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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JANUARY 9TH, 1917.

*SUSSEX v. ÆTNA LIFE INSURANCE CO.

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

Appeal by the defendants from the judgment of LENNOX, J., ante 154.

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

H. S. White, for the appellants.

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

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

*ELECTRIC DEVELOPMENT CO. OF ONTARIO LIMITED v. ATTORNEY-GENERAL FOR ONTARIO AND HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

Constitutional Law—Action against Hydro-Electric Power Commission of Ontario—Necessity for Fiat of Attorney-General—Power Commission Act, R.S.O. 1914 ch. 39, sec. 16—Public Development of Water Power Act, 6 Geo. V. ch. 20—Water Powers Regulation Act, 6 Geo. V. ch. 21—Parties—Attorney-General—Powers of Court—Control of Executive by Courts—Summary Dismissal of Action—Abuse of Process of Court.

Appeals by the plaintiffs from orders of MIDDLETON, J., ante 17, setting aside the issue and service of the writ of summons against each of the defendants.

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

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., for the appellants.

Edward Bayly, K.C., for the Attorney-General.

I. F. Hellmuth, K.C., for the defendants the Hydro-Electric Power Commission of Ontario.

HODGINS, J.A., reading the judgment of the Court, said that the plaintiffs, by the endorsement of the writ, claimed: (1) a declaration that the defendants the Commission had no right to divert water from the Niagara and Welland rivers, notwithstanding the powers in that regard granted them by an Act respecting the Public Development of Water Power in the vicinity of Niagara Falls, 1916, 6 Geo. V. ch. 20, and the Water Powers Regulation Act, 1916, 6 Geo. V. ch. 21, and that the Lieutenant-Governor in Council had no power to authorise them to do so; or (2) a declaration that the covenants in paras. 16 and 20 of the agreement between the Queen Victoria Niagara Falls Park Commissioners and the appellants' assignors were binding on the Lieutenant-Governor in Council, notwithstanding the two statutes. An injunction was also asked against the Commission.

The Attorney-General may be a proper party to certain proceedings against or affecting the Crown: Dyson v. Attorney-General, [1911] 1 K.B. 410, [1912] 1 Ch. 156; but there is no case which forms any authority for the present proceeding—any sort of justification for the proposition that the Lieutenant-Governor in Council can be controlled or directed by the Court or be declared bound by covenants in an agreement. That being so, naming the Attorney-General as a party is futile. That rights of the Crown, both direct and indirect, may be dealt with in an action framed in that way, is established by the Dyson and other cases. But this is not one of those rights. The argument is, that this Court is entitled and bound to make a declaration which shall tie the hands of the Executive of the Province, and define exactly the limits within which it can act. The practical results of such an experiment would be rather perplexing. The course here proposed is an impossible one: Murdock v. Kilgour (1915), 33 O.L.R. 412; Re Massey Manufacturing Co. (1886), 11 O.R. 444, 465, per Cameron, C.J.; Church v. Middlemiss (1877), 21 L.C. Jur. 319; Liquidator of the Maritime Bank v. Receiver-General (1889), 20 S.C.R. 695; Re Trent Valley Canal (1886), 11 O.R. 687, 699; The King v. The Governor of the State of South Australia (1907), 4 Commonwealth L.R. 1497; Com-

mercial Cable Co. v. Government of Newfoundland, [1916] 2 A.C. 610.

The real point at issue is, whether the Executive can be subjected to the control of the Courts where its discretion is involved. But, in another aspect, can the Court make a declaration against the express words of an Act of the Legislature? See secs. 3 and 7 of 6 Geo. V. ch. 20.

The appeal as against the Attorney-General should be dismissed with costs.

The appeal as against the Commission seemed to be completely covered by the cases of Re Florence Mining Co. (1909), 18 O.L.R. 275; Smith v. City of London (1909), 20 O.L.R. 133; and Beardmore v. City of Toronto (1910), 21 O.L.R. 505.

Counsel in support of the appeal cited appendix A. in vol. 3 of R.S.O. 1914, embodying ch. 322 of R.S.O. 1897, as indicating that the Act prohibiting an action being brought against the Commission except on the fiat of the Attorney-General was ultra vires. But that section was part of an Act of the Legislature itself, while its predecessors, embedded in English statutory enactments, were expressly repealed by R.S.O. 1897 ch. 13, sec. 61. So that whatever was enacted in 1897 was enacted as a statute of the Ontario Legislature. It carried with it the express power of repeal or amendment under the Interpretation Act. The Power Commission Act, R.S.O. 1914 ch. 39, sec. 16, requiring the consent of the Attorney-General to bring an action against the Commission, is a modification of the general right of resort to the Courts, and a legal legislative curtailment of that right.

Other contentions of the appellants were also answered by the learned Judge.

The action, he concluded, was not one that ought to be allowed to proceed to trial in the usual way. The Commission are protected against an action by the terms of the statute. The Attorney-General is made a party only to represent the Lieutenant-Governor in Council. To allow the action to proceed against either defendant would be an abuse of the process of the Court so long as the statutes referred to remain unrepealed.

The appeal as against the Commission should also be dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

ACME STAMPING AND TOOL WORKS LIMITED v. McMILLAN.

