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SUPREME COURT OF CANADA.

DECEMBER 22ND, 1919.

TORONTO R.W. CO. v. HUTTON.

Workmen's Compensation Act—Employee in Course of Employment Injured by Negligence of Third Person—Election to Claim Compensation from Board—Subrogation.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Hutton v. Toronto R.W. Co. (1919), 16 O.W.N. 236, 45 O.L.R. 550, was dismissed with costs (ANGLIN, J., concurring sub modo).

DECEMBER 22ND, 1919.

ONTARIO ASPHALT BLOCK PAVING CO. v. TOWN OF OSHAWA.

Contract—Municipal Corporation—Construction of Pavements—Guarantee-bond—Defective Work and Materials—Action on Bond.

An appeal from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, Town of Oshawa v. Ontario Asphalt Block Paving Co. (1919), 15 O.W.N. 406, was dismissed with costs.

DECEMBER 22ND, 1919.

MALOOF v. BICKELL.

Contract—Brokers—Dealings in Grain for Customer—Right of Brokers to Sell Grain when Margins Exhausted—Illegality of Transactions.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Maloof v. Bickell (1918), 14 O.W.N. 289, was dismissed with costs.

DECEMBER 22ND, 1919.

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LIMITED.

Negligence—Infant—Injury by Electric Shock—Trespasser—Dangerous Place—Notice.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Shilson v. Northern Ontario Light and Power Co. Limited (1919), 16 O.W.N. 181, 45 O.L.R. 449, was dismissed with costs.

DECEMBER 22ND, 1919.

COLEMAN v. TORONTO AND HAMILTON HIGHWAY COMMISSION.

Contract—Construction of Public Highway—Agreement of Landowner to Pay Bonus—Drain—Proportion of Cost.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Toronto and Hamilton Highway Commission v. Coleman (1919), 15 O.W.N. 389, was dismissed with costs.

DECEMBER 22ND, 1919.

MURPHY v. CLARKSON.

Company—Winding-up of Banking Company—Contributory—Subscriber for Shares—Notice of Allotment—Agreement—Condition.

An appeal from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, Re Monarch Bank of Canada, Murphy's Case (1919), 16 O.W.N. 170, 45 O.L.R. 412, was dismissed with costs.

DECEMBER 22ND, 1919.

CARROLL v. EMPIRE LIMESTONE CO.

Landlord and Tenant—Lease of Lake-beach—Ownership—Description—Boundaries—Estoppel.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Carroll v. Empire Limestone Co. (1919), 15 O.W.N. 386, 45 O.L.R. 121, was dismissed with costs, with an express reservation of the plaintiff's rights in the triangular piece of land disclaimed by the defendants.

DECEMBER 22ND, 1919.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Highway—Nonrepair—Accident to Motor-vehicle—Injury to Passenger—Proximate Cause.

An appeal from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, Raymond v. Township of Bosanquet (1919), 15 O.W.N. 327, 45 O.L.R. 28, was dismissed with costs.

DECEMBER 22ND, 1919.

MORWICK v. REID.

Husband and Wife—Business Carried on in Name of Husband—Claim by Wife to Assets as against Execution Creditor of Husband—Partnership—Married Women's Property Act.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Reid v. Morwick (1918), 13 O.W.N. 462, 42 O.L.R. 224, was dismissed without costs, the Court being equally divided.

DECEMBER 22ND, 1919.

SCOTLAND v. CANADIAN CARTRIDGE CO.

Master and Servant—Injury to Health of Servant Working in Factory—Bad Ventilation—Poisonous Vapours—Proximate Cause—Workmen's Compensation Act.

An appeal from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, Scotland v. Canadian Cartridge Co. (1919), 16 O.W.N. 255, 45 O.L.R. 586, was allowed with costs, and the judgment of the trial Judge (CLUTE, J.) was restored.

DECEMBER 22ND, 1919.

MEHARRY v. AUBURN WOOLLEN MILLS CO.

Vendor and Purchaser—Contract for Sale of Gravel-pit—Default—Notice—Termination of Contract—Discretion—Specific Performance.

An appeal from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Meharry v. Auburn Woollen Mills Co. (1919), 16 O.W.N. 238, was dismissed with costs.

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*STOCK v. MEYERS AND COOK.

Sale of Goods—Conditional Sale—Agreement—Seizure of Goods under Execution—Pretended Seizure by Assignee of Vendor when Goods in Possession of Bailiff under Execution—Conditional Sales Act, R.S.O. 1914 ch. 136, sec. 8—Retention of Goods for 20 Days—Conversion—Title—Right to Retake Possession—Pretended Taking Possession and Sale—Concealment—Acceptance of Payment after Default—Waiver—Request for Payment.

