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## APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 16TH, 1916.

### REX v. POLLOCK.

*Criminal Law—Disposing of Trading Stamps—Criminal Code, secs.* 335(*u*), 505—*Voting Contest—Ticket—"Premium."*

Case stated by the Senior Judge of the County Court of the County of York, before whom, without a jury, the defendant (with his own consent) was tried on the 8th December, 1915, upon a charge that "he did, directly or indirectly, issue, give, sell, or otherwise dispose of trading stamps to one Montgomery and others, being merchants or dealers in goods, for use in their business, contrary to the Criminal Code."

The Crown contended that a system adopted by the defendant of distributing prizes and issuing voting tickets constituted a violation of sec. 505 of the Code.

By sec. 335(*u*), "trading stamps" includes, "besides trading stamps commonly so-called, any form of cash receipt, receipt, coupon, premium ticket, or other devise, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods *or a premium to the purchaser* thereof, which is redeemable," etc.

The defendant contended that the evidence disclosed a voting contest or competition, and that the voting ticket given to a purchaser of goods did not represent either a discount or premium on the price of the goods purchased, and was lacking in the elements necessary to constitute it a trading stamp.

The County Court Judge found the defendant "guilty" as charged; and, at the request of counsel for the defendant, reserved the question whether there was any evidence upon which the defendant could properly be convicted of the offence charged —making the charge-sheet and depositions a part of the case.

The case was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

H. H. Dewart, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.C.P., delivering the judgment of the Court, said that counsel for the defendant had placed the case very fairly before the Court. The whole question was whether the giving of the ticket was the giving of a "premium," within the meaning of sec. 335(*u*).

The person to whom the ticket was given was a purchaser of goods; and it was given to him as such, and to be of some advantage to him. It was not given to him as something that was worthless. If it was of any advantage to him, it was a "premium." Obviously it must have been considered by both parties to the transaction as such; and obviously it was, because it gave to the buyer a right to contest for, and to aid himself in the contest for, a prize, or to aid some one else in that contest, and also to sell his rights under the ticket.

The case was well within both the letter and the spirit of the enactment upon which the conviction was based.

*Conviction affirmed.*

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SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *BEAMISH v. GLENN.

*Nuisance — Noxious Trade — Injury to Neighbour's Property — Local Standard of Neighbourhood — Effect of Municipal By-law and Permit — Findings of Fact of Trial Judge — Appeal — Injunction — Form of Judgment — Stay of Operation.*

Appeal by the defendant from the judgment of SUTHERLAND, J., ante 199.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. N. Tilley, K.C., and H. A. Newman, for the appellant.

T. H. Barton, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering judgment, said that the learned trial Judge had found that the carrying on of the de-

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

fendant's business as a blacksmith was a nuisance to the plaintiff as owner and occupier of an adjoining lot and of his house upon it; and that the defendant's business was carried on by him in the usual, and in a proper, manner. The evidence sustained the findings in both respects; and the result was, that the carrying on of the defendant's business, even in an ordinary, careful, and proper manner, could not be continued there.

The contention that because the shop was not upon a place forbidden by by-law of the municipality, the defendant could not be enjoined from committing a nuisance, so long as his business was carried on carefully, was quite without weight. The power of urban municipalities to regulate and control the location, erection, and use of buildings such as, among many others, blacksmith shops and forges, is a restrictive power, not one by which the right can be given to any one man to injure the property of another, or to deprive another of any of his property or other rights.

The form of the judgment should be changed, as was done in Shotts Iron Co. v. Inglis (1882), 7 App. Cas. 518, and Fleming v. Hislop (1886), 11 App. Cas. 686, so as to enjoin the defendant from carrying on the business of a blacksmith in the manner hitherto pursued by him or in any other manner so as to cause material discomfort and annoyance to the plaintiff; but the operation of the injunction may be stayed, at the defendant's request, for one month, to enable him to comply with it; and, if the defendant choose to remove his business to some other locality where it will not be a nuisance, the stay may be extended for six months more to enable him to do so, upon his request for such extension and his undertaking so to remove, within that time.

With this variation in form, the appeal should be dismissed with costs.

LENNOX, J., concurred.

RIDDELL and MASTEN, JJ., also agreed in the result, for reasons stated by each in writing.

*Judgment below varied.*

SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *MARTIN v. PROTECTIVE ASSOCIATION OF CANADA.

*Insurance—Accident Insurance—Insured Injured by Reason of Jump from Moving Train—Want of Care—Indirect Result of Intentional Act—Voluntary or Negligent Exposure to Unnecessary Danger.*

Appeal by the defendants from the judgment of the County Court of the County of Carleton in favour of the plaintiff for the recovery of $650, under a policy of accident insurance, for the loss of a hand caused by the plaintiff falling when jumping from a moving train.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. H. Armstrong, for the appellants.

