The
Ontario Weekly Notes

Vol. VI. TORONTO, APRIL 24, 1914. No. 7

HIGH COURT DIVISION.

MIDDLETON, J. APRIL 14TH, 1914.

FORTUNE v. NELSON HARDWARE CO.

Master and Servant—Injury to Servant—Fall of Elevator—Fault of Plaintiff or Fellow-servant—Negligence—Defective Condition—Evidence—Finding of Trial Judge.

Action for damages for injuries sustained by the plaintiff in the defendants' shop, where he was working for them, by reason of the fall of an elevator in which he was being carried. The plaintiff alleged negligence.

The action was tried without a jury at Sandwich.

T. M. Morton, for the plaintiff.

M. K. Cowan, K.C., for the defendants.

MIDDLETON, J.:—The plaintiff sues at common law to recover damages for injuries sustained on the 29th March, 1912, when an elevator upon the defendants' premises, in which he was, fell. The action was not begun till the 9th January, 1914; so no remedy can be had under the Workmen's Compensation for Injuries Act.

The elevator fell because the wire hoisting cable had become worn and frayed, and so weakened, and the safety-device for some reason did not work. There was no defect in the elevator, and the safety-device was one which ought to have been sufficient. No reason for its failure on this occasion was shewn or in any way indicated.

The plaintiff, as the senior clerk in the shop, had a general charge over the whole place, and knew of the condition of the rope, and failed either to report it or to have it repaired. At

the time of the accident he assumed the whole blame and had no thought of making any claim, thinking that he was, under the circumstances, well treated by being paid full wages, etc. Recently he was discharged for stealing money, and in revenge brings this action.

Mr. Lech, a shareholder of the company, was general manager, and the only person occupying a superior position in the shop. He confined himself mostly to office work and general direction of the business, leaving the care of the staff and premises very largely in the plaintiff's hands.

The master, the company, did provide a safe place for the employees to work, and, if the place became unsafe, as it did, this was, I think, the plaintiff's own fault. At most it was the fault of a fellow-servant. Mr. Morton cannot, at this late date, successfully attack the well-settled law that the relative positions which the servants occupy in the undertaking makes no difference in the application of the fellow-servant doctrine, which, as is pointed out in Halsbury's Laws of England, vol. 20, p. 133, in the case of corporations, resulted in this defence nearly always succeeding, for the corporation itself could scarcely ever be convicted of negligence.

In this case the claim is quite without merit, and I do not experience the regret I generally entertain when this rule prevents a recovery; for the fault here was, I think, with the plaintiff himself.

Action dismissed.

LATCHFORD, J. APRIL 14TH, 1914.

ATTORNEY-GENERAL FOR ONTARIO v. PAGE.

Gift—Donatio Mortis Causa—Evidence to Establish—Corroboration—Contemplation of Death—Delivery of Subject of Gift—Key of Trunk—Bank Pass-books—Policy of Insurance.

Action by the Attorney-General, as administrator of the estate of the late Frederick Hales, a messenger at the time of his death at the Provincial Lunatic Asylum at Mimico, against the defendant, at one time a nurse in the asylum, to recover certain property of the deceased in the possession of the defendant;

and counterclaim by the defendant for the whole of the personal property of the deceased by virtue of an alleged donatio mortis causa.

W. J. McWhinney, K.C., for the plaintiff.
L. F. Heyd, K.C., for the defendant

LATCHFORD, J.:—The property in question is mainly in the custody of the Court, with the exception of a trifling sum of money and the proceeds of Hales's last monthly pay-cheque, $30, which are in the possession of the defendant; and consists mainly of two bank-books, representing about $200, and $1,000, the proceeds of a life insurance policy held by the deceased.

Hales was probably filius nullius. He had some memory of a mother and grandfather; and had, previous to coming to this country, been in a Barnardo Home from his childhood. So far as appears, he had no living relatives.