Appeal by the defendants from the judgment of LENNOX, J., 16 O.W.N. 263.

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

J. M. Ferguson, for the appellants.

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

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to recover damages for the conversion of 4 show-cases, and the defence was that the defendant Meyers was the owner of them, having acquired title by purchase from Minnie Whyte, who, it was alleged, was the owner and in possession of them. The Chief Justice agreed with the conclusion of the trial Judge that there was no real sale to Minnie Whyte; that the pretended sale was a mere sham. The defendant Cook was the real actor—if Minnie Whyte acted at all, it was to play the part of a mere dummy.

That conclusion was not of itself fatal to the appellants' case. The result of the transaction was, that Meyers acquired whatever rights Cook & Mitchell had; and it was necessary to inquire what those rights were, and whether, in the exercise of them, Cook could convey title to the goods sufficient to defeat the respondent's title from McHale.

Apart from the effect of sec. 8 of the Conditional Sales Act, R.S.O. 1914 ch. 136, and the acceptance by Roche of payments on account of the promissory note of McHale after default had been made in payment of the note at its due date, the right of a vendor in the position of Roche is well-settled. The vendor may, if default

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

is made, repossess himself of the article agreed to be sold; and, if he does that, the purchaser's rights to it are at an end; or, having a power of sale, he may exercise it, but is not bound to do so: McEntire v. Crossley Brothers, [1895] A.C. 457.

Section 8 of the Act alters the rights of the vendor and purchaser. The vendor may no longer, if default is made, put an end to the purchaser's rights by taking possession, but the purchaser is given the right, for 20 days after possession is taken, to redeem.

Cook & Mitchell appeared to have acted in accordance with this view; for, after what they treated as a taking of possession, they waited the 20 days before going through the form of selling to Minnie Whyte.

What occurred was not a retaking of possession within the meaning of sec. 8. Cook & Mitchell deliberately concealed from McHale and his vendee that they had done what they deemed to be taking possession—and that for the very purpose of preventing them from exercising the right which the statute gives.

Even if there was a retaking of possession, the concealment with the design mentioned precluded the defendant Meyers from availing himself of it as a retaking of possession within the meaning of the statute.

The learned Chief Justice was not to be taken as concluding that in no case could there be a retaking of possession, within the meaning of sec. 8, unless what was done was sufficient to give notice, to the person entitled to redeem, that possession had been retaken. All that was decided was, that, in the circumstances of this case, there was not a retaking of possession, within the meaning of sec. 8, and that the effect of the section is to postpone the right to exercise the power of sale until the expiration of 20 days from the time possession is retaken.

It was contended for the respondent that, by accepting payment after default, Roche waived his right to retake possession, and that that right could not be exercised without a request first being made for payment of the balance remaining due in support of the purchase-price, and, among other cases, French v. Row (1894), 77 Hun 380, and Cunningham v. Hedge (1896), 76 N.Y. St. Repr. 547, 12 N.Y. App. Div. 212, were cited. These cases, however, were distinguishable, because in none of them was there any power of sale in case of default.

Appeal dismissed with costs.

HIGH COURT DIVISION.

RIDDELL, J. DECEMBER 22ND, 1919.

*RE LANGDON.

Trusts and Trustees—Moneys Held by Solicitors in Trust for Creditors of Trader—Summary Application for Order Declaring Trusts and Giving Directions as to Distribution—Oral Trust—Non-existence of Instrument to be Construed—Rules 233, 600, 604—Dismissal of Application.

An application, upon originating notice, by a firm of solicitors, having in their hands a sum of money, for an order declaring the trusts upon which they held the money and directing the disposition of it.

The motion was heard in the Ottawa Weekly Court.
G. D. Kelley, for the solicitors.
A. C. Craig, for Langdon.
T. A. Beament, for the assignee of Langdon.

RIDDELL, J., in a written judgment, said that L. was carrying on a restaurant business in Ottawa, and became involved in debt: F., one of his creditors, sued, and in September, 1919, obtained judgment for a considerable sum; after action brought, F., with B., another large creditor of L., interviewed L., and B. informed L. that he would have a seizure made by the Sheriff unless a substantial payment should be made on account. L. requested that no seizure should be made, as he had made a sale of his business, and he would divide the proceeds amongst his creditors—the two creditors thereupon agreed to allow the sale to go through without interference from them.