H. S. White, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering judgment, said that the contract provided for the payment of $650 for the loss of a hand; and also that the insured should at all times exercise due care and diligence for his personal safety and protection.

It was admitted that the law of this Province relating to the conditions of a contract of this character was applicable to this contract; that one question now in issue was, whether the plaintiff was disentitled to the compensation by reason of his want of care; and that the law upon that question was, as applied to the circumstances of this case, that, so to disentitle the plaintiff, his injury must have been "the indirect result of his intentional act," such act "amounting to voluntary or negligent exposure to unnecessary danger."

That the injury was the indirect result of his intentional act was undeniable; and it could be nothing else than a voluntary exposure to unnecessary danger.

Reference to Cornish v. Accident Insurance Co. (1889), 23 Q.B.D. 453; Garcelon v. Commercial Travellers' Eastern Accident Association (1907), 195 Mass. 531.

If the man's life, or a great fortune depended upon it, one might not blame him for taking the risk; but, even in such a case, the risk could not be justly put upon the insurance company. In this case the plaintiff travelled by a train which he knew did not stop at the station near his home, and jumped from the moving train when near his home merely because he

desired to get to his home as soon as possible—just because he desired to be there.

The appeal should be allowed with costs and the action dismissed with costs.

RIDDELL, J., gave reasons in writing for the same conclusion. He referred to Neill v. Travellers' Insurance Co. (1885), 12 S.C.R. 55; Canadian Railway Accident Insurance Co. v. McNevin (1902), 32 S.C.R. 194; the Cornish case, supra; Cook v. Grand Trunk R.W. Co. (1914), 31 O.L.R. 183; Lovell v. Accident Insurance Co. (1874), 3 Ins. L.J. 877; 1 Cyc. 259; Am. & Eng. Encyc. of Law, vol. 1, p. 284 et seq.

LENNOX, J., agreed in the Chief Justice's judgment.

MASTEN, J., agreed in the result.

*Appeal allowed.*

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SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *K. and S. AUTO TIRE CO. LIMITED v. RUTHERFORD.

*Guaranty—Indefinite Basis of Contract——Increase in Liability —Release of Guarantor—Construction and Scope of Contract.*

Appeal by the defendant from the judgment of HODGINS, J.A., ante 214, 34 O.L.R. 639.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

George Wilkie, for the appellant.

Leighton McCarthy, K.C., for the plaintiffs, respondents.

LENNOX, J., delivering judgment, said that the argument of the appeal was practically confined to two points: (a) Was the defendant released from liability under his agreement with the plaintiffs of the 7th February, 1914, by the circumstance that a new company was not formed, as contemplated, and the transaction of the 10th February, by which, amongst other things, McLaren was appointed the sole agent of the plaintiffs in the Province of Quebec? (b) What is the effect of the defendant's letter to the plaintiffs of the 27th February, 1914? It was strenuously argued that, owing to changed circumstances, the guaranty agreement of the 7th February never went into effect, or, if it did, that the defendant was released when the plaintiffs,

as alleged, impaired the financial prospects of the Kelly company by obtaining from them an unprofitable agreement on the 10th February.

If a person who holds a guaranty does something inconsistent with the guaranty agreement and to the prejudice of the guarantor, the guarantor may be released thereby; but, the learned Judge said, he could find nothing in what was complained of inconsistent with the terms of the agreement of the 7th February; and it was not pointed out in what way the defendant was prejudiced.

The letter referred to could not be read as limited to the $4,000, the present indebtedness of the Kelly company, or to transactions of that company; and it must be read as waiving the provisions of the main agreement as to the formation of a new company, and continuing the liability of the defendant for goods supplied under the new conditions.

The learned trial Judge had gone very thoroughly into the whole subject; and LENNOX, J., entirely agreed with the conclusions arrived at.

The appeal should be dismissed with costs.

RIDDELL and MASTEN, JJ., concurred.

MEREDITH, C.J.C.P., was also of opinion, for reasons briefly stated in writing, that the appeal should be dismissed.

*Appeal dismissed with costs.*

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SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *RE BAEDER AND CANADIAN ORDER OF CHOSEN FRIENDS.

*Insurance—Life Insurance—Benefit Certificate Issued by Ontario Society—Designation of Preferred Beneficiaries—Change of Domicile of Insured—Alteration of Designation by Change to Beneficiary of same Class—Will Executed at New Domicile—Effect of Law of Domicile — Trust — Insurance Act, R.S.O. 1914 ch. 183, secs. 171(3), (5), 177(4), 178(1), (2), 179(1).*

Motion by the society for an order for leave to pay insurance moneys into Court and summarily determining who are the persons entitled to share therein.

