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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 29TH, 1919.

*WALKER v. MARTIN.

Motor Vehicles Act—Injury to Person on Foot in Highway by Motor Vehicle Driven by Daughter of Owner—Negligence of Driver—Liability of Owner—Vehicle in Possession of Daughter without Consent of Father—"Person in the Employ of the Owner"—Absence of Contractual Relationship—R.S.O. 1914 ch. 207, sec. 19, as Amended by 7 Geo. V. ch. 49 sec. 14.

Appeal by the plaintiff from the judgment of MASTEN, J., 16 O.W.N. 220, 45 O.L.R. 504, dismissing the action as against the defendant, Edward E. Martin.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Shirley Denison, K.C., for the appellant.

George Lynch-Staunton, K.C., and W. H. Barnum, for the defendant Edward E. Martin, respondent.

THE COURT were of opinion that the plaintiff's injuries were not caused by any violation of the Motor Vehicles Act; that the defendant Vivian Martin, the driver of the car, was answerable in damages for the plaintiff s injuries, apart from any of the provisions of the Act; but, if that were not so, she alone was liable under the provisions of the Act. The Court agreed with the trial Judge that the defendant Vivian was not in the service of her father, the other defendant, and had taken his motor vehicle without his consent and in disobedience to his orders.

Appeal dismissed with costs.

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

SECOND DIVISIONAL COURT. SEPTEMBER 29TH, 1919.

*STEVENSON v. TORONTO BOARD OF EDUCATION.

Schools—Garment of Pupil Taken from Cloak-room—Liability of Board of Education for Loss—Negligence

An appeal by the defendants from the judgment of the First Division Court of the County of York in favour of the plaintiff, the father of a pupil at one of the schools under the defendants' jurisdiction, in an action to recover damages for the loss of a coat which was taken from the cloak-room in the school building.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

E. P. Brown, for the appellants.

G. T. Walsh, for the plaintiff, respondent.

MEREDITH, C.J.C.P., giving the judgment of the Court at the close of the hearing, said that Boards of Education are not insurers of school-children's clothing: they are responsible for its loss or injury only when the loss or injury is caused by their negligence; that is, their want of reasonable care, the care which is ordinarily taken in similar circumstances.

There was no want of reasonable care proved in this case.

The board provided two rooms, the one for girls and the other for boys, conveniently situated, where they respectively might leave their over-clothing during school hours.

The plaintiff's daughter hung her overcoat in the girls' room, on going in to school: it was gone when she sought it on going out.

There was no evidence of any kind shewing how or when or by whom the coat was taken from the cloak-room. That it was taken by a thief, not connected with the school in any way, seemed improbable.

The cloak-room in which it was put by the girl was well within the school building. An outer door, and in one way a vestibule and an inner door, had to be passed through, then a hall, and then another hall had to be entered, and the cloak-room door passed through; and doors opening from class-rooms in one of the halls had also to be passed, before the cloak-room could be entered from without.

No one had suggested any better feasible means of accommodation for the pupils in this respect.

The case would be different if experience had proved the cloak-room in question an unsafe place.

Negligence of the defendants was not to be found in any of the facts proved; and so, whether the cloak in question was stolen by some one not connected or by some one connected with the school, or was first taken by some other pupil by mistake or otherwise without intention to steal it, it could not be found that the defendants were answerable in damages for its loss.

The appeal should be allowed and the action dismissed.

SECOND DIVISIONAL COURT. OCTOBER 1ST, 1919.

NUGENT v. GUNN.

Negligence—Collision in Highway of Bicycle and Automobile—Injury to Bicyclist—Evidence—Onus—Motor Vehicles Act, sec. 23—Automobile Turning without Giving Visible or Audible Warning—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of ROSE, J., 16 O.W.N. 145.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellants.

J. E. Anderson, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 1ST, 1919.

JEANNETTE v. MICHIGAN CENTRAL R.R. CO.

Judgment—Action for Malicious Prosecution—Verdict of Jury in Favour of Plaintiff—Judgment Entered for Plaintiff and Affirmed by Appellate Court—Discovery of Fresh Evidence—Judgment Obtained by Fraud—Motion under Rule 523—Order of Judge in Court Directing New Trial—Appeal.

