turn, if he redeemed, would not be able to enforce his claim against the present owner of the land. MIDDLETON, J., said that he could not go beyond the letter of the statute; and that, unless the defendant could shew circumstances which, under the statute, entitled him to relief, the order asked for must go. The order should, therefore, be made; costs to be part of the costs in the action. L. Duncan, for the plaintiff. Grayson Smith, for the defendant.

HAMILTON v. GALLOW—CLUTE, J.—MAY 14.

Fraud and Misrepresentation — Assignment of Interest in Estate in Consideration of Advances—Rescission—Repayment of Advances—Costs.]—Action by John D. Hamilton and the Guardian Trust Company Limited, committee of the estate of John D. Hamilton, against Edward Gallow, and also against Osler Wade, assignee for the benefit of creditors of the estate of John D. Hamilton, to set aside an agreement made on the 19th September, 1910, between the plaintiff Hamilton and the defendant Gallow, and other agreements, and for an accounting, upon the ground that the plaintiff's signature to the agreements was obtained by fraud and undue influence and while the plaintiff was incapable of managing his own affairs and incapable of

making the agreements, by which the plaintiff Hamilton purported to assign to Gallow, in consideration of certain moneys advanced and debts assumed, all his (Hamilton's) interest in the estate of his father. The action was tried without a jury at Toronto. The learned Judge finds, upon the evidence, that all the agreements entered into between the plaintiff Hamilton and the defendant Gallow are fraudulent and void, and should be set aside and cancelled. The advances made by the defendant Gallow to the plaintiff Hamilton were ascertained at $1,331, and this sum, without interest, is to be paid by the plaintiffs to the defendant Gallow. The costs of the plaintiffs and of the defendant Wade are to be paid by the defendant Gallow, or paid by the plaintiffs and deducted from the amount due to the defendant Gallow. E. E. A. DuVernet, K.C., and W. C. Davidson, for the plaintiffs. A. W. Burk, for the defendant Gallow. J. E. Jones, for the defendant Wade.

RE O'MEARA—BRITTON, J.—MAY 14.

Will—Construction—Provision for Son in Case of Need—Application for Payment of Allowance—Jurisdiction of Court—Rules 600-607*—Order Directing Inquiry into Circumstances of Applicant.*]—Application by Martin O'Meara, a legatee under the will of Michael O'Meara, deceased, for an order declaring the applicant entitled to payment of the money mentioned in para. 3 of the will, and directing the executor to pay to the applicant the said money or such part thereof as may be necessary for his support and maintenance. Paragraph 3: "It is my wish that my executor . . . keep . . . my money loaned out . . . and that he use the interest thereof and such part of the principal as may be necessary to help my son Martin O'Meara in case through illness or misfortune he should come to want. . . ." The application was heard at the London Weekly Court. BRITTON, J., was of opinion that the legatee had the right to apply, and that the Court had, under Rules 600 to 607, jurisdiction to entertain and deal with the application. Order directing a reference to the Local Master at London to inquire and report whether the legatee is in want by reason of sickness or misfortune; and, if so, what would be a reasonable sum to pay him monthly. Further directions and costs reserved. M. P. McDonagh, for the applicant. J. M. McEvoy, for other legatees. F. P. Betts, K.C., for the executor.