The firm of solicitors, the applicants herein, were acting for creditors to a large amount; they issued three specially endorsed writs of summons, and were proceeding in the actions, when an arrangement was made. L. had been endeavouring to sell his business, and finally obtained a purchaser. The solicitors for the purchaser considered that the Ontario Bulk Sales Act, 1917, 7 Geo. V. ch. 33, applied, and the applicants pressed the point, and in the interest of their clients insisted that no sale should be made unless the provisions of the Act were complied with. L. made a statutory declaration with what he considered a true and correct account of the names, etc., of his creditors, etc., and it was agreed by the solicitors acting for the purchaser and the applicants that the purchase-money should be paid over to the applicants "in

trust for the said creditors." There was no agreement in writing. The applicants received $2,752.09 as the purchase-money; they obtained waivers of more than 60 per cent. of the creditors named by L., both in value and in number.

In fact there were many other creditors of L. not named by him, although the solicitors were ignorant of it.

Some of these saw L., and in the result L. made an assignment for the benefit of creditors, in the usual form. The assignee made a demand upon the applicants for the purchase-money; the creditors named in L.'s declaration asserted that the money was held in trust for them only, and demanded its division accordingly.

The applicants asked "for an order as to the interpretation of the trusts on which the said solicitors held the sum of money received by them from the proceeds of a sale of the restaurant in the city of Ottawa owned by L., and for an order as to the disposition to be made of the said moneys, and for certain further and other directions as counsel may be advised."

The present case did not come within Rule 604—there was no "deed, will or other instrument" to be construed. Rule 600 did not apply—that is only for trustees under a will, a deed, or an instrument also. The fact that the declaration of L. and the list of his creditors were in writing was nihil ad rem—the trust was wholly oral.

It was urged that an issue might be directed under Rule 233—but the power to direct the trial of an issue given by that Rule is to be exercised only where the motion is itself for something the Court has power to grant, not a wholly unauthorised motion.

This application was wholly unwarranted and without precedent, and must be dismissed with costs.

The learned Judge said that he had had the opportunity of consulting a number of his brethren, and they all agreed in this disposition of the motion.

MASTEN, J. DECEMBER 22ND, 1919.

GRODWARDS CO. v. KIRKLAND LAKE GOLD MINING CO.

Sale of Goods—Machinery—Action for Price—Counterclaim for Rescission of Sale—Machine Breaking down after Use for Short Period—Evidence—Onus—Failure to Establish that Machine not Reasonably Fit for Use—Non-applicability of Rule Res Ipsa Loquitur—Absence of Express Warranty—Absence of Fraud.

Action for $3,183.12, the balance of an account for machinery and goods supplied.

The defendants alleged that the plaintiffs sold and delivered to the defendants on the 12th September, 1918, a machine known as a No. 2 "Tellsmith Crusher;" that the machine was paid for on the 2nd December, 1918, when the property passed and the contract became fully executed; that the machine broke down on the 29th March, 1919, after five days' use, and the defendants "threw it out." They counterclaimed for a declaration that the contract was rescinded, on the ground that the machine was not fit for the purpose intended nor merchantable. The defendants also counterclaimed for $33.50 for extra expenses incurred in installing piers for certain machinery purchased through the plaintiffs.

The action and counterclaims were tried without a jury at Haileybury.

J. B. Allen, for the plaintiffs.

D. Inglis Grant, for the defendants.

MASTEN, J., in a written judgment, said that the evidence wholly failed to establish any legal liability on the part of the plaintiffs in regard to the counterclaim for $33.50.

Turning to the main branch of the counterclaim, the sale was of a specific, ascertained article, not manufactured by the plaintiffs; a similar machine was inspected by the defendants before they ordered the one they got. The plaintiffs contended that, in the absence of any fraudulent concealment, there could in this case be no implied warranty of fitness, and that the maxim caveat emptor applied. It was, however, unnecessary to determine that point, because the defendants had failed to satisfy the onus resting on them of establishing by evidence that the machine was not, at the time it was delivered, reasonably fit for use as a crusher. The defendants were in fact driven to rely upon the rule res ipsa loquitur, and to argue that because the machine broke down it was unfit for its purpose. Upon the evidence the learned Judge was unable so to hold. The defendants had failed to establish that the machine was unfit at the time it was delivered.

There was no express warranty, and no fraud or misrepresentation was established.

The plaintiffs should have judgment for $3,183.12 with costs, and the counterclaim should be dismissed with costs.

LENNOX, J. DECEMBER 23RD, 1919.

