The
Ontario Weekly Notes

VOL. VII. TORONTO, OCTOBER 23, 1914. No. 7

APPELLATE DIVISION.

OCTOBER 14TH, 1914.

MILES v. CONSTABLE.

Landlord and Tenant—Flooding of Demised Premises—Knowledge of Landlord—Concealment of Defect—Appeal—New Trial—Leave to Amend.

Appeal by the defendants from the judgment of KELLY, J., 6 O.W.N. 362.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and LENNOX, JJ.

C. A. Moss, for the appellants.

T. F. Slattery, for the plaintiff, the respondent.

THE COURT set aside the judgment and ordered a new trial. Costs of the former trial and of the appeal to be costs in the cause unless the Judge at the new trial otherwise orders. Leave to the plaintiff to amend within ten days as he may be advised. If the defendants wish to amend, they may apply within ten days after the plaintiff's amendment is served. Either party to be at liberty to examine for discovery.

OCTOBER 15TH, 1914.

RE MESSENGER.

Will—Construction—Appointment of Trust Company as "Executor and Trustee"—Revocation by Codicil of Appointment of Executor and Appointment of Individuals as Executors—Effect as to Trusteeship—Appeal—Consent Order Appointing Additional Trustee.

Appeal by the National Trust Company and A. C. Laughrey and M. A. Lieber from the order of MIDDLETON, J., 6 O.W.N. 667.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and LENNOX, JJ.

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

C. L. Dunbar, for the executors named in the second codicil, the respondents.

N. Jeffrey, for Mrs. Cassidy.

THE COURT, by consent of counsel, varied the order by appointing an additional trustee and vesting the estate in him and the executors appointed by the second codicil, as trustees. In other respects, the appeal was dismissed. Costs of all parties out of the estate.

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. OCTOBER 13TH, 1914.

REX v. PEART.

Criminal Law—Police Magistrate—Conviction for "Threatening"—Evidence of Assault—Imprisonment for Excessive Term—Habeas Corpus—Discharge—Condition—Criminal Code, sec. 1120 (7 & 8 *Edw. VII. ch.* 18, *sec.* 14)—*Amendment—Sec.* 1121 *of Code—Certiorari—Attorney-General—Protection of Magistrate—Costs.*

Motion by the defendant, upon the return of a writ of habeas corpus, for an order discharging the defendant from custody.

F. R. Blewett, K.C., for the defendant.

J. McC. Baird, for the Attorney-General.

LENNOX, J.:—The order will go for the discharge of George Peart from the common gaol of the county of Perth.

It is admitted that the offence, if any, of the prisoner was a common assault, an offence for which the Police Magistrate could at most commit him to gaol for two months. The warrant of commitment is for three months' imprisonment for "threatening," whatever that may mean. The warrant on its face is clearly illegal. The proceedings have been brought up, by certiorari, at the instance of the Attorney-General. If I am at liberty to make use of them—and the case of Rex v. Nelson (1909), 18 O.L.R. 484, would rather indicate that I am not—

they do not materially help the case for the Crown. There is no regular conviction. Great leniency may be proper in the case of a county magistrate, but the proceedings here are more informal and slovenly than I feel called upon to encourage in the case of a salaried official. The complaint does not disclose an assault, for the relative position of the parties is not alleged, and there is nothing to shew that the prisoner was at the time in a position —near enough—to execute his threat, or that he actually attempted to strike the complainant. This defence is not necessarily fatal, particularly if I were dealing with the question of quashing the conviction, for the complainant in his evidence swears, "He had a hammer in his hand and struck at me and I warded off the blow," and there is other evidence to the same effect. The prisoner denies any attempt to strike; and the question of fact was entirely a question for the magistrate. But there is nothing to shew whose evidence he accepted or acted upon. He goes back to the charge as it was laid, and as it is repeated in the heading of the evidence, and he says: "I adjudge the said George Peart guilty of the charge of threatening to strike Biet on the head with a hammer, and I order him to be committed to the common gaol" (where?) "for the period of three months without hard labour;" and the warrant of commitment is for "threatening" accordingly.

