The
Ontario Weekly Notes

VOL. XVII. TORONTO, FEBRUARY 6, 1920. No. 20

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JANUARY 26TH, 1920.

*REX EX REL. DART v. CURRY.

Costs—Proceeding to Set aside Election to Municipal Office—Municipal Act, R.S.O. 1914 ch. 192, secs. 160, 186—Order Made by Master in Chambers Setting aside Election—Reversal by Judge in Chambers—Taxation of Respondent's Costs—Originating Motion—Tariff A., Item 17—Counsel Fee—Quantum—Discretion of Taxing Officer—Appeal—Costs of Appeal to Judge in Chambers—Case not Covered by Tariff—Rule 2—Analogy to Original Motion—Item 20—Examination of Witnesses upon Motion—Preliminary Proceedings—Item 12—Costs of Appeal from Taxation.

An appeal by the defendant and a cross-appeal by the relator from the taxation of the defendant's costs of a proceeding under the Municipal Act to set aside his election as reeve of a township and of a successful appeal to a Judge in Chambers from an order of the Master in Chambers setting aside the election. See Rex ex rel. Dart v. Curry (1919), ante 203, 46 O.L.R. 297.

H. J. McLaughlin, for the defendant.
H. S. White, for the relator.

MIDDLETON, J., in a written judgment, said that the questions raised mainly related to the application of the present tariff of costs to proceedings under the sections of the Municipal Act relating to controverted elections, R.S.O. 1914 ch. 192, secs. 160-186.

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

By sec. 185, Rules regulating the practice and procedure, including costs, may be made by the Judges of the Supreme Court, and as to matters not provided for in those sections or by Rules of Court, the practice and procedure of the Supreme Court is to be applicable. No Rules having been made under this authority, and the power to award costs being given by the Act itself, the Rules have to be resorted to only for the purpose of ascertaining the scale upon which costs are to be allowed and the machinery for taxation.

Since the repeal in 1888 of the old Election Rules, it has been the practice to tax costs upon the ordinary tariff; and it is applicable to all proceedings in this Court where there is no express provision to the contrary.

The proceedings before the Master were upon an originating notice, and the costs were properly taxable under item 17 of Tariff A., as of an originating motion in Chambers. The motion was in no sense interlocutory—it involved the final determination of the issue raised in the proceedings.

A counsel fee of $50 was allowed by the Taxing Officer. By item 17, the fee is in the discretion of the officer, and that discretion will not be interfered with on appeal upon a question of quantum: Conmee v. North American Railway Contracting Co. (1890), 13 P.R. 433; In the Estate of Ogilvie, [1910] P. 243. Had any error in principle been pointed out, the learned Judge might have interfered.

As to the costs of the appeal to the Judge in Chambers, no appropriate item is found in the Tariff, and so resort must be had to analogy, as provided by Rule 2. The appeal was clearly not an interlocutory motion; nor an originating motion, for the case was already in Court. There was no analogy to an interlocutory motion; and the question was, whether the real analogy warranted the application of the same tariff as that applicable to the original hearing before the Master, or whether the analogy should be found in item 20, relating to appeals to the Appellate Division. The learned Judge preferred the former. The allowance for preliminary proceedings should not be increased, as no affidavits were necessary. The fees should be: preliminary proceedings, $15; counsel fee, $50; issuing order, $15: an increase of $50 in the amount as allowed by the Taxing Officer.

Upon the cross-appeal the relator contended that the examination of witnesses before an examiner for use upon the motion must be taken to be covered by the item "preliminary proceedings." The learned Judge said that he was not able to find any authority for the examination of witnesses before an examiner, but no

objection was made upon that score, and taking the depositions of witnesses in that way had probably not increased the expense. Examinations, when properly required, are not covered by the item "preliminary proceedings."

Item 12, relating to examinations for discovery, forms a guide by analogy for the allowance.

One allowance only should be made. The Taxing Officer treated each examination as a separate item. The counsel fees should stand as allowed. The allowance for preliminary proceedings should be reduced to $5. The whole reduction, on the cross-appeal, should be $13.

As success was divided, there should be no costs.

MIDDLETON, J. JANUARY 26TH, 1920.