Contract—Manufacture and Supply of Patented Articles—Commercial Failure—New Contract—Promissory Note—Breaches of Contract—Waiver—Return of Money Paid—Re-assignment of Patent.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., at the trial, in favour of the defendant McMillan. The action was brought to recover $748.63 on a promissory note made by the defendants. The defendant McMillan counterclaimed for breach of contract and for delivery up of the note. The judgment dismissed the action with costs, ordered the note to be delivered up to the defendant McMillan and the return to him of $1,000 paid on the making of a certain contract, and directed the re-assignment of a certain patent for an invention.

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

S. F. Washington, K.C., and J. G. Gauld, K.C., for the appellants.

G. Lynch-Staunton, K.C., and J. A. Soule, for the defendant McMillan, respondent.

The defendant Olson was not represented, having suffered judgment by default.

HODGINS, J.A., read the judgment of the Court. He said that the contracts in respect of which the note was made related to a self-starter for Ford machines, to be manufactured by the appellants under patent rights in Canada owned by both defendants. It proved a failure commercially. The trial Judge found that there were variations in the manufactured article from the sample upon which the first contract was based, and that these variations rendered the starters less durable, very easily broken, and less effective; and no Court could, on the evidence, reverse that finding, which applied to all the starters turned out by the appellants from first to last.

The first contract was dated the 30th June, 1914, and was a straight manufacturing contract, under which the appellants were to complete a sufficient manufacturing equipment to turn out 6,000 starters. A new agreement was made on the 25th

September, 1914, the practical effect of which was to put the sale and marketing of the starters, when manufactured under the first agreement, into the hands of the appellants, and to make them responsible to the respondent for the amount received on sales, less selling expenses.

The arrangement which included the new contract and the giving of the note was a settlement of matters up to that date, was made with full knowledge of the situation, and was binding upon the respondent. The appellants were, therefore, prima facie entitled to recover upon the note.

The first $1,000 was properly paid and retained. The note was given with knowledge of previous breaches of contract and upon the understanding that these were waived. The contract, however, was to remain in full force, and there was no waiver of future breaches. The new agreement did not impair the obligation to manufacture according to sample, which was not done. The note arose out of the contract, and amounted only to a promise of payment under its terms. Not having manufactured according to sample, the appellants could not recover upon the note. It was at least doubtful whether the profit-sharing arrangement affected the first 100 starters.

The result was to affirm the part of the judgment dismissing the action upon the note, and to reverse the part as to the counterclaim. The counterclaim should be dismissed except as to the re-assignment of the patent.

The appellants should pay the costs of the action and the respondent the costs of the counterclaim; and, success in the appeal being divided, there should be no costs of the appeal to either party.

Appeal allowed in part.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

*COCKBURN v. TRUSTS AND GUARANTEE CO.

Master and Servant—Contract of Hiring—Breach—Damages—Salary for Unexpired Portion of Term of Hiring—Mitigation—Profits of Business Venture—Employment of Time and Ability as well as Responsibility and Assets—Nominal Damages.

Appeal by the defendants from the judgment of MIDDLETON, J., 37 O.L.R. 488, 10 O.W.N. 388.

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

Sir George C. Gibbons, K.C., for the appellants.

Hamilton Cassels, K.C., for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, referred to Jamal v. Moola Dawood Sons & Co., [1916] 1 A.C. 175; Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest (1916), 37 O.L.R. 132; British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited, [1912] A.C. 673; Beckham v. Drake (1849), 2 H.L.C. 579, 608; Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105; Wertherm v. Chicoutimi Pulp Co., [1911] A.C 301; Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v. Pontypridd Waterworks Co., [1903] A.C. 426; Brace v. Calder, [1895] 2 Q.B. 253; Sowdon v. Mills (1861), 30 L.J.Q.B. 175; Emmens v. Elderton (1853), 4 H.L.C. 624, 645; Laishley v. Goold Bicycle Co. (1902), 4 O.L.R. 350; and said that there was, if the profits made by the respondent were properly to be taken into account, no damage in fact suffered by him owing to the breach of contract, because in the period of two years he made more than his two years' salary. The trial Judge held that, as this was earned not in similar employment, but in a commercial venture which necessitated the respondent pledging his credit and involving his assets, it was not relevant to the question of damages on this contract. The contrary statement, that anything that shews that the respondent is not actually out of pocket must be considered in assessing damages, is too broad, and must be modified by eliminating everything that lies outside the idea that the respondent is in some way forced to do something caused by the breach of contract, thus mitigating the results which flow from its breach. If his time and ability, which he had exchanged for a salary, are, upon his employment ceasing, devoted to producing an income to take the place of that salary, whether by way of sale and purchase, commission, or otherwise, it is very difficult to suggest any reason why the amount he realises from the employment of these same two factors should not be treated as something to be set off against the damages. If it became evident that the respondent's responsibility and assets did in fact earn the profit, and not his time and ability, the connection would disappear. But, the connection being once granted, the profits, the making of which involved his time and ability, should be fully taken into account in mitigating the damages.

The fact that what the respondent did was entirely different

from what he was called upon to do under his contract, made no essential difference. If what he did was the consequence of the situation caused by the breach of contract, and resulted in minimising the loss caused thereby, and was not something independent of it, in the sense that it might have happened if there had been no such breach, the other party was entitled to the benefit of it in mitigation of damages: Richardson v. Hartmann (1893), 68 Hun (75 N.Y. S.C.) 9; Lee v. Hampton (1901), 79 Miss. 321.

The mode adopted and the difficulties encountered were really no concern of the other party. They were the respondent's own affair, and merely a means to an end. He did not require to embark on the venture; but, having done so, he was bound to admit that he had in fact suffered no loss by so doing.