The defendant, when Hales met her, was about twenty-seven years of age. She was living separate from her husband, to whom she had been married while under age. He had, after the separation, gone through the form of marriage with another woman, after giving notice to the defendant of an application which he had made for a divorce in one of the United States.

The defendant, though not quite certain that she was free, became, in August, 1911, engaged to marry Hales This was clearly established. Hales gave her a ring and spoke of the new relationship to at least one of his associates, many of whom knew of the mutual attachment of the pair, though perhaps not of their actual engagement.

About the end of September, Hales was stricken with typhoid fever. He sent for the defendant. Nurses were not permitted to visit at cottages occupied by male attendants at the asylum. One of the superintendents, Mr. Whitehead, out of sympathy doubtless with the lovers, accompanied Mrs. Page to Hales's room and left them together for a few minutes. What passed between the two can be known only from the defendant. Mr. McWhinney has strongly urged that the discrepancies in her statement of what took place indicate that her relation is not truthful. But there is no substantial variance in the accounts she has given upon her examination for discovery, her examination in chief, and her cross-examination. The discrepancies are slight, and only such as might naturally be expected from a

truthful witness of her limited intellectual capacity. I give full credit to her statements of what occurred.

Her evidence is uncontradicted except upon one point, and on that only by the bursar's clerk, Murray, who says that the red bank-book was in Hales's trunk, and not, as she states, in her suit-case, when he made the inventory. But his memorandum made at the time indicates that both the bank-books were in the suit-case. Murray also states that, "according to memory," he saw the red bank-book—perhaps both bank-books—in Hales's trunk on the night Hales left the trunk in the room he occupied at the time. Murray's opportunity for observing what was in the trunk was very limited; but, even were it better, I shoud not be inclined to credit his evidence as against Mrs. Page's. I am satisfied that both the bank-books were handed to Mrs. Page when Hales delivered to her his other little treasures. It is in the highest degree improbable that he would have removed—as he did undoubtedly remove—his deeds and insurance policies, with the almost worthless watch and watch-case, from the trunk, and not at the same time take away the bank-books, which represented his savings of $201.65.

There could, of course, be no valid gift of his real estate. But as to the personalty the only question is, whether what took place between Hales and the defendant amounted to a good donatio mortis causa.

Hales was not a strong man, and he was smitten with a dangerous and often fatal disease. He had no relatives. He entertained for Mrs. Page an affection so sincere that, although acquainted with her unfortunate past, he had decided to make her his wife. His intention was to benefit his affianced should he not recover. He delivered to her his purse, containing the key of the trunk, which, by his order—a significant circumstance—was later delivered to her, a watch and a watch-case, the bank-books and the bundle of papers, the contents of which were unknown to Mrs. Page until after Hales's death, when it was found to contain his deeds and insurance policies. On the next day, Hales sent her by Whitehead his monthly pay-cheque.

In delivering the articles in question, Hales said: "I am very ill. Take these papers, and in case anything happens they are yours. If not, it will be all right anyway." or "you keep them safe anyway." He also said, "You will find the key of my trunk in the purse."

The requisites of an effective donatio mortis causa are stated in Halsbury's Laws of England, vol. 15, p. 431. It must be

made in contemplation of death; there must be delivery to the donee of the subject of the gift; it must be made in circumstances which shew that it is to take effect only if the death of the donor follows.

All these necessary elements were present in this case. The gift of the key of the trunk of itself constituted a valid donation of the contents of the trunk (Jones v. Selby (1710), Prec. Chy. 300), apart altogether from the subsequent delivery of the trunk and what was in it to the defendant.

The gift of the bank pass-books operates to pass to the defendant the right to the moneys represented by them: Brown v. Toronto General Trusts Corporation (1900), 32 O.R. 319. A policy of assurance may also be the subject of a donatio mortis causa: Amis v. Witt (1863), 33 Beav. 619; Witt v. Amis (1861), 1 B. & S. 109; In re Beaumont, [1902] 1 Ch. 889, at p. 893.