*GIFFIN v. SIMONTON.

Will—Jurisdiction of Supreme Court of Ontario—Action for Revocation of Letters Probate, Establishment of Later Will, and Direction for Issue of Probate—Judicature Act, R.S.O. 1897 ch. 51, sec. 38—Preservation by Force of sec. 12 of Judicature Act, R.S.O. 1914 ch. 56—Construction and Effect.

Motion by the defendant to stay the action, on the ground that the statement of claim disclosed no cause of action within the jurisdiction of the Supreme Court of Ontario.

The motion was heard in the Weekly Court, Toronto.

W. S. MacBrayne, for the defendant.

E. C. Cattanach, for the plaintiff.

MIDDLETON, J., in a written judgment, said that on the 25th July, 1903, William H. Simonton made a will by which he appointed the defendant his executor and made him residuary legatee. On the 17th September, 1919, Simonton died, and the defendant obtained probate of this will.

The plaintiff said that on the 30th April, 1912, Simonton made a will by which he appointed the plaintiff his executor and made him sole legatee.

In this action the plaintiff asked that the probate of the earlier will might be revoked, that the later will might be declared to be the last will, and that this Court might direct that probate should issue to him.

The estate consisted of $3,662.47 on deposit with a trust company.

The defendant's contention was, that the plaintiff must seek his remedy in the Surrogate Court.

Reference to Mutrie v. Alexander (1911), 23 O.L.R. 396; Belanger v. Belanger (1911), 24 O.L.R. 439; Badenach v. Inglis (1913), 29 O.L.R. 165.

Upon the last revision (R.S.O. 1914 ch. 56) of the Judicature Act, sec. 38 of the Judicature Act, R.S.O. 1897 ch. 35, was not repealed, but was continued in effect by sec. 12, which vests in the Supreme Court of Ontario all the jurisdiction formerly vested in the High Court of Justice.

The question now raised is not touched by the cases referred to.

Section 38 gave the then High Court of Justice jurisdiction "to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments."

The defendant contended that this section did not enable a plaintiff to come before this Court to establish a will.

No doubt, the plaintiff could readily obtain relief, if entitled to it, upon a proper application in the Surrogate Court; but it was contended for the plaintiff that this Court has concurrent jurisdiction.

The precise point was determined against the defendant's contention by Spragge, C., in Perrin v. Perrin (1872), 19 Gr. 259.

The learned Judge said that it was his duty to follow this decision, leaving the defendant, if he had the courage of his convictions, to carry the case to a Divisional Court.

The motion should be dismissed; costs to the plaintiff in the cause.

MIDDLETON, J. JANUARY 26TH, 1920.

*MASON & RISCH LIMITED v. CHRISTNER.

Damages—Breach of Executory Agreement for Purchase of Piano from Manufacturer—Measure of Damages—Difference between Cost of Manufacture and Sale-price—Loss of Profits—Duty of Vendor to Mitigate Damages—Absence of Open Market for Sale of Subject of Contract.

Appeal by the defendant from the report of a Master upon the reference directed by the judgment of MASTEN, J.: Mason & Risch Limited v. Christner (1918), 44 O.L.R. 146.

The appeal was heard in the Weekly Court, Toronto.

J. M. Ferguson, for the defendant.

J. G. Kerr, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that the defendant agreed to purchase a piano, but, before the specific article had been appropriated to the fulfilment of the contract, the defendant repudiated the bargain. The action was for the price of the piano; the action failed because the property had not passed. A reference was directed to assess the damages the plaintiff had sustained by reason of the breach of the executory agreement. Upon the reference it appeared that the piano cost $450 to manufacture and that $9 would have had to be spent to tune and adjust before delivery. The sale price was $850. The Master allowed $391 damages.

The appeal was upon the ground that the Master should not have allowed damages upon the basis of the profit lost; but, as there was no difference between the ordinary sale-price and the contract-price, he should have allowed only nominal damages, or at the most the cost incident to making another sale of the instrument.

The fundamental principle in all cases of breach of contract is that, so far as money can do it, the other party to the contract shall be placed in as good a situation as if the contract had been performed, subject to the qualification that the plaintiff has cast upon him the obligation of taking all reasonable steps to mitigate his loss consequent upon the breach: British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London, [1912] A.C. 673; Payzu Limited v. Saunders, [1919] 2 K.B. 581.