The appeal should be allowed with costs. The respondent was in strictness entitled to nominal damages, and should, if he desired, have judgment for them, with such costs as would be taxed if he had sued in a Division Court, with a set-off to the appellants. If the respondent does not take judgment in that form, the action will be dismissed with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

*RE CLARK AND TOWN OF LEAMINGTON.

Assessment and Taxes—Business Assessment—Unlicensed Hotel —"Business"—Assessment Act, R.S.O. 1914 ch. 195, sec. 10 (1) (j), (11).

Appeal by J. C. Clark from an order of the Judge of the County Court of the County of Essex (Dromgole, Co.C.J.), dismissing Clark's appeal from the decision of the Court of Revision for the Town of Leamington confirming a business assessment of $800 in respect of his hotel in Leamington. The County Court Judge, after dismissing the appeal, stated a case for the opinion of this Court.

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

E. C. Awrey, for the appellant.

J. B. Clarke, K.C., for the town corporation, respondents.

HODGINS, J.A., reading the judgment of the Court, said that the town was under local option, and so the hotel was not one "in respect of which a tavern license has been granted:" Assessment Act, R.S.O. 1914 ch. 195, sec. 10 (1) (*j*).

An unlicensed hotel-keeper carries on a business for profit, as business is defined in Rideau Club v. City of Ottawa (1907), 15 O.L.R. 118; in fact, the license affects only one out of many items of the traveller's joy. Apart from any other words which may sufficiently describe an unlicensed hotel business, it may well be treated as comprehended in the words "any business not before in this section . . . specially mentioned" (sec. 10 (1) (*j*)). These are general words, used "for the purpose of including any business which is not expressly mentioned," and are to be construed as including any such business (sec. 10 (11)); and so come within the opening words of sec. 10 as if the business were mentioned and described in the section.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

*DIEBEL v. STRATFORD IMPROVEMENT CO.

Company—Powers of — Contract — Guaranty — "Advances"—Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 23 (1) (d), (k)—Amending Act, 6 Geo. V. ch. 35, sec. 6—Extension of Corporate Powers—Work under Contract not Completed—Substantial Compliance with Contract—Deduction from Amount of Contract in Favour of Guarantor.

Appeal by the defendant company from an order of BOYD, C., 37 O.L.R. 492, 10 O.W.N. 406.

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

Glyn Osler, for the appellants.

R. S. Robertson, for the plaintiff, respondent.

R. T. Harding, for the defendant Johnston.

HODGINS, J.A., reading the judgment of the Court, said that the appeal was upon two grounds: (1) that the guaranty was not within the company's powers; (2) that the plaintiff, not having finished the factory, could not recover.

Upon the first point, the learned Judge referred to sec. 23 (1) (*d*) and (*k*) of the Companies Act, R.S.O. 1914 ch. 178; and said that, taking Tolton as a person engaged in a transaction, as he undoubtedly was, with the plaintiff, if it was one which the defendant company were authorised to engage in, or if it were capable of being conducted so as directly or indirectly to benefit the company, the company might enter into any arrangement for co-operation or joint adventure with Tolton, and guarantee his contract or otherwise assist him.

The contract of the 19th October, 1914, was based upon a transaction entered into by Tolton with the plaintiff, in respect of which the defendant company had in fact advanced moneys and had guaranteed payment for certain materials; and by the contract the means to carry out the undertaking are provided for. The plan was, that Tolton should advance moneys in instalments, partly fixed and partly based on the plaintiff's expenditure, and that the plaintiff should, with that amount of financial aid, complete the building and pay certain liens and claims. The agreement recognised that Tolton was engaged in a transaction, the carrying out of which would in many ways benefit the defendant company, who had more than $2,500 at stake in it, which might be lost if completion of the building were endangered. If so, the guaranty would be within the company's statutory powers under sec. 23 (1) (*d*), as being made pursuant to an arrangement for co-operation or joint adventure with Tolton.

Considering the nature of the transaction, it might well be held that the defendant company were lending money to Tolton to be paid by him under the contract to assist the plaintiff in finishing the building upon lands then owned by the company, but in which he had, or might by the grace of the company have, an interest. Tolton was certainly one having dealings with the company so that the guaranty of his contract came literally within clause (*k*).

It was unnecessary to express any opinion upon the legislation of 1916, 6 Geo. V. ch. 35, sec. 6.

Dealing with the second ground of appeal—that the plaintiff could not recover because the building was not fully completed—the learned Judge said that this objection was not dealt with in the judgment of the Chancellor. The conclusion of the County Court Judge that there was a substantial compliance with the contract of the 19th October, 1914, was the proper one.

The right of the plaintiff to recover from Tolton the sums to be advanced weekly and monthly was in no way dependent on the completion and equipment of the factory, as was pointed out in

Deldo v. Gough Sellers Investments Limited (1915), 34 O.L.R. 274. The covenants were independent, and there was no provision that any part was to become payable when the building was completed.

The question of substantial compliance had been put upon a reasonable basis by H. Dakin & Co. Limited v. Lee, [1916] 1 K.B. 566.

The company guaranteed Tolton's payments; and if, because he did not pay, the company were called on to make them good, equity would require that the company should be allowed to set set off that which the debtor himself could set off. If substantial compliance were enough to warrant judgment under the contract, that judgment could not be for more than that to which substantial compliance would entitle the creditor. So that from the $4,328.61 should be deducted $700, as found by the County Court Judge.