I, therefore, hold the defendant entitled to the moneys in bank represented by the pass-books delivered to her, with accrued interest, and to the moneys and other property in the custody of the Court, in addition to the contents of the trunk, the cash received from Hales, and the proceeds of his pay-cheque. She is also entitled to her costs.

I may add that there is ample corroboration of the intention of the deceased to benefit the defendant. This appears from the delivery of the trunk and pay-cheque, and from other material facts, which appreciably assist me in concluding that the defendant truly states what took place between her and Hales when he delivered his valuables to her.

The evidence of what took place subsequently between her and Dr. Beemer does not weaken her statement. If she understood—which I doubt—the letter read to her by the superintendent, the relative positions of the two would, I am satisfied, have prevented her from objecting to the statements contained in the letter. In any event, there was little in it to which she could take objection.

The action is dismissed and the counterclaim allowed, with costs.

LENNOX, J. APRIL 14TH, 1914.

GAGE v. BARNES.

Damages—Injury to Land by Excavation—Deprivation of Lateral Support—Subsidence—Expense of Restoration—Cause of Action—Judicature Act, sec. 18—Actual Damage—Future Damages—Injunction—Assessment of Damages Equally against Separate Defendants.

Action by John Gage against Thomas Barnes and R. W. Simons for damages for injury to the plaintiff's land by excavating upon adjoining land.

W. A. Logie, for the plaintiff.

G. Lynch-Staunton, K.C., and W. Bell, K.C., for the defendant Barnes.

H. D. Petrie, for the defendant Simons.

LENNOX, J.:—The plaintiff may amend by adding Stephen Simons a party defendant, if he desires to do so. The excavations have been completed to the south of the plaintiff's land, also for a good way north along the west side; and it is not now apprehended that subsequent excavating will be done in a way to invade the plaintiff's rights. The statement of claim only asks for damages, and general relief, but in argument the plaintiff's counsel insisted that damages should be awarded upon the basis of the estimated future depreciation in the value of the plaintiff's land in addition to the injury which has already accrued; or, if not, then that the plaintiff should have a mandatory injunction compelling the defendants to afford proper lateral support for the plaintiff's land and restore it to its former condition and level. Restoration and adequate support are out of the question—the expense is prohibitive. The benefit accruing would not be at all in proportion to the very heavy outlay which a work of this character would involve.

Even where restoration is the proper remedy, a plaintiff may have to content himself with something very far short of the old conditions: Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury, [1908] A.C. 323. The injury to the plaintiff, however, so far as it has accrued, can be adequately compensated in money, and is damage of the class intended to be covered by sec. 18 of the Judicature Act.

As to damages, however, for that which is not yet a wrong, other considerations arise. The statute does not create any new cause of action, or enable the Court to reach to that which it could not otherwise include as a basis of relief—it changes only the character of the relief.

The removal of lateral support is not in itself a cause of action, and Arthur v. Grand Trunk R.W. Co. (1895), 22 A.R. 89, is not a guide to the decision of this case. There the wrong-doing was complete upon the building of the embankment and the diversion of the stream; and the Court found that it was permanent, and the loss to the plaintiff immediate and continuous, and his whole cause of action had accrued. See also the cases of Kine v. Jolly, [1905] 1 Ch. 480, at p. 504, affirmed on appeal in Jolly v. Kine, [1907] A.C. 1, and Colls v. Home and Colonial Stores Limited, [1904] A.C. 179, at p. 212.

Even where the statute can be invoked, as in the case of a continuing nuisance, it is a jurisdiction to be cautiously and sparingly exercised: Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287.