I do not propose to quash the conviction, if this amounts to a conviction.

I am asked to discharge the prisoner conditionally only, under sec. 1120 of the Criminal Code, as amended by 7 & 8 Edw. VII. ch. 18, sec. 14. Speculation as to the meaning of this obscure section is set at rest by the Court of Appeal in Rex v. Frejd (1910), 22 O.L.R. 566. The prisoner now applying is not "charged with an indictable offence;" the magistrate assumed to exercise summary jurisdiction; and the offence, if any, disclosed was one in which he could exercise summary jurisdiction. But there would be no justice in any case in further detaining the prisoner, as already he has served the two months for which at most the magistrate could lawfully commit him, or within a day or two of two months. In the view I take, it is not necessary to consider the effect of the complaint that the prisoner was not afforded an opportunity to elect as to the mode of trial.

Neither can I amend under sec. 1121 of the Criminal Code. I cannot find that "there is a good and valid conviction" in law to sustain the warrant of commitment—assuming that I am at liberty to give effect to the proceedings produced in Court.

I am asked to make an order protecting the magistrate. I am discharging the prisoner ex debito justitiæ. I have no power in such a case to make an order for protection of the magistrate: Rex v. Lowery (1908), 15 O.L.R. 182; and I am not sure that I would make the order if I had the power. See Rex v. Nelson, 18 O.L.R. 484. It is not too much to expect that a man who applies for or accepts a position as a salaried magistrate will bring to the discharge of his important functions at least a fundamental knowledge of the provisions of the Criminal Code and the outstanding principles governing the administration of justice; and the evidence here if it is to be looked at would suggest to me the wisdom of an inquiry as to sanity rather than an immediate conviction. Costs were not referred to, and I make no order.

KELLY, J., IN CHAMBERS. OCTOBER 16TH, 1914.

BREWSTER v. CANADA IRON CORPORATION LIMITED.

Company—Order for Winding-up Made in Another Province—Application for Leave to Proceed with Action Brought in Ontario against Company before Order—Dominion Winding-up Act, sec. 125.

Application by the plaintiff for leave to proceed with this action, notwithstanding an order for the winding-up of the defendant company.

H. E. McKittrick, for the plaintiff.
D. C. Ross, for the defendants.

KELLY, J.:—Subsequent to the commencement of this action, on the 9th August, 1913, an order was made under the Winding-up Act (Dominion) by the proper Court in the Province of Quebec to wind up the defendant company. The head office of the defendants is in Montreal, but they have carried on part of their operations at Midland, Ontario. The action is brought in respect of the death of the plaintiff's son, which occurred at the defendants' works at Midland. The liquidators are the Montreal Trust Company, whose head office is in Montreal, and Edgar MacDougall, of that city. The application is for leave to proceed with the action.

The defendants raised the objection that the application is not properly made to this Court, but should have been made to the Court out of which the winding-up order issued, which alone, they contend, is qualified to grant such leave in the present case. Opposed to this is the view urged by the plaintiff's counsel that the Courts of the various Provinces are auxiliary to one another for the purposes of the Winding-up Act (see sec. 125); and that, therefore, this Court possesses jurisdiction to grant the application, notwithstanding that the winding-up proceedings have been instituted and are being carried on in the Province of Quebec.

The Quebec Court is now seized of the matter, and, being a Dominion Court for the purposes of the winding-up proceedings and having jurisdiction to restrain an action in another Province (Baxter v. Central Bank, 22 O.R. 214), it has also the right to determine whether or not an action such as this should, at this or any other stage of the winding-up proceedings, be permitted to proceed. It is thus the proper Court to exercise control over the liquidators and the proceedings to wind up, and to direct what is the proper course to be pursued in these proceedings in the interests of the shareholders, the creditors, and claimants. Inconvenience and confusion might, and perhaps would, result if matters such as the present application could be disposed of in the Courts of any Province, and not be confined to the Court wherein the winding-up proceedings were instituted. For this Court to assume the right to permit the action to continue would be to ignore the jurisdiction taken upon itself by the Quebec Court when it granted the winding-up order.