RE NOYES.

Will—Construction—Inartistic Provisions for Sale of Estate and Disposition of Proceeds—Provision for Payment of Shares of Daughters at Age of 20—Payment into Court—Payment out—Costs.

Motion by the administrators with the will annexed of the estate of Constance Maud Noyes, deceased, for an order determining the meaning and effect of the will.

The motion was heard in the London Weekly Court.

E. W. M. Flock, for the administrators.

J. M. McEvoy, for John Guy Noyes, the husband of the deceased.

F. P. Betts, K.C., for the Official Guardian, representing the infant children of the deceased.

LENNOX, J., in a written judgment, said that the will was drawn by the testatrix, and was in the following terms:—

"I Constance Maud Noyes hereby direct in case of my decease that my husband John Guy Noyes act of sole trustee and become beneficiary of my property 787 Richmond Street London Canada under the following conditions—viz. that one thousand dollars of sale price be paid into the Bank for Gladys Laura Noyes and Violet Maud Noyes—equal share and this money shall not be touched till Violet Maud Noyes attains the age of twenty years—but Gladys Laura Noyes is to receive her share on her twentieth birthday—Should either child be deceased when their share falls due the surviving child is to become sole beneficiary—Should both be deceased—Gerald Haighton Noyes is to become sole claimant."

The testatrix intended, although she did not say so in so many words, that her property should be sold—and that had been done—and that, as a first charge on the proceeds, a clear $1,000 should be set apart for her two daughters, Gladys Laura and Violet Maud, and that the residue of the proceeds after payment of all outlays should go to her husband.

The husband must see that the $1,000 is paid before he looks for anything. It will be paid in the legal sense when it is paid into Court.

The words "the surviving child is to be become sole beneficiary" mean sole beneficiary of the specific sum of $1,000, and the contingent right of Gerald Haighton Noyes is limited in the same way.

The words, "this money shall not be touched till Violet Maud

Noyes attains the age of twenty years," must be read as referring to the last antecedent, the share of Violet—her "equal share"—otherwise the specific direction, "Gladys Laura Noyes is to receive her share on her twentieth birthday," is ignored.

The $1,000 should be paid into Court now and be paid out when the person or persons entitled shall attain the age of 21 years, unless the Court otherwise orders. The testatrix intended that it should be paid at the age of 20, but that is not final where the will does not provide that the receipt of the infant is to be a sufficient discharge: Re Roberton (1909), 17 O.L.R. 568.

The $1,000, with its fair proportion of interest since the date of the sale, should be paid into Court.

Gladys Laura will have her 20th birthday on the 4th April, 1920. If she lives to attain 21, her original share may be paid out to her without further order, but before that date only with the privity of the Official Guardian. The same terms will apply with proper modifications to Violet Maud as to her money, if there is no change of circumstances by death in the meantime.

Order accordingly. Costs of all parties of the application to be paid out of the residue—fixed at $20 for the Official Guardian, $30 for the administrators, and $30 for the husband.

SUTHERLAND, J., IN CHAMBERS. DECEMBER 24TH, 1919.

GOIT v. SILK.

Costs—Taxation—Sheriff's Costs of Interpleader Application—Interlocutory Motion.

Appeal by the Sheriff of the City of Toronto from the ruling of the Taxing Officer that the costs of an application by the Sheriff for an interpleader order should be taxed as if the application were an interlocutory one.

H. F. Parkinson, for the Sheriff, contended that he should have been allowed such costs as were applicable to a motion upon originating notice.

Gordon McLaughlin, for the execution creditor.

A. D. McKenzie, for the claimant.

SUTHERLAND, J., in a written judgment, said that the decision in Western Canada Flour Mills Co. Limited v. D. Matheson & Sons (1917), 39 O.L.R. 59, was binding upon the Taxing Officer, and also upon a Judge in Chambers, and must be followed. The costs were therefore properly taxed as if costs of an interlocutory motion; and the appeal should be dismissed with costs.

SUTHERLAND, J. DECEMBER 24TH, 1919.

RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

Public Health—Compulsory Vaccination—Vaccination Act, R.S.O. 1914 ch. 219, sec. 12—City Council Notified by Provincial Board of Health to Order Vaccination of Citizens—Failure of Council to Comply—Motion by Provincial Board for Mandamus to Council — Status of Board — Corporation — Parties — Public Health Act, R.S.O. 1914 ch. 218, secs. 15, 83.

Application by the Provincial Board for a mandamus to the city corporation and the city council.