There are undoubtedly cases in which the beneficial provisions of sec. 18 of the Judicature Act can be given a wider range than in a case of the class I am dealing with. The basis upon which the Court can act, as I understand it, is well-defined, and is not of recent origin. The limitation of its powers results from the fact that it is the actual subsidence or falling away of the plaintiff's property, and not the excavation, however close it may approach, which constitutes the defendant's wrong-doing and gives a cause of action. I have not here to consider the possible right of a land-owner to obtain an injunction quia timet—no such question arises here. But the slightest invasion of the plaintiff's property is a wrong. To cause his property to subside or fall away, even to the slightest degree, is an invasion of his rights, and gives a right of action without proof of actual loss: Attorney-General v. Conduit Colliery Co., [1895] 1 Q.B. 301. And, whatever may be the law as to the right to an injunction to prevent probable or impending damage, apprehension of damage gives no cause of action for damages, of itself: Lamb v. Walker (1878), 3 Q.B.D. 389. Backhouse v. Bonomi (1861) 9 H.L.C. 503, makes it clear that the resultant injury, and not the excavation which causes it, is the cause of action, by declaring that the Statute of Limitations runs not from the time that the work complained of was done, but from the time that the actual injury to the plaintiff accrues. And there is a new

cause of action for each new subsidence or falling away: Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127. And by the judgment of the House of Lords in West Leigh Colliery Co. Limited v. Tunnicliffe & Hampson Limited, [1908] A.C. 27, it was declared that depreciation in the market value of the property, attributable to the risk of future subsidence, could not be taken into account. . . .

[Reference to the remarks of Lord Macnaghten, at p. 29; Lord Ashbourne, at pp. 31, 32; and Lord Atkinson, p. 33.]

Upon the authorities thus far referred to I find the plaintiff entitled to damages as follows:—

Damage to dwelling-house	$550
" " store and annex	350
" " cottage	200
" " land by excavations to date..	250
Total actual damage to date	$1,350

I have not overlooked the cave-in which occurred after the evidence had closed. This is the amount, $1,350, for which I would give judgment if the matter rested here. But I am unable to distinguish this action in principle from . . . Ramsay v. Barnes, 5 O.W.N. 322, decided by my brother Middleton; and, as well because of the respect I entertain for the opinion of the learned Judge, as of the provisions of sec. 32 of the Judicature Act, I shall assess future damages by reason of excavations at the sum of $450, and direct judgment to be entered for $1,800 with costs.

While I have not deemed it advisable to order restoration by the construction of breastworks, retaining wall, or other artificial means, I have estimated the damages upon the basis that all material which hereafter falls from the plaintiff's land will be allowed to remain and accumulate where it falls, so as to confine the falling away within as narrow bounds as possible. There will be an injunction, therefore, restraining the defendants the Simonses from removing any of this material, and restraining them also from working their gravel pit, blasting, or taking out material in such a way as to injure the plaintiff's buildings; and the plaintiff may amend his pleadings so as to claim for this.

There was a strenuous effort to shift responsibility from Barnes to the Simonses and from these defendants to Barnes. In every item of damage and wrongdoing they were not perhaps equal contributors, but, taking in the whole of the damage

awarded, I am of opinion that an equal assessment upon Barnes and the Simonses is the most equitable adjustment I can make.

Among other relevant cases are: Greenwell v. Low Beechburn Coal Co., [1897] 2 Q.B. 165; North Shore R.W. Co. v. Pion (1889), 14 App. Cas. 612; and Hall v. Duke of Norfolk, [1900] 2 Ch. 493.

MIDDLETON, J. APRIL 14TH, 1914.

*RE FLETCHER.

Will—Testator Owning three Parcels of Land—Devise of First Parcel to Son—Devise of "Balance" to Daughter, Followed by Description of Second Parcel—Right of Daughter to Third Parcel—Dominant Clause—Residuary Devise—"Timber"—Separate Devise of—Scope of Word—Moneys to be Invested by Executors—Payment of Interest to Legatees—When Interest Begins to Run.

Motion by executors, upon originating notice, for an order determining certain questions arising upon the will of Daniel T. Fletcher, who died on the 17th July, 1913.