The motion was referred to a Divisional Court by MIDDLETON, J. See ante 88, where the facts are stated.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

S. F. Washington, K.C., for the claimants, the three children of the deceased.

J. R. Meredith, for the Official Guardian, representing Caroline Wagner, the infant grandchild of the deceased.

MEREDITH, C.J.C.P., read a judgment in which he said that the one question argued was, whether a change of beneficiaries, under a benevolent society's benefit certificate, made by will in a foreign country, the statute-law whereof did not, speaking generally, permit such a mode of transfer, is good, the will being duly executed with the formalities required to give validity to a will made either in Ontario or in the foreign country.

The insurers are a provincial benefit society, and can carry on business only in such manner as the law which gives them legal existence permits, and so only in accordance with the provisions of the Ontario Insurance Act, which the society's rules recognise and give effect to. So, by the terms of the contract, the beneficiaries can be changed by will, that is, an instrument valid as a will in the domicile or place of residence of the testator: see sec. 177(4); and the laws of the foreign state do not purport to affect it. And so, if the beneficiaries have been changed in accordance with the provisions of the provincial enactment, the new beneficiary takes, and the old are excluded altogether.

The words of sub-sec. 5 of sec. 171 are wide enough to support the claim of the grandchild that a valid change was made by the will. The words used in the will were sufficient as a declaration under the statute.

The infant grandchild is entitled to the moneys in question. No order as to costs, except that the costs of the Official Guardian be paid out of those moneys.

RIDDELL, J., read a judgment in which he reviewed the authorities and stated his opinion that the will was a declaration such as required by sec. 171(3) of the Act, and that it was effective to change the beneficiary.

MASTEN, J., also read a judgment, in which he referred to the authorities and to sec. 178(1) and (2) and sec. 179(1) of the

Act, and said that, in his opinion, the new appointment was valid, and the infant grandchild was entitled to the fund.

LENNOX, J., agreed in the result.

*Order accordingly.*

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SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *BENNETT v. STODGELL.

*Vendor and Purchaser—Agreement for Sale of Land—Statute of Frauds—Consideration—Rule against Perpetuities—Offer or Option—Attempt to Withdraw—Acceptance—Indefiniteness of Agreement—Failure of Vendor to Carry out Agreement—Sale to other Persons—Addition of Purchasers as Defendants—Remedy against in Damages—Remedy against Vendor—Measure of Damages—Assessment—Costs.*

Appeal by the defendants from the judgment of SUTHERLAND, J., ante 174.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

E. D. Armour, K.C., for the appellants.

J. H. Rodd, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he dealt with and discussed all the points raised by the appellants, viz.: (1) that there was no contract sufficient to satisfy the provisions of the Statute of Frauds; (2) that there was no consideration for any agreement to sell; (3) that, if there was any such agreement, it was invalid under the rule against perpetuities; (4) that the offer to sell was validly retracted; (5) that the contract was too indefinite to be enforceable; (6) that the plaintiff had not sustained any legal damages by breach of the agreement.

The learned Chief Justice's conclusion was against the appellants upon each of the points numbered (1) to (5) inclusive.

Taking up the 6th contention, the Chief Justice said that upon the direction for a new trial, and the trial had accordingly, to assess the damages for the plaintiff, sustained in consequence of the seller's breach of his contract to sell, two subseequent purchasers had been added as defendants, and it seemed to have been taken for granted that they were equally liable, with the contractor, for the breach of his contract, to which they were in no sense parties or privies. As there was no pretence that they

were proceeded against for damages for inducing the contractor to break his contract, or otherwise than upon the written contract in question, the judgment against them should not be allowed to stand. Although the plaintiff cannot have the equitable relief of specific performance, because he failed to register his agreement, and so permitted, it is said, a bonâ fide purchaser, for valuable consideration without notice of his rights, to acquire the property, yet he can have the common law relief, damages for breach of contract; but none but the parties to that contract can be liable upon it.

The learned Chief Justice said that he was unable to follow McIntyre v. Stockdale (1912), 27 O.L.R. 460, deeming it not well decided; he also referred to In re Northumberland Avenue Hotel Co. (1886), 33 Ch. D. 16, Lavery v. Pursell (1888), 39 Ch. D. 508, and Elmore v. Pirrie (1887), 57 L.T.R. 333, which are cited in McIntyre v. Stockdale; and to Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146.

The appeal of the added defendants should be allowed and the action dismissed as to them, with such costs of action and appeal as they had incurred in their own defence and which are separable from the costs of their co-defendant.

As to the damages to be paid by the defendant Stodgell, they had been assessed at $2,500, which meant that the man who bought the land for $7,500 now said that the man who sold it to him for that price should pay damages as if the land was really worth $10,000 at the time the transaction should have been closed. The measure of damages is the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made. There was some evidence that that difference was $2,500; but that rested upon the testimony of land agents speaking of inflated speculative value; and the actual sale made in good faith to Morton shewed that $1,200 was the enhanced price. There would be also some other items of inconsiderable amount in the way of damages, which, with some reasonable advance over the $1,200, would make $1,500; and $1,500 would be ample compensation to the plaintiff as reasonable damages for the defendant Stodgell's breach of his agreement.