H. M. Mowat, K.C., for the applicants.
C. M. Colquhoun, for the corporation and council.

SUTHERLAND, J., in a written judgment, said that the application was for a peremptory order of mandamus directing the council effectively to order the vaccination or re-vaccination of all persons resident in the municipality who had not been vaccinated within 7 years, as provided by the Vaccination Act, R.S.O. 1914 ch. 219, and especially by sec. 12 thereof, and to issue a proclamation warning the public that sec. 12 is in force. That section provides:—

"In every municipality where smallpox exists, or in which the Provincial or Local Board of Health has notified the council that in its opinion there is danger of its breaking out owing to the facility of communication with infected localities, the council of the municipality shall order the vaccination or re-vaccination," etc.

The fact that smallpox had existed in Toronto for some time past, and to a considerable extent, was common knowledge and was proved by the material filed on the application—indeed no attempt was made to controvert this. The Legislature must be assumed to have come to the conclusion, before it enacted sec. 12, that where smallpox was found to exist in a municipality it was in the public interest that vaccination or re-vaccination should be ordered. Smallpox having apparently, in the opinion of the Provincial Board of Health, been proved to exist, the chief officer for the Province of Ontario, by a written notice served on the mayor of the City of Toronto, on the 8th December, 1919, called his attention and that of the members of the council to the fact that there had been a large number of cases in the city, and directed or requested the mayor and council to carry out the provisions of the Vaccination Act, sec. 12, within 48 hours after receipt of the notice.

The council having failed to comply with the notice, the motion was launched.

The applicants were, under the Public Health Act, R.S.O. 1914 ch. 218, sec. 3 (1), constituted a Provincial Board of Health for the Province of Ontario, and clothed therein with powers of investigation, inquiry, and inspection with reference to disease and public health.

By sec. 15 of that Act every local board is created a corporation; and, by sec. 83, it is expressly declared (1) that "no determination or order of the Provincial Board or of a local board for the removal or abatement of a nuisance shall be enforced except by the order of a Judge of the Supreme Court where such removal or abatement involves the loss or destruction of property to the value of $2,000 or upwards," and (2) that "the order may be made upon the application of the Provincial Board or of the local board."

It was argued that the maxim expressio unius est exclusio alterius should be applied in the construction of this statute. Reference to Blackburn v. Flavelle (1881), 6 App. Cas. 628, 634; Graham v. Commissioners for Queen Victoria Niagara Falls Park (1898), 20 O.R. 1; Re City of Ottawa and Provincial Board of Health (1914), 33 O.L.R. 1.

The learned Judge was of opinion that the Provincial Board had no status or power to apply to this Court for the order of mandamus, and that the order could not be made with only the present parties before the Court. Such an order might be obtained at the instance of the Crown, and it might be made upon the present application were the Crown to consent to be added as an applicant. It was possible also that on an application by a ratepayer of the city such an order might be made, or that, if one were to consent to become an applicant, such order might be made upon this motion. In the latter case further argument would be necessary.

ROSE, J. DECEMBER 24th, 1919.

PATON v. FILLION.

Vendor and Purchaser—Agreement for Sale of Land—Default Made by Purchaser in Payment of Price—Action for Declaration of Instalments Paid and Property Transferred in Part Payment—Counterclaim—Misrepresentations Made by Vendor—Fraud—Relief from Forfeiture—Terms—Agreement as to Proceeds of Sale of Trees Cut by Purchaser on Land—Costs—Reference—Remedies—Damages—Set-off—Waiver.

Action for a declaration that, by non-payment of two instalments of the purchase-money, the defendant had forfeited all his

rights under an agreement by which the plaintiff agreed to convey to the defendant certain lands in the county of Peterborough; a declaration that the plaintiff was entitled to retain such money as the defendant had paid, as well as certain lands in Saskatchewan which the defendant had conveyed to the plaintiff as part payment of the purchase-price of the lands in Peterborough; an account of the defendant's dealings with timber cut by him on the Peterborough lands; and other relief. The defendant counterclaimed for large damages for misrepresentation.

The action and counterclaim were tried without a jury at a Toronto sittings.

T. R. J. Wray and A. D. McKenzie, for the plaintiff.

F. D. Kerr and A. O. Langley, for the defendant.

Rose, J., in a written judgment, after stating the facts, found that there had been misrepresentation by the plaintiff as to the value of the wood upon the Peterborough lands; and said that, if the defendant had paid the purchase-price, he would have been entitled to very substantial damages for the misrepresentation. As he had not paid the price, he was entitled to have the amount of the damages set off against what he still had to pay. To give him this set-off and to work out the rights of the parties, it was necessary to relieve him against the forfeiture stipulated in the agreement; and there was no reason why the relief should not be granted upon proper terms.