This is not opposed to the terms of sec. 125 of the Act, which enacts that the winding-up of the business of a company or any matter or proceeding relating thereto may be transferred from one Court to another with the concurrence or by the order or orders of the two Courts, or by an order of the Supreme Court of Canada. It is under such circumstances and to that extent that the Courts of the various Provinces are auxiliary to one another.

I am of opinion that the order should not be made by this Court, and the application must be dismissed, with costs in the cause to the defendants.

It is unnecessary to add that this ruling does not, in any way, touch upon the merits of the application, or the propriety of allowing the plaintiff to proceed now with his action to establish his claim—all of which is matter for consideration on an application to the proper tribunal.

LENNOX, J. OCTOBER 17TH, 1914.

RE CANADIAN CORDAGE AND MANUFACTURING CO.

FERGUSON'S CASE.

Company—Winding-up—Contributory—Statute of Limitations —Contract under Seal—Period of Limitation.

Appeal by the liquidator of the company in a winding-up proceeding from the order of the Local Master at Peterborough, to whom the winding-up was referred, striking the name of Hugh Ferguson from the list of contributories.

S. T. Medd, for the liquidator.
J. E. L. Goodwill, for Ferguson.

LENNOX, J.:—No calls have ever been made by the company, but the question of calls has no bearing upon the matter in issue.

The liability or non-liability of Hugh Ferguson to be made a contributory is to be determined by the express terms of his contract; and by it the balance of his subscription for stock, $400, became due on the 1st January, 1903.

In my opinion, the learned Local Master did not err in finding that the Statute of Limitations began to run on the 2nd January, 1903; but, with great respect, I am of opinion that he did err, as did counsel, in assuming that the limitation is six years. The fact that the contract is by specialty seems to have been overlooked; and on such a contract the time for enforcement is not six years but twenty years.

The order appealed from will be set aside, and an order issue directing that Hugh Ferguson be placed upon the list of contributories; but, as the point upon which the matter turns was not taken either upon the argument before me or in the Court below, the liquidator will have costs of the application against the contributory down to and including the order appealed from only, and will have his costs of the appeal out of the assets of the company.

MIDDLETON, J. OCTOBER 17TH, 1914.

HARRISON v. SCHULTZ.

Limitation of Actions—Possesory Title to Land—Evidence—Building — Encroachment—Retention of Land Encroached upon—Improvements under Mistake of Title—Conveyancing and Law of Property Act, R.S.O. 1914, *ch.* 109, *sec.* 37 *—Compensation—Damages for Trespass—Costs.*

Action to restrain the defendant from proceeding with the erection of a building alleged to encroach upon the plaintiff's land, for removal of the building, and for damages.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiff.

F. C. Kerby, for the defendant.

MIDDLETON, J.:—The plaintiff complains of the encroachment of a building erected by the defendant upon lands to which the plaintiff claims to have established a possessory title. It is admitted that the paper title of lot 2 is in the plaintiff and the paper title of lot 1, to the immediate south thereof, is in the defendant. It is also admitted that the defendant's building is south of the true boundary-line between lots 1 and 2.

The plaintiff's case is, that the fence to the south of her property had for a long period enclosed a narrow strip of lot number 1, and she had thereby acquired possessory title.

The whole issue is one of fact, and I think the plaintiff has succeeded in establishing the possession that she alleges, and that the building which has now been erected on the westerly end of the defendant's lot encroaches upon the land of which the plaintiff has acquired possessory title, substantially to the extent alleged, that is to say, to the extent of 5 inches at the west and 8 inches at the east. The whole controversy has been with reference to this tapering strip, some 30 feet long.