Reference to Murphy v. Glass (1869), L.R. 2 P.C. 408; Bechervaise v. Lewis (1872), L.R. 7 C.P. 372; Halsbury's Laws of England, tit. "Guarantee," vol. 15, p. 508, para. 960.

The appeal should be allowed to the extent of cutting down the plaintiff's judgment by $700 and by adding interest on the balance from the date of the writ, and otherwise dismissed. No costs of appeal.

Appeal allowed in part.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

*RE OWEN SOUND LUMBER CO.

Company — Winding-up — Contributories — Directors — Misfeasance — Winding-up Act, R.S.C. 1906 ch. 144, sec. 123—Scope of—Procedure—Irregularity in Election of Directors—De Facto Directors—Liability—Payment of Dividends out of Capital—Payment of Bonuses—Increases in Salaries.

Appeals by J. M. Kilbourn, Wesley Sheriff, and W. H. Merritt, and cross-appeal by the liquidator, from the orders of MIDDLETON, J., 34 O.L.R. 528, 9 O.W.N. 103, made upon appeals from the rulings of the Local Master at Owen Sound.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

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

W. N. Tilley, K.C., and W. H. Wright, for the appellants Sheriff and Merritt.

H. J. Scott, K.C., and D. Robertson, K.C., for the liquidator, respondent and cross-appellant.

HODGINS, J.A., reading the judgment of the Court, dealt with the appeals under five heads:—

(1) As to the $5,000 stock allotted or distributed on the 28th April, 1910. The Local Master held H. E. Rowland ($2,500), W. H. Merritt ($1,300), J. M. Rowland ($500), and Wesley Sheriff ($400), liable as contributories for the amounts of stock distributed to them as above. The Rowlands did not appeal; Sheriff and Merritt did. Middleton, J., held Merritt liable for $1,300, but held Sheriff not liable. Merritt now appealed; and the liquidator also appealed, seeking to make all four responsible for the whole $5,000. HODGINS, J.A., agrees with the Local Master and Middleton, J., that Merritt should be put on the list of contributories for 13 shares and 13 shares only. The appeals of Merritt and of the liquidator on this branch should each be dismissed with costs.

(2) Dividends paid on the 10th April, 1912, $6,300. The Master held that there was no liability for these dividends as regards any of the parties. Middleton, J., decided that the two Rowlands, Merritt, and Sheriff were, as de facto directors, guilty of misfeasance under sec. 123 of the Winding-up Act, R.S.C. 1906 ch. 144. From this decision Merritt and Sheriff appealed; and their appeal should be allowed with costs.

(3) Dividends paid on the 18th April, 1913, $6,300. The Master held that the two Rowlands, Merritt, and Kilbourn were not liable; Middleton, J., reversed this; Merritt and Kilbourn appealed; and their appeal should be allowed with costs.

(4) Moneys voted on the 14th April, 1914—$2,500 to W. H. Merritt, $3,000 to H. E. Rowland, $500 to J. M. Rowland—for guaranteeing indebtedness to bank. These were disallowed by the Master and by Middleton, J.; the liquidator appealed; and the appeal should be allowed.

(5) Increases in the salaries of the Rowlands for 1914—$600 and $500—voted the 14th April, 1914. The Master disallowed this claim; Middleton, J., affirmed the disallowance; the liquidator appealed; and the appeal should be dismissed.

Orders below varied.

FIRST DIVISIONAL COURT. JANUARY 12TH, 1917.

CRAWFORD v. McMILLAN.

Contract—Formation—Sale of Goods—Correspondence—Evidence Statute of Frauds.

Appeal by the defendants from the judgment of the County Court of the County of Welland in favour of the plaintiff in an action to recover damages for the breach of an alleged contract by the defendants for supplying the plaintiff with 400 bags of potatoes at 78 cents a bag, delivered at Ridgeville.

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

C. R. McKeown, K.C., for the appellants.

W. M. German, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the alleged contract was evidenced by the correspondence which passed between the parties, partly by letters and partly by telegrams, supplemented by an alleged oral agreement; and the main defence relied on was that there was no concluded contract, and at all events no contract in writing sufficient to satisfy the Statute of Frauds.

In answer to an inquiry by the plaintiff, the defendants wrote to him on the 20th September, 1915, quoting a price of 78 cents per bag for a car-load of potatoes to be delivered at Welland. On the 22nd September, the plaintiff wrote to the defendants suggesting that the price was too high. On the 28th September, the defendants replied that they could not quote a lower price. The plaintiff said that he communicated with the defendants by telephone on the 29th September, before the letter of the 28th had reached him, and that an arrangement was then made between them, by word of mouth, for the sale and purchase of a car-load of potatoes at 78 cents per bag, delivered at Ridgeville. This was denied by the defendants; what they had said was that they would endeavour to supply a car-load at 78 cents per bag, but would not promise to do so. They also testified that on the 29th, before the conversation by telephone, they had written to the plaintiff cancelling their quotation of the 28th, and that the plaintiff was so informed at the outset of the conversation. On the 30th September, the plaintiff wrote to the defendants: "Confirm order by

'phone 29th inst. at 78 cents per 90 lbs. car, delivered at Ridgeville, bulk as big car as you can, not less than 400 bags."