E. F. Lazier, for the applicants.

J. G. Farmer, K.C., for Elsie Dawn Cowell.

S. F. Washington, K.C., for the adult residuary legatees and adult daughter.

E. C. Cattanach, for the infant residuary legatees and infant daughter.

MIDDLETON, J.:—The question of importance and difficulty arises upon the sixth clause of the will, by which the testator gives certain lands to his daughter Elsie Dawn Cowell. During his lifetime the testator had purchased three parcels of land in the township of Binbrook, from one Richard Quance. By an earlier clause of the will (the fourth) he gave to his son John certain lands, inter alia "all of the lands deeded by one Richard Quance . . . contained in said lot three, block four, concession one of the township of Binbrook." This was the first of the three parcels contained in the deed.

By the clause in question he gives to his daughter "the balance of the lands and premises described in the aforesaid deed

*To be reported in the Ontario Law Reports.

from Richard Quance, executor, to me, said lands being composed of part of lot three in the fourth block and second concession of the township of Binbrook." This covers the second parcel comprised in the Quance conveyance.

The third parcel was on the opposite side of the concession road, and is part of lot two, block four, concession one, Binbrook. The daughter claims that, notwithstanding the fact that this land is not specifically described, it passes to her, as it constitutes part of the "balance" of the lands described in the deed, which she says is the governing part of the description, followed by a defective enumeration.

There is a residuary clause, which purports to deal with the residuary realty as well as the residuary personalty, and it is shewn that, if this piece of land is included in the devise to the daughter, there is no real estate to pass under the residuary clause.

I do not regard this as affording any assistance, and it appears to me that the clause in question must be dealt with, and the gift to the daughter interpreted, quite apart from any consideration based upon the residuary clause. It is only important as indicating that in any event there will not be an intestacy.

Where a testator, manifestly intending to describe lands which he does own, erroneously describes lands as to which he has no title, the Court is often enabled to give effect to the testator's wishes by rejecting entirely the erroneous description. If there then remains sufficient to operate as a devise of the land which the testator actually owns, it will pass by the will. Cases of this type are collected and well discussed by my brother Riddell in Re Clement, 22 O.L.R. 121, and Smith v. Smith, 22 O.L.R. 127. All these cases proceed upon the theory that the Court is giving effect to the real intention of the testator as expressed upon the face of his will, such intention not being permitted to be defeated by a mere erroneous particular description of land which has been already adequately described in general terms

That, however, does not help in solving the problem presented by this will. This is not the case of a testator erroneously describing as his own something which he does not own and omitting a description of that which he does own. He owned two parcels which are adequately and properly described as constituting the residue of the land conveyed to him by Quance. If I could be satisfied from the will that he intended to give both these parcels to his daughter, then the fact that he afterwards describes one would not defeat her rights; but when these

general words, ample to carry both parcels, are followed by the equally plain statement "the said lands being composed of," etc., followed by the description of one parcel only, I am put to determine which is the dominant clause in the gift; as I am not able to determine with the same certainty as in cases like Re Clement and Smith v. Smith, where the choice was between a nugatory clause on the one hand and an operative clause on the other. Here what I have to determine from the words used is, whether the testator meant his daughter to have one parcel or two parcels. . . .

[Reference to West v. Lawday, 11 H.L.C. 375; Travers v. Blundell, 6 Ch.D. 436.]

In In re Brocket, [1908] 1 Ch. 185, Mr. Justice Joyce had before him a will very much like that now in question, and I think that the principles which he there applied govern me. . . .

The learned Judge . . . concludes: "So I think in a will, if there be . . . an equivalent specific enumeration of particulars by name and locality, that specific enumeration must be held to limit and restrict what has gone before . . . The specification here by name and locality, introduced by the word 'namely,' is analogous to a specification in a conveyance by schedule or schedule and plan, and is not merely an imperfect enumeration of properties intended to be devised. In other words, I think the specification by name and locality, which is free from all ambiguity, forms the leading description."