I think this is a case in which the provision of the Conveyancing and Law of Property Act as to improvements under mistake of title, now found in R.S.O. 1914 ch. 109, sec. 37, may well be applied; for I find that the defendant made the lasting improvements embodied in the building in question under the belief that the land was his own, and that I ought to require him to retain the land, making compensation therefor. This compen-

sation, I think, should be assessed at more than the real value of the land, which is probably next to nothing. I therefore direct the retention of the land upon payment of $50 as compensation and $50 for the trespasses established by the evidence, $100 in all, together with the costs of suit, which, I think, should be fixed at the sum of $100.

If this result is of little profit to either party litigant, it may perhaps serve as an indication that there should not be expensive litigation over a mere trifle.

DYKE v. BOURNS—LENNOX, J.—OCT. 7.

Judgment—Motion for, in Default of Defence—Practice—Certificate of State of Cause.]—This action came on by way of motion for judgment before LENNOX, J., at the spring sittings at Port Arthur. It then appeared that both defendants had been served with the writ of summons, a notice of cancellation of the sale in question in the action, and notice of the motion. No one appeared upon behalf of either defendant. The learned Judge then directed that the motion should stand over, and that the plaintiff should file and post up a statement of claim; the motion to be subsequently renewed. It now appeared that the statement of claim had been duly filed and posted up, and no statement of defence or other answer has been made by either defendant. The plaintiff renewed the motion for judgment. The certificate of the state of the cause did not refer to the direction to file the statement of claim, or shew that the pleadings had been again noted closed, and was not signed by the Local Registrar. The learned Judge said that he saw no good reason why the defendant John E. Bourns should be ordered to pay costs; but in other respects the plaintiff appeared to be entitled to the relief claimed. Judgment for the plaintiff, reciting the proceedings in the action, including the motion at Port Arthur, the direction then made, the adjournment, and the subsequent renewal of the motion, in the terms of the statement of claim, with costs against the defendant Nellie M. Bourns and without costs as against the defendant John E. Bourns, upon the certificate being amended and signed by the Local Registrar and filed. John A. Dyke, for the plaintiff.

RE COLEMAN—LENNOX, J.—OCT. 8.

Executors—Claim of Estate under Contract—Uncertainty of Construction—Compromise—Approval of Court on Behalf of Infants.]—After making his will, Joseph H. Coleman, now deceased, entered into a contract for the sale of certain properties and a business he was carrying on, for $20,000, and this contract was current at the time of his death. Amongst other things, the contract related to a business carried on in Hamilton, only 51 per cent. of which belonged to the testator. The purchaser contended that by the written contract the testator agreed to sell him the entire interest, not merely a 51 per cent. interest in this concern. The meaning of the contract was uncertain, and the executors took the opinion of two eminent counsel in Toronto. The 49 per cent. interest could only be obtained by payment of $5,000. This would leave only a net sum of $15,000 to be paid to the estate. In the end, to avoid litigation, the purchaser offered to be at the loss of one-half this disputed amount, that is, to increase his purchase-money by $2,500, thus netting the estate $17,500. The counsel above referred to advised the acceptance of this sum, and all the adults interested and the Official Guardian advised that this sum be accepted. The executors now moved for the approval of the Court on behalf of the infants interested in the estate. LENNOX, J., said that he was of opinion that the carrying out of the sale upon these terms was in the interest of the estate, and approved of the sale at $17,500. He was also asked to approve of the purchase of a residence for the widow and family in Toronto, to cost $6,500. There was no specific property in sight. The learned Judge said that, as soon as there was something definite to act upon, this part of the application could be renewed. Costs of the application, including the costs of the Official Guardian, out of the estate. James Fraser, for the executors. F. W. Harcourt, K.C., Official Guardian, for the infants.

HODGINS v. LINDSAY—FALCONBRIDGE, C.J.K.B.—OCT. 13.