Walsh v. Willaughan (1918), 42 O.L.R. 455, distinguished.

The terms upon which the relief ought to be granted were: first, that the defendant should enter into an agreement with the plaintiff, an agreement which would make it certain that the proceeds of the sales of trees cut on the land should be so applied that, after the defendant should have received something equivalent to a reasonable wage for his work, the balance should go to the plaintiff until his claim should be satisfied; secondly, that the defendant should undertake not to remove any trees until the agreement should be executed.

If, within two weeks, the defendant files and serves notice that he elects to enter into the agreement mentioned and undertakes not to remove any wood from the land until the agreement is executed, there will be judgment relieving him against the forfeiture and awarding damages—either the sum of $2,500 or such sum as shall be ascertained upon a reference; and there will be no costs, down to and including the trial, to either party. If the defendant does not make the election mentioned, there will be judgment awarding to the plaintiff possession of the lands in Peterborough, and declaring that he is entitled to sell those lands. In that case

the plaintiff will be entitled to the portion of the contract-price that was to be paid in cash—$4,000—and to the value of all trees cut by the defendant on the Peterborough lands; and the defendant will be entitled to his damages, to be fixed at $1,575 more than the net allowance to the plaintiff in respect of the charges against the Saskatchewan lands and chattels, unless either party, at his own risk as to costs, elects to take a reference to determine the damages; and there will be a reference to the Local Master at Peterborough to ascertain the value of the trees cut by the defendant and to ascertain the defendant's damages, if either party elects to have such damages determined upon a reference, and to take any other necessary accounts between the parties; and the proceeds of the sale of the lands will be applied accordingly; if there is any surplus after payment of the plaintiff's claim, it will go to the defendant; but, if there is a deficiency, the plaintiff will have judgment against the defendant for the amount of it; there will be no costs to either party down to trial, and the question of the subsequent costs will be reserved until after report.

The defendant was not confined to the remedy provided in the agreement made at the same time as the agreement for sale, i.e., a claim for $5 per thousand feet of the deficiency—the document did not touch the case of a deficiency of cordwood, ties, poles, or posts; and the misrepresentation was fraudulent.

The defendant did not waive his claim to damages by proceeding with the contract after he had knowledge of the misrepresentations. The defendant did not know his rights until, in consequence of being served with the writ of summons by which this action was commenced, he consulted his solicitors. See Webb v. Roberts (1908), 16 O.L.R. 279.

MASTEN, J. DECEMBER 27TH, 1919.

RUSSELL MOTOR CAR CO. LIMITED v. CANADIAN PACIFIC R.W. CO. AND PERE MARQUETTE R.W. CO.

Railway—Carriage of Goods—Shipment in Car—Deficiency in Quantity Found in Car at End of Transit—Evidence—Onus—Failure to Shew Quantity in Car when Possession Taken by Consignees—Liability of Railway Company as Warehousemen only—Absence of Negligence.

Action to recover the value of certain goods consigned to the plaintiffs and said to have been lost in transit by the defendants, the carriers, or one of them.

The action was tried without a jury at Toronto.

Shirley Denison, K.C., and W. J. Beaton, for the plaintiffs.

Angus MacMurchy, K.C. and J. Q. Maunsell, for the defendants the Canadian Pacific Railway Company.

J. M. Ferguson and W. C. LaMarsh, for the defendants the Pere Marquette Railway Company.

MASTEN, J., in a written judgment, said that the plaintiffs purchased the goods from the Mueller Manufacturing Company Limited, of Sarnia. It was said that the consignors shipped the goods in a box-car, No. 41599, over the Pere Marquette line; that the Pere Marquette Railway Company received the car, and at Chatham transferred it, as directed, to the Canadian Pacific Railway Company for transmission to Toronto; that 19,744 forgings were shipped in the car, but only 15,867 were received, leaving a deficiency of 3,838, for which the plaintiffs sought to charge the defendants at the rate of 46 cents per forging.

The crucial point in the case was, whether the plaintiffs had brought home the loss to the railway companies.

In the view of the learned Judge, the plaintiffs had failed to satisfy the onus cast upon them of establishing how many forgings there were in the car at the time they took possession of it.

The liability of the defendants as carriers ceased when the plaintiffs took possession of the car; and from that time the defendants were warehousemen and liable only if negligence on their part was established. No such negligence was established—on the contrary, all reasonable precautions were taken by the Canadian Pacific Railway Company.