The second question raised is the meaning of the provision that timber shall, notwithstanding the devise of the land, not form part of the property devised, but form part of the residuary estate. "Timber" is, I think, to be confined to trees which are not ornamental or shade trees, and which are capable of being sold for manufacture into lumber. It will not cover mere brush, which is not of merchantable value, nor will it authorise the destruction of trees which have a value apart from their value as lumber by reason of their use for ornamental and shade purposes.

The third question is the date from which interest runs upon the moneys to be invested by the executors for the benefit of the daughters Myrtle and Susan. These gifts, being made generally from the testator's estate, there is no right to demand payment within the "executor's year," and interest therefore runs from a year from the testator's death. The executors have that time within which to make their arrangements.

The costs of all parties may come out of the estate.

BOYD, C. APRIL 18TH, 1914.

*MURPHY v. LAMPHIER.

Will—Action to Establish — Evidence—Onus — Testamentary Capacity—Procurement of Will by Others—Stealth, Haste, and Contrivance—Executors Propounding Will—Costs.

Action by the executors named in what purported to be the last will of Jane Lamphier, who died on the 30th September, 1913, aged eighty years, to establish the will, which was dated the 25th May, 1912.

The alleged will disposed of all the property of the testatrix, in general words. The chief assets of the estate were a farm of 200 acres and an hotel property at Erindale.

There were four previous wills: the first dated the 26th October, 1903; the second, the 28th December, 1905; the third, the 11th October, 1909; and the fourth, the 22nd July, 1911.

The fifth will, now sought to be established, provided that all property, real and personal, should be sold and divided equally among all the children of the testatrix and Hannah Lamphier, a daughter-in-law. No provision was made for the husband of the testatrix, who survived her; and the executors named were the solicitor who drew the will and Joseph Murphy, brother of Hannah, the daughter-in-law.

The provisions of this will differed widely from those of all the previous ones.

The action was tried without a jury at Toronto.

J. G. O'Donoghue, for the plaintiffs.

J. W. Bain, K.C., for the defendants.

BOYD, C., set out the facts at length, commented on the evidence, and referred to Blewitt v. Blewitt (1833), 4 Hagg. Ecc. 410, 464; Marsh v. Tyrrell (1828), 2 Hagg. Ecc. 84, 112, 122; Simpson v. Gardner's Trustees (1833), 11 Ct. of Sess. Cas. 1049, 1052; Ingram v. Wyatt (1828), 1 Hagg. Ecc. 384; Dodge v. Meech (1828), 1 Hagg. Ecc. 612, 617; Menzies v. White (1862), 9 Gr. 574, 576; Boughton v. Knight (1873), L.R. 3 P. & D. 64, 72; Birkin v. Wing (1890), 63 L.T.R. 80, 82; Cranvel v. Sanders (1619), Cro. Jac. 497; Harwood v. Baker (1840), 3 Moore P.C. 282; Banks v. Goodfellow (1870), L.R. 5 Q.B. 549, 568; Jarman on Wills, 6th ed. (1910), vol. 2, pp. 2213,

*To be reported in the Ontario Law Reports.

2217; Bythewood's Conveyancing, 4th ed. (1889), vol. 7, p. 333; Barry's Conveyancing, ed. of 1872, p. 36; Wilson v. Wilson (1875-6), 22 Gr. 39, 24 Gr. 377; Martin v. Martin (1866-9), 12 Gr. 500, 507, 15 Gr. 586.

The learned Chancellor concluded:—

The last important decision is of the Privy Council in 1910, where the test applied was: Did the testator's illness so affect his mental faculties as to make them unequal to the task of disposing of his property? Bur Singh v. Uttam Singh, L.R. 38 Ind. App. 13.

The notes of stealth, haste, and contrivance attach to this transaction, and have not been removed.

Stealth or clandestinity is shewn by its consummation "behind the backs of relations, who might guard and protect against imposition:" words used in Ingram v. Wyatt, 1 Hagg. Ecc. at p. 438; and it was wrapped in secrecy till after the mother's (testatrix's) death.