Negligence—Injury to Bicyclist by Motor Vehicle—Rule of Road—Excessive Speed—Evidence—Damages—Costs.]—Action by an infant and his father to recover damages arising from an injury sustained by the boy from the negligence of the defendant. The boy was riding a bicycle upon a public highway, and the injury was caused by a motor vehicle driven by the defend-

ant. The action was tried without a jury at St. Catharines. The learned Chief Justice finds that the defendant was not turning the corner in accordance with the provisions of the local municipal by-law, which provided an obvious and proper rule of the road, apart from municipal legislation; and, having regard to the fact that the defendant was thus in the wrong, he was going too fast. Miss Carrie Griffiths, his own witness, said that he "was not going *so very* fast"—a significant phrase. The boy was riding at a moderate rate of speed (per John Watson, a very good witness called by the defendant). He was not guilty of contributory negligence; and the defendant was liable. The damages of the infant plaintiff were assessed at $100, and of his father at $25.50. Judgment for the plaintiffs for $125.50, with costs, fixed at $40. No further set-off of costs, a rough set-off being applied in fixing this amount. J. S. Campbell, K.C., for the plaintiffs. M. J. McCarron, for the defendant.

RE MACAULAY—FALCONBRIDGE, C.J.K.B.—OCT. 14.

Will—Construction—Power of Executors of Deceased Executrix to Convey Lands of Testator.]—Motion by the executors of Annie E. Macaulay, deceased, sole executrix under the will of John C. Macaulay, deceased, for an order under the Vendors and Purchasers Act declaring that the applicants had power to sell and convey land forming part of the estate of John C. Macaulay, deceased. The motion was heard at the London Weekly Court. The learned Chief Justice said that, in his opinion, there was nothing in the will which would necessitate a departure from the ordinary rule; and, therefore, the executors of the deceased sole executrix could make title: Re Stephenson, Kinnee v. Malloy (1894), 24 O.R. 395; Williams on Executors, 10th ed., p. 180; Weir on Probate, pp. 115-117; Farwell on Powers, 2nd ed., pp. 92-3. Costs of all parties, including the purchaser, out of the estate. J. M. Gunn, for the applicants. J. B. McKillop, for one Carson, representing the class named in clause 5 of the will of John C. Macaulay. T. G. Meredith, K.C., for the purchaser.

FARMERS BANK OF CANADA v. MENZIES—MASTER IN CHAMBERS—OCT. 16.

Particulars—Statement of Claim—Negligence.]—Motion by the defendants for particulars of the statement of claim. The

defendants had not pleaded, and said that they were unable to do so, except by way of general denial, unless particulars of the negligence alleged should be given. The Master finds that the charges of negligence against the defendants in the statement of claim are not sufficiently explicit to enable the defendants to plead. The allegations contained in the statement of claim on which the charges of negligence are based are too general. All the information demanded by the defendants to enable them to plead is in possession of the liquidator of the plaintiffs, and should be furnished. Order made for particulars of the allegations on which the charges of negligence contained in paragraphs 3, 4, and 5 of the statement of claim are based. Costs of the application to be costs in the cause. R. McKay, K.C., for the defendants. M. L. Gordon, for the plaintiffs.

RE BUSTARD AND DUNLOP—FALCONBRIDGE, C.J.K.B.—OCT. 17.

Title to Land—Intestacy—Stepchildren of Intestate—Vendors and Purchasers Act—Question between Owner and Mortgagee.]—Motion by the owner of land, under the Vendors and Purchasers Act, for an order declaring that an objection made to the title by the respondent, a person proposing to advance money upon mortgage, was invalid. The objection was in respect of the descent of the land upon an intestacy. The learned Chief Justice said that the case did not seem to admit of a doubt. The descent was to be traced from the widow of Philip Armstrong. The children of her husband's first wife were not of her blood and did not inherit any part of her estate. The objection had been fully answered. No costs. D. C. Ross, for the owner. H. H. Shaver, for the mortgagee.