The appeal should be allowed to that extent, and the damages reduced to $1,500; there should be no costs of the appeal as between the plaintiff and the defendant Stodgell.

RIDDELL and LENNOX, JJ., concurred.

MASTEN, J., also agreed in the conclusions of the Chief Justice, for reasons briefly stated in writing.

*Appeal allowed in part.*

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SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *WALLACE v. CITY OF WINDSOR.

*Highway—Nonrepair—Injury to Pedestrian by Fall on Defective Sidewalk—Negligence—Failure to Give Notice to Municipality in Due Time—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 460(4), (5)—*Reasonable Excuse—Prejudice.*

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 100, dismissing the action, which was brought to recover damages for injury sustained by the plaintiff by a fall on a sidewalk in the city of Windsor, said to be out of repair.

The trial Judge dismissed the action because he found that the plaintiff had not given notice to the defendants, the city corporation, within the time limited by sec. 460(4) of the Municipal Act, and that there was no reasonable excuse (sub-sec. (5)) for not giving it, although he found that the defendants were not prejudiced by the lack of notice.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. C. McMaster, for the appellant.

F. D. Davis, for the defendants, respondents.

MEREDITH, C.J.C.P., was of opinion, for reasons stated in writing, that there was no reasonable excuse for not giving the notice, and that the defendants were prejudiced by the lack of notice. The appeal should, he considered, be dismissed.

MASTEN, J., for reasons stated in writing, agreed with the Chief Justice that there was no reasonable excuse for not giving the notice, but agreed with the trial Judge as to the absence of prejudice. He was of opinion that the appeal should be dismissed.

RIDDELL, J., for reasons given in writing, was of opinion that there was reasonable excuse for not giving the notice, and also that the defendants were not prejudiced by the want of it. He was in favour of allowing the appeal and entering judgment for

the plaintiff for $600, the amount of damages provisionally assessed by the trial Judge.

LENNOX, J., was of the same opinion, for reasons stated in writing.

*The Court being divided, the appeal was dismissed.*

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SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

## *SITKOFF v. TORONTO R.W. CO.

*Negligence—Street Railway—Death of Man Struck by Moving Car—Nonsuit—No Reasonable Evidence for Jury—Duty of Trial Judge to Withdraw Case from Jury.*

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial with a jury at Toronto, dismissing an action brought under the Fatal Accidents Act to recover damages for the death of the plaintiff's husband caused by his being struck by a car of the defendants; the plaintiff alleged negligence on the part of the defendants' servants operating the car. The trial Judge was of opinion that there was no reasonable evidence to go to the jury, but asked them to assess the plaintiff's damages, and they assessed them at $1,200.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. M. Godfrey, for the appellant.

D. L. McCarthy, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the single question involved in the appeal was, whether there was any evidence adduced at the trial upon which reasonable men, acting conscientiously, could find that the real cause of the death of the plaintiff's husband was the actionable negligence of the defendants.

At the trial, the driver of the car which was said to have caused the man's death was examined as a witness for the plaintiff. No evidence was given in the defendants' behalf. The driver testified that all the care that was possible, in the circumstances, on his part, was taken; and to reckless or stupid want of care on the part of the man who was killed, want of care which directly caused his death. No other eye-witness of the accident was called. Other witnesses were called who proved that the car ran a very considerable distance after the man was struck.

Several witnesses were called who testified that they did not hear any sound of the gong of the car; but not one of them was asked, or ventured an opinion on, the question whether he would have heard it if it had rung, while some of them volunteered a statement of their inattention. The driver testified positively that he did sound the gong. And a witness, a passenger in the car, testified that another passenger stood up in the car and shouted, "Why don't you look where you are going?" immediately before the accident. It was conceded that the speed of the car was not excessive.

The learned Chief Justice was of opinion that, in all the circumstances of the case, it could not be said that reasonable men, acting in good faith, could find a verdict against the defendants.

There is a well-defined and unmistakable boundary between the province of the Court and that of the jury in all such cases as this; and the interests of justice require to-day, just as they did in the days of Erle, C.J.—see Cotton v. Wood (1860), 8 C.B.N.S. 568—that the right and duty of the Courts to determine whether there is evidence upon which reasonable men could find, before letting any case go to a jury, should be always exercised—that no surrender or invasion of either province should be permitted. Reasonableness—whether it is called a question of law or fact—such as this "belongeth to the knowledge of the law, and is therefore to be decided by the Justices."

The appeal should be dismissed.

RIDDELL, J., concurred.

MASTEN, J., also concurred, giving reasons in writing.

LENNOX, J., read a dissenting judgment.