Haste is shewn by the superficial way in which really important things were slurred over or neglected, the taking for granted that all wills should be revoked and executors thrust in without any information being sought from the testatrix, and all rushed through in less than half an hour. . . .

Contrivance is shewn in the cut and dried answer and the ordered array of names, and in many other respects that there is no need to dwell on.

There is no environment to help the plaintiffs. No evidence is given, except from Mrs. Hayes, that the testatrix was at any time dissatisfied with the will she had made, or that her intentions were at any time other than as therein expressed. She made no reference to the will propounded at any time afterwards, though she lived over a year and a quarter, and was, according to the plaintiffs, bright and clear to the last.

The whole of the evidence brings me to the conclusion that her capacity on the 25th May, 1912, was on the verge of extinction. Extreme care and caution were imperatively called for in the doing of any testamentary act, in order to satisfy the Court of her volition and understanding. The evidence now given falls far short of what is needed to satisfy the onus resting on the plaintiffs. I am unable to say judicially, as put by VanKoughnet, C., in Menzies v. White, 9 Gr. 574, that the testatrix thoroughly understood the effect of the will, and deliberately intended it to have that effect. . . .

These plaintiffs are executors chosen by some one else than

the deceased, and so have really no locus standi. This will should not have been brought into existence. It was procured to be made by Mrs. Brown and Mrs. Hayes, and their solicitor was employed. The cautions proper to be taken to find out the old lady's fitness for the occasion were not taken. Such remissness is not to be rewarded by depleting the estate to pay the costs of the party who loses. It is well that costs are not given against the plaintiffs; but I refrain from this for the reasons given in Ingram v. Wyatt, 1 Hagg. Ecc. at p. 470.

The action is dismissed without costs.

SOADY v. SOADY—BRITTON, J.—APRIL 11.

Money Lent—Action for—Onus—Failure to Discharge—Statute of Limitations.]—Action by a man against his brother for $2,264, made up of ten items of money lent, money paid for the defendant, services, board, etc. The learned Judge said that the onus was upon the plaintiff, and that he had not established one of the items. All items before the 1st January, 1907, were barred by the Statute of Limitations. Action dismissed with costs, and counterclaim dismissed with costs. W. K. Murphy, for the plaintiff. R. D. Moorhead, for the defendant.

ALLIS-CHALMERS-BULLOCK LIMITED v. ALGOMA POWER CO. LIMITED—MIDDLETON, J.—APRIL 14.

Contract—Supply of Machinery and Plant—Abatement of Price — Several Issues of Fact — Findings of Trial Judge — Costs.]—Action to recover a balance alleged to be due to the plaintiff company for the supply and installation of machinery and plant under two agreements: (1) to supply the defendant company with certain plant required for an extension of its works at Michipicoten Falls; (2) for the construction of certain machinery at the Helen mine, which the defendant company had undertaken with the mining company to install for the purpose of enabling electricity to be used as a motive power at the mine. Several issues of fact were tried; and the learned Judge makes his findings as to these, in a written opinion; and states his conclusion to be that there should be an abatement of the balance due the plaintiff company by sums aggregating $3,-

530.29, leaving a net balance due the plaintiff company of $4,776.37, which should bear interest at the rate of six per cent. from the 1st October, 1909. Each party having in part succeeded in its contentions, and an indulgence having been granted to the plaintiff company by a postponement of the trial, there should be no costs to either party. C. A. Moss and Featherston Aylesworth, for the plaintiff company. W. N. Tilley and W. M. Cram, for the defendant company.

OLDS v. OWEN SOUND LUMBER CO.—MIDDLETON, J.—APRIL 4.