The learned Chief Justice said that there was no completed contract sufficient to satisfy the Statute of Frauds. The plaintiff's case was, that a different arrangement from that contemplated by the letter of the 28th September was orally entered into. The quotation was for delivery at Welland; the alleged oral bargain and the letter of the 30th September required that delivery should be made at Ridgeville. There was no stipulation as to the size of the car in the defendants' offer. By his letter of the 30th September, the plaintiff required that a car containing not less than 400 bags should be supplied. There was, therefore, no acceptance of the defendants' offer, and nothing in writing to bind them to do what the plaintiff testified it was agreed in the telephonic conversation that they would do.

The judgment should be set aside with costs of the appeal, and the action should be dismissed with costs.

Appeal allowed.

HIGH COURT DIVISION.

BRITTON, J. JANUARY 9TH, 1917.

W. A. STONE & CO. v. NATIONAL COAL CO.

Partnership—Promissory Note Signed in Firm Name—Liability of Member of Firm—Recognition by Endorsement—Satisfaction—Lost Instrument—Security.

Action upon a promissory note for $1,700 made by the defendants the National Coal Company, dated the 23rd February, 1915, payable 30 days after date, to the order of the plaintiffs. It was endorsed, "The National Coal Co. per Louis Stander."

The defendant Stander was sued as endorser and as a member of the firm or partnership of the National Coal Company; he defended the action; the other defendants did not defend.

The action was tried without a jury at Brantford.

J. Harley, K.C., for the plaintiffs.

W. S. Brewster, K.C., for the defendant Stander.

BRITTON, J., in a written judgment, said that in form Stander was not personally an endorser; if an endorser, he was not liable, as there was no presentment for payment and no notice to him of presentment and non-payment.

The debt represented by the note was contracted on or before the 22nd January, 1915. Stander did not become a partner in the National Coal Company until the 23rd February, 1915. On that day, Stander entered into an agreement with one Katz and one Rebecca Lipovitch to go into partnership and carry on the business. As such partner, Stander did not object to his partner Katz signing the note in question. Again, the defendant Stander himself recognised and adopted the signature of the National Coal Company, by himself endorsing for that company.

The partnership of which Stander became a member was to commence on the date of the agreement, the 23rd February, 1915, and was to continue for three years from the 1st March, 1915; but, by mutual agreement on the 12th April, 1915, Stander retired from the partnership. By agreement, the parties to the partnership assumed the liabilities, and owned the assets.

This judgment was not based upon any agreement between the parties themselves upon dissolution as to liability to creditors, but upon general liability as parties in signing a note in the firm name; there was in fact no consideration moving on the part of the plaintiffs to the defendant Stander. There was no request on the part of the plaintiffs that Stander should sign. There was no request by Stander for time. Nor was there in fact any agreement that the company or any of the partners should get any.

The liability of Stander arose to the plaintiffs as creditors of the firm, when the defendant was one of the firm, because in fact a signer of the note.

There was no satisfaction of the note in the plaintiffs not returning until several days after it had been received a renewal note for $1,400 sent by Katz to them with $300 in cash; they retained the cash and sent back the note.

Judgment for the plaintiffs against the defendant Stander for $1,400, with interest at 5 per cent. from the 26th March, 1915, with costs.

The original note was not produced. It must be produced, or the plaintiffs must give security to the defendant Stander, before execution issues or payment made.

KELLY, J. JANUARY 10TH, 1917.

*LANCASTER v. CITY OF TORONTO.

Insurance—Life Insurance—Contract between City Corporation and Insurance Company—Insurance of Lives of Soldiers being Bona Fide Residents of City at Time of Declaration of War—Meaning of "Resident"—Person Living in House outside City and Working in City.

Action against the Corporation of the City of Toronto and the Metropolitan Life Insurance Company to recover $1,000, alleged to be due by the defendants in respect of a policy issued by the defendant company on the life of the plaintiff's husband, Henry Richard Lancaster, who died in the city of Toronto, on the 5th February, 1916.

On the 14th August, 1914, Lancaster enlisted at Toronto for war service, and at once went with his battalion to the Province of Quebec for training.

He had nothing to do with procuring the insurance; the insurance was arranged for by the Council of the City of Toronto, and was intended to cover the lives of all members of the Canadian Overseas Contingent who were bona fide residents of Toronto previous to the declaration of war and had since enlisted. A formal separate application for Lancaster's insurance was made on the 16th December, 1914, signed by the Treasurer of the City of Toronto. But this was said to have been a mistake.

The question was, whether Lancaster came within the terms of the insurance contract entered into by the two defendants.

The action was tried without a jury at Toronto.

A. G. Slaght, for the plaintiff.

C. M. Colquhoun, for the defendant city corporation.

H. S. White and F. C. Carter, for the defendant company.

KELLY, J., in a written judgment, after stating the facts, said that what the defendant corporation intended from the very beginning to contract for was insurance upon the lives of those who at the time of the declaration of war were bona fide residents and who after that time had enlisted.

The plaintiff was married to Lancaster in England in 1903, and came to Toronto in 1910. From that time until the spring of 1913 they lived in Toronto. In March, 1913, they went to

live in a rented house, just outside of Toronto, and there they continued to live until the husband enlisted in August, 1914. He worked in Toronto, returning every night to his house outside. The question was, whether he was a "resident" of Toronto.