If goods can be sold in the open market, the vendor's duty is to offer for sale and so mitigate his damage; but this rule has no application to cases in which there is not an open market for the goods.

Where the article sold is a machine or a piano, and there is no such thing as an open market ready to absorb all that is cast upon it, but only a limited number of purchasers exist, the case is obviously different. The vendor has his store, maintained at large expense, and his salesmen, to whom he pays wages, and is under large expense for advertising his wares. He may have a hundred pianos to sell, and, when a contract to buy is made, the profit, so called, goes to meet pro tanto this overhead expense, before his ultimate net profit can be ascertained. When this contract is broken, it is no answer to say, "You can sell your piano at the same price, and so have suffered no damage." If the contract had not been broken, a second piano would have been sold, and the dealer would have had the profit on two sales instead of one. The existence of the open market ready to absorb all that can be fed to it is the true test.

Reference to Dunkirk Colliery Co. v. Lever (1878), 9 Ch.D. 20, 25.

The precise question was determined by Hagarty, C.J., in Williams v. Williams, on the 10th April, 1884, in a considered judgment, not reported and which cannot be found.

Appeal dismissed with costs.

MEREDITH, C.J.C.P. JANUARY 26TH, 1920.

RE PORTER.

Will—Construction—Absolute Devise of Lands to Sons on Attaining Age of 25—Subsequent Clause Expressing Desire that Widow shall have Rents and Profits for Support of herself and Children —Limitation to Period before Sons Attain Full Age—Express Gift of Life-estate in other Land.

Motion by James Porter, mortgagee under a mortgage from Charles Edmund Porter and David Alexander Porter, upon lands in the township of Nelson, for an order determining whether, on the true interpretation of clause 12 of the will of Charles Porter, deceased, his widow, Martha Jane Porter, was entitled to a life-

estate in the lands. The mortgage was made to the applicant after the sons had attained the age of 25.

The testator died more than 20 years before this motion was made.

The material paragraphs of his will were as follows:—

3. All my personal estate subject to any provision hereafter made I give to my said wife.

5. To my son Charles Edmund Porter I give the north 50 acres of lot 3 . . . to become his in absolute possession when he reaches the age of 25.

6. To my son David Alexander Porter I give the 50 acres known as the east half of the north half of lot 4 . . . to become his in absolute possession when he reaches the age of 25.

7. To my son Hugh James Porter I give the 50 acres known as the west half of the north half of said lot 4 to become his in actual possession at the age of 25.

8. In case of the death of any of my sons before taking possession I desire that his allotment of land shall be jointly owned by the survivor or surviving son or sons.

11. I desire that my wife notwithstanding anything in clause 7 of this my will contained shall have a life-interest in the 50 acres therein named.

12. I desire that my wife shall continue to reside where we now live and shall receive all rents or profits derived from my said estate, real or personal for the support of herself and my children and their proper education.

The motion was heard in the Weekly Court, Toronto.

A. W. Langmuir, for the applicant.

I. F. Hellmuth, K.C., for Martha Jane Porter.

MEREDITH, C.J.C.P., in a written judgment, said that the single question involved in this motion was whether the testator's widow took under the clause 12 of his will an estate for life in the lands in question.

The learned Chief Justice could not think that such was the intention of the testator or was the effect of his will.

In earlier clauses of the will he gave to his two sons Charles and David the land, absolutely, when they became 25 years of age: meanwhile clause 12 was to have full effect.

It is a plain rule of construction, as well as of common knowledge, that a plain, absolute, gift is not to be cut down unnecessarily by less certain words of bounty: a rule very applicable to this case; and one which well fits in with the general purposes of the testator as expressed in his will.

The gift to the widow is for support and education of the family: a need which would decrease as forisfamiliation took place and increased. At 25 these sons should in all probability need a home for themselves and their families, thus lightening the mother's duties and outlay; so the land in question should become theirs, in possession, absolutely.