Action dismissed with costs.

KELLY, J. DECEMBER 27TH, 1919.

REX v. BUCHENOR.

Criminal Law—Defamatory Libel—Conviction—Costs—Criminal Code, sec. 1044.

Prosecution for a defamatory libel.

The trial took place before KELLY, J., and a jury, at Sandwich.

J. M. Pike, K.C., for the Crown.

W. H. Furlong, for the defendant.

KELLY, J., in a written judgment, said that the defendant was convicted of publishing a defamatory libel. When the learned

Judge was passing sentence, the question of costs, payment of which he intimated his intention to impose on the defendant, was reserved for further consideration.

The learned Judge was of opinion that the case fell within sec. 1044 of the Criminal Code, which, in certain cases there specified, empowers the Court to order payment by the convicted person of the costs incurred in and about his prosecution and conviction. This was an aggravated case, fully justifying that course. He therefore ordered these costs to be paid by the defendant.

KELLY, J. DECEMBER 27TH, 1919.

RE BULMAN.

Will—Construction—Devise to Widow in General Terms—Subsequent Direction to Divide Estate between Children, after Death of Widow—Power to Sell and Invest—Nature of Estate Given to Widow.

Motion by Robert J. Bulman, son of Robert Bulman by his second wife, for an order declaring that under the will of Robert Bulman his second wife, Sarah Maria Bulman, took an absolute estate in land owned by the testator in the city of Toronto.

The testator died in 1905, leaving him surviving a son by his first marriage, W. E. Bulman, his second wife, Sarah Maria Bulman, and the applicant. Sarah Maria Bulman died in 1919, and Robert J. Bulman, her son, was the sole beneficiary under her will.

The motion was heard in the Weekly Court, Toronto.

A. C. Heighington, for the applicant.

J. T. Richardson, for W. E. Bulman.

KELLY, J., in a written judgment, said that the testator, by his will, after a direction for the payment of debts and funeral and testamentary expenses, gave, devised, and bequeathed all his real and personal estate to his wife Sarah Maria Bulman, and appointed her sole executrix, "with power to sell said estate and invest the money . . . in any way she may think more profitable and after the death or marriage of my said wife upon the youngest of my children attaining 21 years to divide my estate between my children then living share and share alike."

The text of the will shewed an intention that, on Sarah Maria Bulman's remarriage or death and on the youngest of the testator's

children attaining 21, the estate was to be divided between the testator's children then living, share and share alike; and, when this was read with the devise and bequest, in the earlier part of the same sentence, of all the testator's real and personal estate to Sarah Maria Bulman, it seemed quite clear that the devise to her was not, and was not intended to be, to her absolutely.

The cases cited in support of the applicant's contention all deal with devises by which there was attempted to be given to other devisees, on the death of the first taker, not the whole subject of the original devise, but "the balance if any," or "what is left," or "what has not been spent," etc.

There was a clear distinction between these cases and the present one, where there was no express direction from which the conclusion could be drawn that the testator intended the widow to use or dispose of any part of the corpus of the estate, even if he intended her to enjoy the revenue therefrom during her lifetime, which, however, might be open to argument. The express powers given to her as an executrix were merely to sell and invest the proceeds of sale with a direction as to the character of investment. If the intention was that she should take the estate absolutely, it is improbable that the testator would have thought it necessary to give her these express powers, and particularly the power to invest.

The devises made in such cases as Constable v. Bull (1849), 3 DeG. & S. 411, Re Sheldon and Kemble (1885), 53 L.T.R. 527, were in language much more favourable to the first taker than was the form of the devise to the wife of this testator, and in each the decision was against an absolute gift to such first taker.

Reference also to Re Cutter (1916), 37 O.L.R. 42, where many of the earlier cases are collected.

It was evident that the testator intended to benefit his children living at the time of his wife's death; and, having due regard to the language of the whole will, effect could be given to that intention without doing violence to any other part of the will and without infringing upon any binding authority to the contrary.

The order should declare that, under Robert Bulman's will, his widow, Sarah Maria Bulman, did not take an absolute estate in fee simple.

Costs out of the estate.

COUNTY OF MIDDLESEX v. CITY OF LONDON—FALCONBRIDGE, C.J.K.B.—DEC. 22.