There is nothing in the evidence to warrant giving to the word "resident" any meaning other than its ordinary meaning. A man's residence is where he eats, drinks, and sleeps, or where his family eat, drink, and sleep: Rex v. Inhabitants of North Curry (1825), 4 B. & C. 953, 959. Prima facie a man's home is where his wife lives, and so he may be said to be resident there: Regina v. Norwood Overseers (1867), L.R. 2 Q.B. 457, 459. See also The Oldham Case (1869), 1 O'M. & H. 151, 158; The Northallerton Case (1869), 1 O'M. & H. 167, 170, 171; Re Ingilby (1890), 6 Times L.R. 446; Holborn Guardians v. Chertsey Guardians (1884), 54 L.J.M.C. 53; Mellish v. Van Norman (1856), 13 U.C.R. 451, 455; In re North Renfrew (1904), 7 O.L.R. 204; Re Sturmer and Town of Beaverton (1911), 24 O.L.R. 65; In re Ladouceur v. Salter (1876) 6 P.R. 305.

Lancaster was not, therefore, at the critical time, a resident of the city; there was no privity between him and either of the defendants; and there was no ground upon which the plaintiff could succeed

Action dismissed with costs.

SUTHERLAND, J. JANUARY 12TH, 1917.

RE BLAHOUT.

Will—Construction—Bequest of Income for Maintenance and Education of Children—Discretion of Executors—Ability of Children to Support themselves.

Motion by the Trusts and Guarantee Company Limited, executors of the will of Joseph Francois Blahout, deceased, for an order determining two questions arising upon the will and a codicil thereto.

The testator was twice married; in the will he bequeathed $1,000 to Stephanie, his daughter by his second wife, on certain terms; he gave his wife Antonia his house and household furniture and effects in lieu of dower; he gave certain moneys on deposit in a bank and insurance moneys to his executors in trust to divide amongst his four children by his first wife, share and share alike,

in case and when they should attain the age of 21; and he directed the executors to invest the moneys of his estate and to use the income for the maintenance and education of his children by his first wife.

In the codicil he revoked the gifts to his daughter Stephanie and wife Antonia; he directed the executors to sell the house, and out of the proceeds to hold in trust $1,000 to be paid to Stephanie in case and when she should reach the age of 21, and, if she should die before, to divide the $1,000 among the other four children; and he directed his executors to pay to his wife Antonia one-third of the net proceeds of the sale of the house, and to divide the balance amongst the four children of the first wife, share and share alike, "as and when they respectively attain the age of 21 years, the share of any child dying before attaining the age of 21 years to be paid to the survivor or survivors." By another clause he directed the executors to sell the household furniture and effects and divide the proceeds among all his children at majority.

The motion was heard in the Weekly Court at Toronto.

H. J. Martin, for the executors.

T. H. Peine, for Harry William Paul Blahout and May Maud Blahout, now Keeler.

F. W. Harcourt, K.C., for the infant Lillian Blahout.

SUTHERLAND, J., in a written judgment, said that the general direction in the will to use the income of part of the estate for the maintenance and education of the children of the first wife gave the executors a discretion to use such part of the income as they might consider necessary from time to time for the maintenance and education of any of the children, without regard to whether some of the children were or were not more self-supporting than others: Hanson v. Graham (1801), 6 Ves. 238; Rees v. Fraser (1879), 26 Gr. 233; Anderson v. Bell (1882), 29 Gr. 452; Allen v. Furness (1892), 20 A.R. 34; In re Gossling, [1903] 1 Ch. 448; Re McIntyre (1905), 9 O.L.R. 408; Re Spring (1908), 12 O.W.R. 420; Re Becksted (1910), 1 O.W.N. 424.

Therefore Harry W. P. Blahout, the eldest child, now of age, was not entitled to be paid the sum of $613.67 accrued income on his share of the estate with accrued interest thereon; and the executors were justified in using any portion of the income accrued from the shares of Harry W. P. Blahout and May Maud Keeler for the support and maintenance of Lillian E. Blahout, still an infant.

Order accordingly. Costs out of the estate.

SUTHERLAND, J. JANUARY 12TH, 1917.

GOOD v. GENERAL ANIMALS INSURANCE CO. OF CANADA.

Insurance—Animal Insurance—Misrepresentations—Immateriality—Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 156 (6)—"Cash."

An action to recover $1,000 upon a policy issued by the defendants insuring the plaintiff against the loss of a stallion.

The policy was for the term of three months from the 19th April, 1916. The animal died on the 7th or 8th June, 1916.

The defence was that the policy of insurance was obtained by the plaintiff by misrepresentation in stating that he had purchased the animal and paid therefor $2,800 in cash, when in fact the horse was not purchased or paid for in cash but was obtained by the plaintiff partly as the result of a trade and partly of a promissory note.

The action was tried without a jury at Stratford.

D. Robertson, K.C., for the plaintiff.

George Wilkie, for the defendants.

SUTHERLAND, J., in a written judgment, said that the term "cash" has a strict meaning: Stroud's Judicial Dictionary, 2nd ed. (1903), p. 269; Mears v. Western Canada Pulp and Paper Co. Limited, [1905] 2 Ch. 353. But, in such a case as the present, and having regard to the course of conduct of the parties, it would not be appropriate, as against the plaintiff and in favour of the defendants, to press the construction too far.