The gift was not a gift to the widow for life: but there was a gift to her, for life, plainly expressed, of the land devised to the third son; that, with the family home upon it, she was to have as long as she should live: what more should be needed? No more seemed to be needed now, when all the children but one had other homes of their own.

Her life-estate in that land, her dower in the rest of the land, and her bequests under the will, seemed a very fair share of the estate when her obligations to support and educate the family had ceased.

The express gift of the life-estate in one of the three farms given to the three sons, in all the circumstances of the case, more than ordinarily negatived any intention to give an unexpressed life-estate in the other two farms.

In this view of the meaning of the will, the learned Chief Justice was glad to find himself in concurrence with the widow in her own judgment as to it. She deemed that she had dower only in the lands in question, and conveyed her dower to the sons' mortgagee.

Whether estopped from demanding more against the mortgagee was a question which was not raised in this matter.

Upon the construction of the will, the ruling must be that the sons took absolutely at 25.

Costs of the motion should come out of the part of the estate in question—no other part of it was involved in the motion.

MIDDLETON, J., IN CHAMBERS. JANUARY 27TH, 1920.

MILLER v. DUGGAN.

Particulars—Statement of Defence and Counterclaim—Particulars for Trial—Examination for Discovery—Pleading—Practice.

Appeal by the plaintiff from an order or direction of the Master in Chambers that a motion made by the plaintiff for particulars of the statement of defence and counterclaim stand until after the plaintiff had examined the defendant for discovery.

Erichsen Brown, for the plaintiff.
G. S. Hodgson, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff alleged that, before the 23rd June, 1919, he and the defendant were jointly interested in certain building transactions. He then particularised in a general way some six building contracts. At that time the plaintiff owned an equity of redemption in some land and a Ford automobile, and the defendant owned an equity of redemption and an automobile. It was agreed that a company should be formed, and these building contracts, equities of redemption, and automobiles should be conveyed to the company, and the plaintiff should have stock and a salary. In working out this scheme the plaintiff, at the defendant's request, conveyed to him the said assets to hold as trustee. The company was not formed. The plaintiff claimed to have his conveyance set aside and to recover possession of his property.

The defendant denied that there was any joint interest in the building contracts, and set out that with reference to one he was a subcontractor and agreed to do the work, paying the plaintiff $500 profit; with regard to others he was to supervise the construction for $100 per house; as to others the defendant had no interest, but was acting merely as supervisor for the owner; and as to the last the plaintiff assigned the money coming to him under a contract to the defendant as security for his indebtedness.

The agreement to form a partnership or company was denied, and the Statute of Frauds was relied upon.

The defendant stated that he discharged the plaintiff from his employment for misconduct; and that the plaintiff, being then indebted to the defendant, conveyed his equity of redemption, car, and interest in the one contract as security for his debt. As a matter of grace the plaintiff had been allowed to remain in possession of the house, on his agreeing to make payment of the instalments falling due upon the mortgage, which he had not done.

By counterclaim the defendant claimed to recover $1,811.76 debt and $2,200 damages for breach of duty.

Particulars of these items must be given to enable the action to be tried—and no objection was made to an order being made for this.

What was asked and resisted was an order for particulars "of the date and terms of employment of the plaintiff as a subcontractor in respect of house No. 26 Dawlish avenue, and whether the same was in writing and if in writing producing the document," and so on as to every statement in the pleading. The plaintiff observed no such particularity in his statement of claim as he now required

from the defendant. He had pleaded over, so particulars were needed only for the trial.

Reference to Spedding v. Fitzpatrick (1888), 38 Ch.D. 410, 411, 412.

When our ample means for discovery are kept in mind, and it is not forgotten that the functions of particulars and discovery are widely different (Milbank v. Milbank, [1900] 1 Ch. 376), it seems plain that no order should be here made going beyond what is above indicated.

The learned Judge did not agree with the course adopted below. Particulars may be delayed in certain cases until the party seeking particulars has been examined for discovery (Waynes Merthyr Co. v. D. Radford & Co., [1896] 1 Ch. 29); but there is no reason why the party seeking particulars should first examine for discovery. After he has examined and failed to get due information, an order for particulars may be proper in order to define the issues for trial; but no such case was here suggested.

Save as indicated above there was no need for particulars here.