Municipal Corporations—Construction and Maintenance of Highways—Liability of City Corporation to County Corporation for Share of Expense.]—Action to recover $7,500 and interest said to be due to the plaintiffs by the defendants as the defendants' share of

the expense of the construction and maintenance of suburban roads leading into London. The action was tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the points involved in this case had been discussed in elaborate written arguments. He agreed with the defendants' contentions, both as to the law and as to findings or inferences of fact. The action should be dismissed with costs. G. S. Gibbons and J. C. Elliott, for the plaintiffs. T. G. Meredith, K.C., for the defendants.

MULLEN COAL CO. v. PULLING AND MCKEE—LENNOX, J.—DEC. 22.

Contract—Breach—Damages—Payment out of Trust Fund—Costs of Trustees—Disposition of Remainder of Fund—Reference—Payment into Court.]—Action to recover $20,000 placed in the defendants' hands on the 3rd May, 1917, with interest from that date. The money was paid by the plaintiff company to the defendants as trustees under the terms of a written agreement. The action was tried without a jury at Sandwich. LENNOX, J., in a written judgment, said, after stating the facts and considering the evidence before him, that the defendants, as trustees for certain plaintiffs in an action of Taylor v. Mullen Coal Co., should have judgment for $1,480, payable out of the trust fund, as damages sustained by these cestuis que trust by reason of the plaintiff company's neglect and refusal to abide by and carry out its agreements of the 4th May, 1916, and the 3rd May, 1917. The defendants personally should have judgment against the plaintiff company for their costs of defending this action, to be taxed as between solicitor and client, the taxed costs to be payable out of the trust fund and retained by the defendants. There should be judgment for the plaintiff company against the defendants, without costs, for the balance of the $20,000, together with the interest earned thereon, computed from the 31st May, 1917, until judgment, after deducting from the total of principal and interest the $1,480 and the defendants' taxed costs as aforesaid. Either party may have a reference to fix the damages if either is not content with the assessment at $1,480. That sum is to be paid into Court, and will remain there until the issues as to damages are finally determined, and will be applied and paid out according to the event. This judgment is without prejudice to the rights, if any, of such of the plaintiffs in the former action as are not represented by the defendants in this action. A. R. Bartlet, for the plaintiff company. T. Mercer Morton, for the defendants.

RICHES v. RICHES—MULOCK, C.J. EX.—DEC. 24.

Husband and Wife—Alimony—Cruelty—Desertion—Findings of Trial Judge.]—An action for alimony, tried without a jury at a Toronto sittings. MULOCK, C.J. Ex., in a written judgment, said that the plaintiff and defendant were married in Toronto in 1911, were separated in 1917, and had ever since lived apart. At the date of the marriage the defendant was 43 and the plaintiff 23 years of age. The plaintiff charged the defendant with cruelty which had ruined her health, and with desertion. The learned Chief Justice found that both cruelty and desertion were proved. The plaintiff was a faithful, dutiful, and affectionate wife; the defendant was solely to blame for the discord and strife which grew up between them, and which were the consequences of his ill-treatment of her. He had developed a violent antipathy to her; and, having regard to his violent temper, it would be unsafe for her to live with him. The defendant in his statement of defence alleged that the conditions which had arisen between the parties were caused by the plaintiff's hasty temper, indiscretion, and the influence of relatives, friends, and acquaintances over her; but he wholly failed to establish any such defence. These conclusions were reached after a minute and careful examination of the facts, circumstances, and evidence. The plaintiff was entitled to judgment for alimony with costs; reference to the Master in Ordinary to fix the amount. J. M. Godfrey, for the plaintiff. George Wilkie and D. R. Hossack, for the defendant.

ALLEN v. RECORD PRINTING CO.—KELLY, J.—DEC. 27.

Costs—Settlement of Action for Libel Reached after Case Called for Trial—Question of Costs Left to Trial Judge—No Costs Awarded to either Party—Interlocutory Costs.]—An action for libel, which was set down for trial with a jury at Sandwich, and came before KELLY, J., the presiding Judge. After the case had been called for trial, the parties, through their counsel, agreed upon a settlement of all matters involved, except the question of costs, which they left to the trial Judge. KELLY, J., in a written judgment, said that, the trial not having proceeded, he had no knowledge of the real merits of the case to assist in determining on which, if either, of the contending parties the burden of the costs should be imposed. He therefore made no order as to costs against either party. If costs of any interlocutory motion or motions had been imposed upon either of the parties, such costs should not, in the circumstances, be exacted. O. E. Fleming, K.C., R. L. Brackin, and W. D. Roach, for the plaintiff. J. H. Rodd and A. R. Bartlet, for the defendant.