*Appeal dismissed;* LENNOX, J., *dissenting.*

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## HIGH COURT DIVISION.

BRITTON, J., IN CHAMBERS. DECEMBER 16TH, 1915.

### RE ELLIOTT v. McLENNAN.

*Certiorari—Application for Removal of Examination for Discovery in County Court Action—Judgment—Improper Evidence—Right of Appeal—Exclusion of Remedy by Certiorari.*

Motion by J. B. Mackenzie, formerly solicitor for the plaintiff in an action in the County Court of the County of York,

wherein one Joseph Elliott was plaintiff and J. McKee McLennan and another were defendants, for an order for the issue of a writ of certiorari to remove into the Supreme Court of Ontario the examination of the plaintiff for discovery taken in that action.

The applicant appeared in person.
No one opposed the motion.

BRITTON, J., said that he was of opinion that certiorari would not lie upon the facts presented. Rex v. Woodhouse, [1906] 2 K.B. 501, was not an authority for certiorari in a case like this. The object of certiorari was to get rid of the judgment. It was argued that, the answers to the questions put to the plaintiff by counsel being the only evidence, there would be nothing upon which the judgment could rest, and the plaintiff would be at liberty to go to trial.

The action was dismissed by the County Court Judge. It was said that the reasons given were not in fact reasons; and it was said that there was no power on examination for discovery to elicit—and particularly in the absence of the plaintiff's solicitor—the alleged fact that the plaintiff did not authorise the bringing of the action. Apart from collusion between the plaintiff and the defendant's solicitor—which was alleged—the case was just one of a decision alleged to have been given upon improper evidence. If the case had been decided upon improper evidence, an appeal would lie; and, that being so, certiorari ought not to be granted.

*Motion refused.*

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SUTHERLAND, J. FEBRUARY 14TH, 1916.

## MILLAR v. PHILIP.

*Principal and Agent — Agency for Sale of Land — Purchase by Agents in Name of Third Person—Contract under Seal between Principal and Third Person—Liability of Agent as Undisclosed Principal—Liability for Damages for Loss Occasioned by Sale to Person without Means—Damages—Return of Commission—Costs.*

Action by Charles Millar against William Philip, R. B. Rice & Sons, and W. C. Tolton, to establish a joint liability of all the defendants for an indebtedness under an agreement for the sale of land by the plaintiff to the defendant Philip, upon the ground that the other defendants were undisclosed principals

in the purchase in the name of Philip, the plaintiff having entered into the contract by mistake and in ignorance caused by the defendants' fraud, deceit, and breach of duty. The plaintiff claimed judgment for $17,455.49 and interest, damages against the defendants R. B. Rice & Sons and Tolton for breach of duty to the plaintiff as his agents, and to recover $562 paid to the defendants R. B. Rice & Sons as a commission.

The action was tried without a jury at Toronto.

W. N. Tilley, K.C., for the plaintiff.

W. H. Irving, for the defendants.

SUTHERLAND, J., after setting out the facts in a written opinion, found, upon the evidence, that Rice, whose firm was the agent of the plaintiff for the sale of the lots in a subdivision, proposed and advised a sale to an undisclosed purchaser at a price less than that previously fixed by the plaintiff, and on terms of payment less advantageous to the plaintiff; that the plaintiff agreed to sell 20 lots at a price of $46 a foot; and that thereupon a contract of purchase was executed under seal by the defendant Philip for the purchase of the 20 lots at the price named, and upon terms of payment easier than those stipulated for in previous contracts; that Rice failed to disclose that he or his firm was interested in the purchase; and that the plaintiff would not have made the reduction in price had he known the facts. The learned Judge also found that the allegations of the plaintiff in regard to the conduct of R. B. Rice & Sons as his agents had been substantially proved; and that the defendant Tolton was not an agent of the plaintiff, but was an undisclosed principal of Philip; that Philip is a man of no means; that the defendants R. B. Rice & Sons, by violation of their duty to the plaintiff, occasioned loss to him for which they were responsible; and that the plaintiff could have sold the land at a better price.

Discussing the law applicable, the learned Judge said that it is well-established that "no principal may sue or be sued on any deed . . . unless he is described as a party thereto and it is executed in his name:" Bowstead's Law of Agency, 5th ed. (1912), p. 311; Halsbury's Laws of England, vol. 1, p. 208, para. 442. Philip was the agent or representative in the transaction of R. B. Rice & Sons and Tolton, and the contract was under seal; but it was argued that, as it did not require to be under seal, the plaintiff was not precluded from having a judgment against the undisclosed principals: Mechem on Agency, 2nd

ed., p. 159; McCarthy v. Cooper (1884-5), 8 O.R. 316, 12 A.R. 284; but that principle could not be applied in the present case so as to justify a judgment against R. B. Rice & Sons and Tolton on the contract or a judgment against Tolton on any ground.