Contract—Manufacture and Delivery of Lumber—Shipment—Payment for Lumber Delivered—Inspection of Lumber—Interest.]—Action by the vendor upon a contract for the sale of lumber. Certain lumber had been delivered and paid for; other lumber had been delivered and not paid for; other lumber had been tendered and refused. No claim was made by the plaintiff save for the price of the lumber delivered and not yet paid for. The defence was, that the contract called for the delivery of the entire quantity, and that, the vendor not having delivered all, the purchasers could keep what they had without payment; and the defendants counterclaimed damages for failure to deliver and also for the delivery of inferior lumber. The learned Judge finds that the plaintiff was ready to deliver and not in default; that the whole run was sold at one price, and the best had not yet been delivered; that part of the lumber was, at the time of the contract, manufactured and ready for shipment, but part was in the log and required time for manufacture; that the manufactured lumber was one lot, the lumber to be manufactured was a second lot, which indicated that "shipment" and "delivery" were not used in the agreement as meaning the same thing; that an inspection made by an inspector agreed upon was conclusive on the parties; that the claim for damages for failure to deliver had no foundation; that the defendants should pay for the lumber received at the contract-price, less $500, an allowance made because the lumber supplied was below the average of the entire run; and that the defendants should pay interest from sixty days from shipment and the costs of the action. Judgment accordingly. J. H. Rodd, for the plaintiff. W. H. Wright, for the defendants.

ECKERSLEY v. FEDERAL LIFE ASSURANCE CO.—BRITTON, J., IN CHAMBERS—APRIL 15.

Jury Notice—Action on Insurance Policy—Proper Case for Trial without Jury—Order Striking out Notice—Direction for Transfer of Action to Non-jury List—Rule 398.]—Motion by the defendants to strike out the jury notice served by the plaintiff. The learned Judge said that he had read the statement of claim, the statement of defence, and the affidavits filed, and it appeared to him that the action was one which ought to be tried without a jury. He, therefore, directed that the issues should be tried, and the damages, if any, assessed, without a jury. If the action had been entered for trial, it should be transferred to the non-jury list, pursuant to Rule 398. Costs of the motion to be costs in the cause. J. Y. Murdoch jun., for the defendants. J. P. Crawford, for the plaintiff.

RE ROSS—BRITTON, J., IN CHAMBERS—APRIL 17.

Infant—Custody—Right of Father—Welfare of Child—Children's Aid Society.]—Motion by the father of John Ross, an infant, upon the return to a habeas corpus, for an order for the delivery of the child to the applicant. The learned Judge said that he had given this matter anxious consideration, and, having regard for the true welfare of the boy, and at the same time not forgetting the affection of his mother and the natural desire on her part to have her son with her, his conclusion was that the custody of the boy should not be given to the mother, but that he should be returned to, and be retained by, the Children's Aid Society of Toronto. The boy had been well clothed and cared for. He was now learning to do useful work—was willing to do it—and liked the work of the farm and country life. At the boy's present age, living in the city, with no other boys of his own household to associate with, would be a constant trial and temptation, to which, in all the circumstances, the boy should not be subjected. No costs. A. R. Hassard, for the applicant. W. B. Raymond, for the respondents.

BELL v. ROGERS—BRITTON, J.—APRIL 17.

Judgment Debtor—Refusal to be Sworn or Examined—Motion to Commit for Contempt—Dismissal—Order for Further Examination.]—Motion by the plaintiff to commit the defendant for contempt in refusing to be sworn and refusing to answer lawful questions to be put to him upon his examination as a judgment debtor. The learned Judge said that, upon the papers filed and what was stated upon the argument, it was clear that a case has not been made for an attachment; and the motion should be dismissed, but, in the circumstances, without costs. It was equally clear that the plaintiff was entitled to have a further examination of the defendant as a judgment debtor; and the plaintiff should not be put to the additional expense of making a special application for an order for such further examination. Order made (as in Chambers) that, upon an appointment being taken out and served upon the defendant, and upon his being paid his conduct-money, the defendant should attend pursuant to such appointment, and answer all such lawful questions as might be put to him upon such examination as a judgment debtor. J. P. MacGregor, for the plaintiff. M. L. Gordon, for the defendant.