The purchase of the stallion could not be considered a trade. In reality it was a new purchase, on which was credited in effect cash to the amount paid or agreed to be paid for another stallion. For the balance a somewhat long-term note was given, but it carried interest at 5 per cent. till paid. The agent of the defendants apparently filled out the various application forms, and the defendants did not treat the answers to the questions as of very great or strict importance. It was argued that, if answers had been given to the questions in strict accordance with the facts, the insurance would not have been granted. With this contention the learned Judge did not agree; he could not believe that the defendants would have considered the variations of the

answers from the strict truth as materially affecting the risk; and, in all the circumstances, he found that they were not material.

Reference to the Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 156, sub-sec. 6; In re Universal Non-Tariff Fire Insurance Co. (1875), L.R. 19 Eq. 485, 493; Strong v. Crown Fire Insurance Co. (1913), 29 O.L.R. 33, 55.

Judgment for the plaintiff for the amount claimed with interest from the date of the writ and costs.

W. A. STONE & CO. v. STANDER—BRITTON, J.—JAN. 9.

Fraudulent Conveyances—Action to Set aside—Evidence—Intent.]—The plaintiffs, suing on behalf of themselves and all other creditors of the defendant Louis Stander, brought this action against Louis Stander and Mary Stander, his wife, to set aside certain conveyances made by Louis to Mary, dated the 1st February, 1915, alleging that they were made with the fraudulent intent to hinder, defeat, and delay the creditors of Louis. The action was tried without a jury at Brantford. BRITTON, J., in a written judgment, said that he was of opinion that the plaintiffs had failed to establish any fraudulent intent on the part of the defendants in the transactions impeached. It did not appear that there were any creditors other than the plaintiffs. Judgment for the defendants dismissing the action with costs. J. Harley, K.C., for the plaintiffs. W. S. Brewster, K.C., for the defendants.

TRAINOR v. O'CALLAGHAN—BRITTON, J.—JAN. 10.

Executors and Administrators—Refusal of Executor to Administer Estate—Will—Estate of Widow durante Viduitate—Failure to Prove Remarriage of Widow—Claim of Title by Possession—Evidence—Judgment for Administration—Maintenance of Child Entitled in Remainder—Improvements under Mistake of Title—Costs.]—Action for administration of the estate of William O'Callaghan, deceased, or for other relief, the plaintiff being one of the daughters of the deceased. The defendants Michael O'Callaghan and Roderick Hawley were the executors named in the will of the deceased, who died in 1872. At the time of his death, he was in possession of a farm in the township of North

Gower. By his will he gave to his wife his real and personal property as long as she should remain single; if she married, the property was to be sold, she was to receive $200, and the remainder of the money was to be divided between the testator's two daughters; if she remained single till her death, the property was to be sold and the proceeds to be divided between the two daughters. The widow was said to have married the defendant Michael O'Callaghan about the year 1910; she died on the 23rd May, 1916. The defendants never proved the will, and refused to administer the estate. The defendant Michael O'Callaghan denied his executorship and repudiated the plaintiff's claim; he set up that the deceased was not the owner of the farm of which he was in possession at his death, and asserted title in himself (Michael) by length of possession. The action was tried without a jury at Ottawa. BRITTON, J., in a written judgment, after setting out the facts, said that there was no sufficient evidence of the actual marriage of the widow to Michael. If the widow did not marry, she held the land for her life. William died in possession of the land, and that was prima facie evidence of ownership. The prima facie case had not been rebutted. There should be administration of the estate of William. The defendant Michael was not entitled to receive from the plaintiff anything for her maintenance. She worked in the field and at house-work at least enough to entitle her to food, clothing, and education. If it appeared otherwise in the administration proceedings, the claim could be dealt with by the Master. The defendant Michael had not made out a case for the value of improvements made under a mistake of title. Judgment for the plaintiff for administration; reference to the Local Master at Ottawa. The plaintiff's costs of the action up to judgment, fixed at $125, to be paid by the defendant Michael O'Callaghan. The costs of the administration, commission and disbursements, to be paid out of the estate. J. R. Osborne, for the plaintiff. R. A. Pringle, K. C., and F. B. Proctor, for the defendants.

FARLEY v. FARLEY—KELLY, J.—JAN. 10.

Contract — Services — Quantum Meruit — Fraudulent Conveyance—Setting aside—Amendment—Creditors' Claims.]—Action by a niece of the two defendants to set aside a conveyance of land made by the defendant John Farley to the defendant George Farley, with intent to defeat the plaintiff's claim, and to recover $1,800 for services to the defendant John Farley. The action was tried without a jury at Owen Sound. The learned Judge stated the facts at length in a written judgment, made findings thereon, and concluded that the plaintiff was entitled to be paid for her services upon a quantum meruit basis for a period of six years before action. There should be judgment in her favour for $1,100 against the defendant John Farley, with costs of the action. The plaintiff was not an execution creditor of the defendant John Farley, and so the action, as to the claim to set aside the conveyance, should be on behalf of herself and all other creditors of her debtor. The record should be amended accordingly. Judgment setting aside the conveyance and directing a reference to ascertain creditors' claims and for sale of the land to satisfy the claims if not paid. The defendant George Farley to pay one-half of the costs of the action. W. S. Middlebro, K.C., for the plaintiff. W. H. Wright, for the defendants.

LAWSON v. NATIONAL TRUST CO. LIMITED—CAMERON, MASTER IN CHAMBERS—JAN. 11.