The plaintiff, however, was entitled to damages and a return of the commission.

If the defendants R. B. Rice & Sons are willing, either alone or in conjunction with the defendant Tolton—he being also willing—to agree to pay the obligations of the defendant Philip under the contract, they may be permitted to do so, in which case judgment will go accordingly, and for a return of the commission, with costs against the defendants. If they are unwilling, judgment is to be entered against the defendants R. B. Rice & Sons for the amount of the commission and damages at the rate of $20 per foot for the loss sustained by the plaintiff in consequence of their breach of duty to him as agents, and setting aside the contract and declaring that the land is the property of the plaintiff, with costs against R. B. Rice & Sons; no costs to or against the other defendants.

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BOYD, C., IN CHAMBERS. FEBRUARY 15TH, 1916.

## *REX v. LEITCH.

*Liquor License Act—Offence against sec.* 141—*Person Found Intoxicated in Local Option Municipality—"Public Place"—Amending Act,* 5 *Geo. V. ch.* 39, *sec.* 33—*Blacksmith's Shop—Conviction—Finding of Magistrate.*

Motion to quash the conviction of the defendant by a magistrate for an offence against sec. 141 of the Liquor License Act, R.S.O. 1914 ch. 215: "Where in a municipality in which a local option by-law is in force or in which no tavern or shop license is issued, a person is found upon a street or in any public place in an intoxicated condition . . . he shall be guilty of an offence against this Act." By clause (*a*), added by 5 Geo. V. ch. 39, sec. 33, "public place" includes "any place, building or public conveyance to which the public habitually resort or to which the public generally are admitted either free or upon payment," etc.

James Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

THE CHANCELLOR said that there was some evidence that Leitch was seen in an intoxicated condition in Morris's blacksmith shop, in the village of Newburg.

Judicial notice may be taken that in the ordinary country village the forge of the village blacksmith is a place of popular resort when work is going on. Several people were congregated in this shop on the day in question, talking about horses and races and passing the time.

The amendment by which clause (*a*) was added was subsequent to the decision in *Rex* v. *Cook* (1912), 27 O.L.R. 406.

"Public place" is a fluctuating term, and the meaning varies with the context; but see Regina v. Wellard (1884), 14 Q.B.D. 63—"A public place is one where the public go, no matter whether they have a right to go or not."

*Motion dismissed with costs.*

[See Rex v. Clifford, ante 344.]

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BOYD, C., IN CHAMBERS. FEBRUARY 16TH, 1916.

## *REX v. ARMSTRONG.

*Liquor License Act — Offence against sec. 78 — Attempting to Tamper with Witnesses upon Prosecution under Act—Convictions—Powers of Provincial Legislature—Validation of Ultra Vires Enactment by Dominion Legislation—Canada Temperance Act, R.S.C.* 1906 *ch.* 152, *sec.* 150—*Want of Certainty in Informations and Convictions—Conviction by two Justices—Adjudication by one only—Attempt to Tamper before Prosecution—"On any Prosecution."*

Motion to quash two convictions of the defendant made by two Justices of the Peace, under sec. 78 of the Liquor License Act, R.S.O. 1914 ch. 215, for attempting to tamper with two witnesses upon a prosecution of the defendant for keeping intoxicating liquor for sale without a license, in violation of the provisions of that Act.

G. H. Kilmer, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

THE CHANCELLOR said, in reference to the main objection, that sec. 78 of the Liquor License Act to-day was in the same

words as sec. 57 of the Act in force when Regina v. Lawrence (1878), 43 U.C.R. 164, was decided—R.S.O. 1877 ch. 181—and the enactment was in that case regarded as beyond the powers of the Provincial Legislature, as it had to do with the crime of subornation of perjury—a crime already dealt with by the Parliament of Canada in its criminal law enactments. Section 57, notwithstanding that decision, was retained unaltered upon the Provincial statute-book. The explanation was to be found in sec. 114 of the Canada Temperance Act, 1878, 41 Vict. ch. 16 (Dom.), which is practically in the same words as sec. 57, with the addition of words applying it to prosecutions under local liquor laws of the Provinces. This is still in force in R.S.C. 1906 ch. 152, sec. 150. The effect is to validate what is now sec. 78 of the Liquor License Act.

Reference to Regina v. Gibson (1896), 29 N.S.R. 88, 89; Kerley v. London and Lake Erie Transportation Co. (1912), 26 O.L.R. 588, 594.

On this ground the convictions are immune from attack.

The objection as to want of certainty in the information and conviction could not prevail: the words of the statute were followed; there was no misapprehension of what was involved; and the point was covered by Regina v. Lawrence, supra.

Another objection was, that judgment was given by one Justice in the absence of the other. It appeared that judgment was reserved, and that one of the Justices announced the result of the consideration of the case by the two. The conviction was signed by the two, and the adjudication was in fact by the two. The opinion of Barker, C.J., in Rex v. Haines (1908), 39 N.B.R. 49, was to be preferred to that of Gregory, J., in the same case. This objection was overruled.