Costs here and below should be costs in the cause.

MIDDLETON, J., IN CHAMBERS. JANUARY 28TH, 1920.

WILSON v. WILSON.

Husband and Wife—Pleading—Alimony—Statement of Defence and Counterclaim—Motion to Strike out—Allegations as to Quantum of Alimony—Practice as to Directing Reference.

An appeal by the defendant from an order of a Local Judge striking out certain paragraphs of the statement of defence in an action for alimony.

G. N. Shaver, for the defendant.

B. H. L. Symmes, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the appeal was out of time, but he extended the time because the order was one which, if it stood, would tend to produce much confusion and needless expense.

The claim was for alimony. The defendant said that in his endeavours to please the plaintiff he bought a farm and put it in her name, and that she was in possession of this farm, the stock, and all the furniture, including a piano and sewing machine, and

was working this with the help of her children, and was in receipt of wages earned by her children and of $10 per week which he was contributing under an order made by a magistrate. This, the defendant thought, ought to satisfy the plaintiff, even if he was in the wrong, which he denied. Then he counterclaimed, and asks that the farm and chattels might be declared to be his and might be put in his name, to prevent the plaintiff disposing of the same as her own.

Other defences were set up; those outlined were struck out by the Local Judge. Why was not explained. What was said was that the Judge at the trial could determine only the right to alimony, and must refer the quantum to the Master, and that these allegations only went to the quantum.

The learned Judge dissented from both statements. Unless driven to it by the conduct of the parties at the trial or the exigencies of the case, he never directed a reference to fix the amount of alimony. The amount properly payable could not be justly ascertained without some knowledge of the merits of the case, and wrong was frequently done by divorcing the trial from the reference and treating the reference as some mere mechanical process, such as the taking of a mortgage account. He had recently had an example in Malcolm v. Malcolm (1919), ante 93, 375, 46 O.L.R. 198, of the result.

The counterclaim should be dealt with in this action. Why have separate litigation? One airing of the domestic disputes should be enough.

The appeal should be allowed. In view of the default, the costs of this appeal should be in the cause. There should be no costs below.

ROSE, J. JANUARY 28TH, 1920.

*SPARKS v. HAMILTON.

Promissory Notes—"Foreign Bills"—Action against Endorser—Defence of Want of Due Presentment, Notice, and Protest—Waiver of Notice—Conduct not Shewing Waiver of Non-presentment—Promise to Pay—Presumptive Evidence—Onus—Laches—Ignorance of—Note Payable at Office of Payees in Named City—Payees Ceasing to have Office there—"Proper Place" for Presentment—Presentment Dispensed with—Foreign Law—Tender before Action—Costs.

Action by the holders against the endorser of three promissory notes, made by A. J. Saunders, each for $500, dated at Toronto,

the 5th November, 1904, payable to the order of Hurley & Co., "at their office, City of Philadelphia, State of Pennsylvania." One of the notes was payable two, another three, and the third four years after date. As to the last, liability was admitted. As to the others, the defence was an alleged failure on the part of the holders to present the notes to the maker for payment and to give notice of dishonour to the endorser and to protest the notes.

The action was tried without a jury at a Toronto sittings.
H. W. A. Foster and W. J. Beaton, for the plaintiffs.
G. W. Mason, for the defendant.

ROSE, J., in a written judgment, said that two contentions made by the plaintiffs, viz., that the defendant was really in the position of a maker and was primarily liable without presentment, protest, etc., and that the defendant was liable upon a release executed by him, failed upon the evidence.

There remained nothing to consider but the defence of want of due presentment, notice, and protest.

When the note payable three years after date fell due, the plaintiffs took no steps with regard to it; but on the 16th November, 1907, they wrote to the defendant, telling him that the three notes had been assigned to them and that the first two were overdue and unpaid; and they asked for payment by the 1st December. At the end of December, 1907, the defendant wrote to the plaintiffs asking that the matter be allowed to stand for a short time and promising to make a proposition of settlement; and from that time until the commencement of this action in January, 1918, there were repeated promises to pay, some payments on account, and many requests for extension of the time for payment of the balance.