Pleading — Statement of Defence — Relevancy — Construction of Trust Deed—Claim against Estate of Deceased Trustee and Beneficiary—Issues between Defendants—Refusal of Motion to Strike out Parts of Pleading.] — Motion by the plaintiff for an order striking out certain paragraphs of the statement of defence of the defendant company and the defendant Hardy, on the ground of irrelevancy. The plaintiff, the sole and continuing trustee under a certain trust indenture, brought this action to obtain a construction of the indenture with respect to certain questions which had arisen. The defendant company and the defendant Hardy were the executors of the will and trustees of the estate of Frederick Barlow Cumberland, deceased, who was a beneficiary and trustee under the indenture. The only specific claim of the plaintiff against the defendant company and the defendant

Hardy was for payment by them out of the estate of Cumberland of $11,825.26, said to have been paid by him out of the corpus, and that his interest as a beneficiary under the trust indenture should be charged with the payment of that sum. The learned Master, in a written judgment, said that so many collateral issues were involved in the main issue that a great deal of latitude should be allowed the defendants in framing a defence. An additional fact which rendered it very difficult to confine the defendants to the strict rules of pleading was the existence of a very serious contest between the defendant company and the defendant Hardy on the one side and the remaining defendants on the other side. In this contest the plaintiff could take no part, except in so far as his duty as trustee was involved. The action would fail in its purpose if the pleadings did not contain the issues arising between the defendants. The plaintiff could not be embarrassed by the portions of the pleading complained of. Motion refused. Time for reply extended for 10 days. Costs of the application to be costs to the defendant company and the defendant Hardy in the cause, unless the trial Judge should otherwise order. Donald Macdonald, for the plaintiff. H. S. White, for the defendant company and the defendant Hardy.

TORONTO LOCAL BOARD OF HEALTH v. SWIFT CANADIAN CO. LIMITED.—FALCONBRIDGE, C.J.K.B.—JAN. 12.

Nuisance—Injunction — Issue Directed to be Tried.]—Motion by the plaintiffs for an injunction restraining the defendants from using their plant until they have abated a nuisance. The motion was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he was not disposed to hamper or interfere with the operations of a company which is engaged in putting up provisions for our armies in the field. And on this ground alone he had felt inclined to dismiss the motion. He had, however, come to the conclusion that he should direct an issue to determine whether there was any nuisance cognizable in law caused by the operating of the defendants' plant—nuisance cognizable in law because it would be open to the defendants to argue that, assuming that they were exercising statutory powers and using up-to-date appliances, they were not liable even though there might be emanation of offensive odours. Judgment accordingly. Costs of the motion to be costs in the proceedings. C. M. Colquhoun, for the plaintiffs. Gideon Grant, for the defendants.

RE SOLICITORS—FALCONBRIDGE, C.J.K.B.—JAN. 12.

Solicitors — Costs — Taxation — Order for, Obtained by Solicitors—Ambiguity—Liability of Estate of Deceased Person—Amendment.]—Appeal by the solicitors from the taxation of their costs by the principal Taxing Officer. Upon the hearing in the Weekly Court, the solicitors asked to have the order for taxation amended. The learned Chief Justice, in a written judgment, said that the order, as issued by the solicitors, was ambiguous. It did not expressly require the Taxing Officer to determine what right, if any, the solicitors had against the assets of the estate, and the Taxing Officer had not entered upon any such inquiry. The amendment sought was apparently with the view of continuing the ambiguity and of enabling the solicitors to suggest that they now have an adjudication upon a question not yet determined; this should be refused. The right of the solicitors against the estate could be no greater than the right of their client (an executor), which depended upon many things, and should in no case be entered upon in the absence of those beneficially interested in the estate. Appeal dismissed with costs. R. H. Holmes, for the solicitors. T. N. Phelan, for the client.

RE MCFARLANE—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JAN. 13.

Will—Identity of Legatee—Order Declaring—Payment of Legacy by Executors.]—Motion by Peter Bartley for an order declaring that his identity with a legatee mentioned in the will of Peter McFarlane, deceased, was established upon evidence submitted. The learned Chief Justice, in a brief memorandum, said that it might be declared that the applicant was the legatee mentioned in the will and that the executors might pay over to him the amount of the legacy. Costs out of the estate, if the parties desire. J. P. MacGregor, for the applicant. A. E. Knox, for the executors.

PERNEY v. DORAN—SUTHERLAND, J.—JAN. 13.

Mortgage—Redemption—Dispute as to Amount Due—Application of Payments—Tender—Costs.]—An action for redemption. The plaintiff desired to have a mortgage for $2,200 upon a valuable property in the city of Niagara Falls discharged. The mortgage was made by one McClive in favour of the defendant on the 23rd June, 1913. There was a dispute as to the application of certain payments made by McClive to the defendant. The plaintiff acquired the property, subject to the mortgage, on the 28th June, 1916. This action was begun on the 27th September, 1916, the plaintiff alleging that the amount then due for principal and interest on the mortgage was $1,680. It was admitted that the plaintiff had, on or before the date when the statement of claim was delivered, tendered $1,680 to the defendant; the tender was refused, the defendant claiming the full sum of $2,200. The action was tried without a jury at Welland. Upon the evidence, the learned Judge found in favour of the plaintiff's contention. Judgment declaring the plaintiff entitled to redeem and on payment of $1,680 to receive from the defendant a discharge of the mortgage. The defendant to have his costs of the action down to the date of the filing of the statement of claim, the 31st October, 1916, and the plaintiff costs thereafter, the excess of the plaintiff's costs over the defendant's to be deducted from the $1,680. C. V. Langs, for the plaintiff. F. C. McBurney, for the defendant.