The remaining objection, viz., that the attempt to tamper was before the initiation of the prosecution, applied to one of the convictions only. The words of sec. 78, "Any person who, *on any prosecution* under this Act, tampers," etc., contemplate a prosecution actually begun: Ex p. White (1890), 30 N.B.R. 12, 14; Regina v. Le Blanc (1885), 8 Legal News (Montreal) 114.

The conviction for the offence in regard to the witness Hyde was affirmed with costs.

The conviction for the offence in regard to the witness McArthur was quashed without costs.

BOYD, C. FEBRUARY 17TH, 1916.

## RE PALMER.

*Will — Construction — Annuities — Payment out of Particular Funds—Termination of Annuities at Deaths of Annuitants —Repugnant Clause—Residuary Devise—Rents.*

Motion by the executor and the trustees under the will of Catharine Palmer, deceased, for an order determining 5 questions arising in the distribution of the estate in regard to the proper construction of the will.

The testatrix died in Ireland. She devised her real estate in Ontario to her executors in trust to sell and from the income arising from the real estate until sale and from the proceeds after sale to make the following payments: (1) to her daughter Katharine during her life and after her death to her children an annuity of £135, to be the first charge upon the estate, and "as the several annuities hereinafter bequeathed fall in the amounts thereof or so much as may be necessary shall be added year by year to the said annuity . . . until it shall be increased to . . . £300 . . . and then shall continue at that amount;" (2), (3), (4), (5), (6) annuities to her step-children; (7) to her daughter-in-law Clara an annuity of $200 during widowhood. The testatrix then directed that if the income from the property should at any time be insufficient to provide in full for the annuities, the same (excepting the £135 a year to Katharine and her children) should be proportionately reduced; and after the sum of £300 a year for Katharine should be made up, the testatrix directed that from such of the said annuities as should fall in from time to time the amounts of such annuities, or so much as should be necessary, should go from year to year as annuities to her sons Harry and Thomas until the same should reach £50 a year each, and then should continue as an annuity to each of them for his natural life of £50 a year, in addition to the other bequests made in their favour in the will, and at the death of each his annuity should be disposed of as he should appoint.

The questions were as follow:—

1. Are the sons Harry and Thomas entitled to the annuities directed to be paid to them by the will?

2. Are the same payable only out of funds set free by the falling in of preferred annuities, or are the said annuities chargeable against the estate of the deceased generally.

3. Have these two annuitants respectively any right to disposition of such annuities or of capital funds from which the said annuities arise after their deaths respectively, or do the said annuities terminate upon the death of them respectively?

4. Is Katharine, as residuary devisee and legatee under the will of the deceased, entitled to the real estate referred to in the will as in the occupation of Harry or to the price or proceeds of the sale or setting apart thereof to or for him, as provided for in the will?

5. And is she entitled to the rents which have been paid by him for the said real estate from the time of the death of the testatrix?

The motion was heard in the Weekly Court at Toronto.

G. H. Sedgewick, for the executor and trustees.

H. E. Rose, K.C., for Katharine E. Handcock.

Grayson Smith, for Harry B. S. Palmer and Thomas L. Palmer.

A. W. Langmuir, for A. L. Palmer and Mrs. Clara Kelly.

THE CHANCELLOR answered the first question, "Yes."

To the second question he answered that the annuities to Harry and Thomas are payable out of such annuities as fall in from time to time, and are not chargeable against the estate generally.

In regard to the third question, the Chancellor said that the added clause, "At the death of each of them respectively his annuity shall be disposed of as he shall by deed or will appoint," was repugnant to the gift for natural life; and the explicit limitation in time was not controlled and overruled by these subsequent words. The third question should be answered by saying that the annuities terminate on the death of the sons.

The fourth question is answered by saying that Katharine is entitled to the real estate in Muskoka as residuary legatee and to the rents derived therefrom since the death of the testatrix—on the assumption that the trustees have not thought fit to acquire that estate as an investment for the son Harry.

The fifth question is answered by the fourth.

Order accordingly; costs out of the estate.

PEPPIATT v. REEDER—KELLY, J.—FEB. 14.