There were originally four notes. The first was payable on the 5th November, 1905. After it fell due, Hurley & Co., who were the holders, drew on the defendant for the amount, with interest and protest charges, and he paid the draft. He swore that he did not receive any notice of dishonour or any notice of any kind from a notary in regard to the notes at two and three years—those here in question—but that that fact was not present to his mind when he made his promise to pay and payments on account; that he had had notice with reference to the note due in 1905; that he knew that it had been protested; that he had paid it; and that he assumed that the holders had done what was requisite with reference to the others. There seemed to be no reason to doubt his statement; and, even if he should

be considered to have waived his right to object to the want of notice, there was nothing in what he did which precluded him from setting up any failure to present the notes for payment and to protest them for non-payment: Woods v. Dean (1862), 3 B. & S. 101; Britton v. Milsom (1892), 19 A.R. 96; and other cases.

The promise was, however, presumptive evidence of the presentment, notice, and protest. The promise being established, the onus of proving laches on the part of the holder, and that the endorser was ignorant of it when he made the promise, is cast upon the endorser: Taylor v. Jones (1809), 2 Camp. 105; Britton v. Milsom, supra; Falconbridge on Banking and Bills of Exchange, 2nd ed., p. 671. The defendant had proved ignorance. Whether he had proved laches remained to be considered.

The notes being "foreign bills" (Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 25), protest upon non-payment was necessary to hold the endorser (sec. 112). This is the law of Pennsylvania, as well as of Canada: Laws of Pennsylvania, 1901, No. 162, sec. 152. It was admitted that the note which fell due in 1907 was not protested. There was, therefore, no liability in respect of it.

The note which fell due in 1906 was protested, but was it duly presented for payment? The question for determination was whether the defendant had proved that there was no due presentment for payment. Such presentment as there was, was at the place which had been, but no longer was, the office of the payees. When the notary found that the payees no longer had an office at that place, and that the maker was not at that place, he made no further efforts to find the maker, but forthwith protested the note. The question was whether—Hurley & Co. no longer having an office in Philadelphia—the holders were bound to do anything more than they did in the way of presenting the note for payment.

That question was to be decided according to the law of Pennsylvania: Bills of Exchange Act, sec. 162. By agreement of counsel, in lieu of proof of the foreign law, it was left to the learned Judge to find what the law was by reference to the Negotiable Instruments Law, Pennsylvania Laws of 1901, No. 162, and relevant authorities.

The learned Judge's conclusion, upon the Pennsylvania Law and a large number of authorities collected by him, was that presentment at the office of Hurley & Co. having been impossible and there being nothing in the statute which made any place other than that office a "proper place" for presentment, present-

ment was dispensed with (sec. 82), the note was dishonoured (sec. 83), and the endorser was bound.

The plaintiffs were therefore entitled to judgment in respect of the notes payable in 1906 and 1908, but failed in respect of the note payable in 1907.

If, after taking into account the payments made and computing interest, it should appear that the amount which was due on the day (before action) when the defendant tendered $450 in respect of the notes upon which the plaintiffs succeed, was less than $450, there ought to be no order as to costs; but, if that amount was more than $450, there ought to be judgment for the amount now due with costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 29TH, 1920.

LEONARD v. WHARTON.

Pleading—Statement of Claim—Libel—Amendment—Substitution of New Statement of Claim after Order for New Trial—Effect of Order—Addition of Causes of Action—Embarrassment—Direction for Speedy Trial.

Appeal by the defendants from an order of the Master in Chambers, made upon the application of the plaintiffs, permitting the plaintiffs to amend by substituting for the statement of claim upon the files a new pleading, directing the defendants to plead thereto within 10 days, and giving the plaintiffs leave to set the action down for trial at the current jury sittings in Toronto within 2 days after delivery of the amended statement of defence. The order was made after the case had been tried and a new trial directed by a Divisional Court of the Appellate Division: see Leonard v. Wharton (1919), ante 127.