*Reference—Scope of—Ascertainment of Damages for False Statements—Evidence Negativing Fraud—Rental Value of Premises—Limiting Number of Witnesses—Rulings of Master—Appeal—Costs.*]—Appeal by the defendant from rulings of the Master in Ordinary upon a reference. The appeal was heard in the Weekly Court at Toronto. The learned Judge said that what the Master had to do was to ascertain what damages the plaintiff had sustained by reason of the defendant's false and fraudulent statements mentioned in the pleadings: see Peppiatt v. Reeder (1915), ante 121. The Master limited to two the number of witnesses to be called by the defendant on the question of the rental value of the lands and premises, and intimated his refusal to admit evidence negativing the defendant's fraud. The appeal was against these rulings. It had already been determined in appeal that the lease, as well as other documents in question, was procured by the false and fraudulent statements, representations, and actions of the defendant. Evidence directed solely to that question should not be admitted by the Master. As to that ruling the appeal should be dismissed. The Master did not follow the proper course in limiting the number of witnesses as he did. The appeal from that ruling should be allowed. By the terms of the reference to the Master, the costs thereof are to be in his discretion; and, if either party unnecessarily adds to those costs, it may be a matter for the Master's consideration when making his report and disposing of the costs. Costs of the present appeal to be disposed of by the Master with the costs of the reference. J. J. Gray, for the defendant. Edward Meek, K.C., for the plaintiff.

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MAY v. MAY—BRITTON, J.—FEB. 14.

*Husband and Wife—Alimony—Evidence—Dismissal of Action—Costs—Disbursements—Rule* 388.]—An action for alimony, tried without a jury at Cayuga. Upon the evidence, the learned Judge held, the plaintiff was not entitled to succeed. Action dismissed. The defendant is to pay to the plaintiff's solicitor actual disbursements properly made: Rule 388. R. S. Colter, for the plaintiff. H. R. Morwood, for the defendant.

CLAREY V. MISKELL—SUTHERLAND, J.—FEB. 14.

*Landlord and Tenant—Recovery of Possession by Landlord—Rent—Account—Payment into Court—Costs.*]—Action by the lessor of a moving picture theatre against the lessee to recover possession of the premises and for rent, taxes, license fees, etc. The plaintiff obtained judgment for possession by default, and took possession. The money claim was in dispute, and the trial thereof took place, without a jury, at Ottawa. The sum of $235.57 was paid into Court by the defendant, but there was no tender before action. The learned Judge disposed of the disputes arising upon the evidence in a written judgment in which he stated his findings of fact. His conclusion was, that $235.57 was, at the time it was paid into Court, a substantial payment of everything due by the defendant to the plaintiff. The plaintiff was compelled, however, to bring the action; and he should be allowed $75 as costs down to the time the money was paid in; no costs otherwise in the action to either party. F. A. Magee, for the plaintiff. A. W. Fraser, K.C., for the defendant.

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BOYD V. BRODIE—KELLY, J.—FEB. 14.

*Evidence—Conflict of Testimony—Finding of Fact of Trial Judge—Principal and Agent—Investment—Liability of Agent.*]—The plaintiff sought in this action to make the defendant account for $2,000 which, as was alleged, the defendant received from the plaintiff as the plaintiff's agent. This was money which the plaintiff paid to purchase a share or interest in a mining property, in which the defendant also invested $500. The plaintiff asserted that he was induced to enter into the transaction by the defendant's representations (1) that he (the defendant) was investing in the enterprise an equal amount with the plaintiff; and (2) that the transaction was one in which there would be a quick turn-over. The purchase was made about the end of April, 1909. The action was tried without a jury at Toronto. The learned Judge, after reviewing the evidence in a written judgment, said that, because of the remarkable contradiction between the stories of the plaintiff and defendant respectively, he had gone over the whole case with much anxiety; and, after the most careful consideration, he found no reason for believing the plaintiff's story rather than the defendant's.

Moreover, whatever surrounding light was cast upon these contradictory stories was in favour of accepting the defendant's evidence rather than that of the plaintiff. Action dismissed with costs. T. H. Lennox, K.C., and C. W. Plaxton, for the plaintiff. J. J. Maclennan, for the defendant.

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AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED—BOYD, C., IN CHAMBERS—FEB. 19.

*Libel—Discovery—Defences—Justification — Fair Comment —Particulars—Examination of Officer of Plaintiff Company—Special Damage—Diminution of Profits—General Damage.*]—Appeal by the defendants from the order of the Master in Chambers, ante 453, refusing the defendants' motion to compel better discovery by the president of the plaintiff company upon viva voce examination therefor. The Chancellor dealt with the questions which the president refused to answer upon his original examination, and pointed out, in a written memorandum, which questions should be answered and which need not be answered. Certain of the questions related to damages (the action being for libel); and, as no special damage was alleged, the questions could not be asked in the form in which they were put; but the Chancellor followed the course indicated in Blachford v. Green (1892), 14 P.R. 424, and said that, if the plaintiffs alleged diminution of profits, particulars should be given and the examination continued on that line; but, if there was no such claim, there should be no discovery as to general damage. Appeal allowed in part. Costs of the application and appeal to be costs in the cause. G. M. Clark, for the defendants. W. J. Elliott, for the plaintiffs.

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## CORRECTION.

IN SHAW v. UNION TRUST CO. LIMITED, ante 455, line 9, for "378" read "278."