A. C. McMaster, for the defendants.
J. P. MacGregor, for the plaintiffs.

MIDDLETON, J., in a written judgment, said, after stating the facts, that the amendment was practically a complete abandonment of the original statement of claim and the substituting for it of a document of 21 pages, quite departing from Bullen and Leake's or any other familiar common law precedents of pleading. In substance, it was an attempt to rehabilitate three causes of action which the defendants thought had been finally disposed

of. The new pleading also introduced entirely new causes of action, some of which arose prior to the bringing of this action, and would therefore be barred by the Limitations Acts, and other causes of action which arose subsequent to the bringing of this action, and therefore could not be set up in this action, although some of the facts alleged might be given in evidence for the purpose of shewing malice. All of this was set out in language not appropriate to pleading.

The learned Judge found it difficult to ascertain exactly what was meant by the order of the Divisional Court directing the new trial; but he could not believe that it was intended that the matter should be re-opened in any way that would justify this pleading. It is important not merely for the plaintiffs but for the defendants to know what is to be open for determination at the new trial. The best opinion that the learned Judge can form is that the liability based upon the second clause of the letter of the defendants and the innuendo alleged in the pleading are the only matters to be dealt with at the new trial. The main difficulty is that this alleged libel is upon its face defamatory only of the plaintiff Leonard and not of the plaintiff company.

The better course to adopt is to set aside the order of the Master in its entirety, leaving the action to proceed upon one count on the old record. If the parties could agree to eliminate all else from the statement of claim and all of the defence not appropriate to this count, it would simplify matters upon the new trial; but the learned Judge had, he said, no power to give any such direction.

There was nothing in the material to justify the order made by the Master for a speedy hearing.

The appeal should be allowed and the motion before the Master should stand dismissed—costs here and below to be paid by the plaintiffs to the defendants in any event.

FALCONBRIDGE, C.J.K.B. JANUARY 29TH, 1920.

YOUNG v. WORLD NEWSPAPER CO. OF TORONTO AND GEORGE.

Libel—Trial—Jury—Findings—Judgment—Action against two Defendants—Costs.

Action against the company and Ida L. George for libel.

The action was tried with a jury at a Toronto sittings.
G. Wilkie and G. Hamilton, for the plaintiff.
K. F. Mackenzie, for the defendant company.
A. W. Roebuck, for the defendant George.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the finding of the jury was as follows: "We find" the plaintiff "not guilty of assault. We find the Toronto World guilty of libel and assess the damages at $100 for the plaintiff and the World pay all costs of the Court." After interrogation by the Chief Justice and further instruction, the jury retired, and returning said: "We find Mrs. George not guilty."

The learned Chief Justice said that, upon these findings, judgment must be entered for the plaintiff against the defendant company for $100 with costs on the Supreme Court scale, and dismissing the action as against the defendant George with costs.

Following Bullock v. London General Omnibus Co. et al., [1907] 1 K.B. 264, and Underhill Coal Co. v. Grand Trunk R.W. Co. and Puddy Brothers Limited (1919), 16 O.W.N. 354, the plaintiff being justified in suing both defendants, the learned Chief Justice ordered that the plaintiff should have judgment against the defendant company for the amount which the plaintiff should pay to the defendant Young for costs. This was probably what the jury meant by "the World pay all costs of the Court," but the Chief Justice of course exercised his own discretion, guided by the above cases.

Judgment accordingly.

MIDDLETON, J. JANUARY 31ST, 1920.

WRIGHT v. PETERS.

Vendor and Purchaser—Agreement for Sale of Land—Default of Purchaser in Making Deferred Payments—Power of Resale—Liability of Vendor to Account—Forfeiture of Claim by Default.

An action by a vendor of land against the purchaser for a declaration that, by reason of the default of the defendant, the purchaser in making the deferred payments under two agreements of purchase and sale, the agreements were of no force or effect, the defendant had no interest in the land, and had forfeited all moneys paid upon the agreements.

The action was not defended, and the plaintiff moved for judgment on the statement of claim.

The motion was heard in the Weekly Court, Toronto.

J. M. Bennett, for the plaintiff.

No one appeared for the defendant.

MIDDLETON, J., in a written judgment, said that it seemed well-settled that where there is a power of resale the vendor is not liable to account to the purchaser for any surplus; and the purchaser by his default has lost any claim: Dart on Vendor and Purchaser, 7th ed., pp. 179, 180; Ex p. Hunter (1801), 6 Ves. 94, 97.

The judgment should so declare.