Appeal by the plaintiff from the order of LENNOX, J., 16 O.W.N. 137.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellant.

D. W. Saunders, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

CITY OF WINDSOR v. CURRY.

Assessment and Taxes—Income Assessment—Action to Recover Amount of Taxes Based on Assessment—Sworn Statement of Person Assessed on Appeal to Court of Revision—"Total Assessable Income"—Effect of Judgment of Court of Revision—Evidence of Person Assessed.

Appeal by the city corporation, the plaintiffs, from the judgment of the County Court of the County of Essex in an action to recover $229.80 for taxes on the income of the defendant. The judgment was for only $80.04, and the plaintiffs, by their appeal, sought to increase the amount.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

F. D. Davis, for the appellants.

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

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the assessment of which the respondent complained was imposed at his request, and upon his own affidavit, in his own handwriting, in which he unequivocally stated that his "total assessable income" was the amount of that assessment, $5,000.

The respondent was one of the heirs to an estate of great value at Windsor; and the assessment commissioner of that city, believing that the respondent should pay income tax, but being without knowledge of the amount of income, applied to him for a statement of it, in the manner provided for in the Assessment Act, at the same time sending to him a blank form of the return which the Act required; but the request met with no response; then a second and then a third were made with the same results. The commissioner then, instead of taking proceedings against the respondent under the Act for disregard of its provisions, adopted

the common, and generally very successful, expedient of assessing for a large sum—$35,000. The response was immediate, in the form of a notice of appeal against the assessment, and a request to the commissioner for another blank form so that the several items ineffectually requested return might be made. The form was given and filled in by the respondent himself and sworn to by him: it was then produced before the Court of Revision, and, upon it, the appeal against the assessment was allowed, and the amount of it reduced from $35,000 to $5,000.

In the face of these indisputable facts, how was it possible for the respondent in this action, brought to recover the proper tax imposed upon that assessment, to escape payment on the sole ground that he ought not to have been assessed?

Any contention that the assessment appeal was not made by or under the authority of the respondent was futile in the face of admitted facts.

The learned Chief Justice added that he was not inclined to accept as accurate the views expressed by the learned County Court Judge as to the effect generally of a judgment of a Court of Revision upon an appeal such as that made to the Windsor Court of Revision by the respondent; or to say that, upon such evidence as was adduced at the trial of this action, it could not reasonably be found that the respondent continued to be a resident of Windsor until the time of his marriage.

The appeal should be allowed and judgment be entered in the County Court for the amount of these taxes, as well as of those for which the appellants had judgment, with interest as the Act provides, and costs throughout.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

ABELL v. VILLAGE OF WOODBRIDGE.

Injunction—Interim Order—Appeal from—Refusal of Appellate Court to Treat Appeal as Motion for Judgment—Appeal from Interim Order Dismissed—Action to be Tried in Ordinary Way.

Appeal by the defendants from an order of MASTEN, J., in the Weekly Court, enjoining the defendants until the trial of the action from entering upon, trespassing upon, or interfering with the plaintiff's property in question in the action. See Abell v. Village of Woodbridge and County of York (1919), 45 O.L.R. 79, 15 O.W.N. 363.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

W. A. Skeans, for the appellants.

J. H. Moss, K.C., for the plaintiff, respondent.

Counsel agreed that the appeal should be treated as a motion for judgment.

THE COURT (after consideration) did not deem it fit to deal with the appeal as a motion for judgment, and therefore left all the matters involved in the action to be dealt with at the trial in the ordinary way, unprejudiced in any way by anything done upon the interlocutory application.

Treating the appeal as one against the interlocutory order made by Masten, J., merely, the Court dismissed it with costs to be costs in the action to the plaintiff in any event.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

*RE LYONS AND MCVEITY.

Landlord and Tenant—Lease for 14 Months—Rent Payable Monthly—Tenant Overholding and Paying Rent Monthly—Tenancy from Year to Year.

Appeal by Lyons, landlord, from an order of the Judge of the County Court of the County of Carleton, dismissing the appellant's application for a summary order for possession of premises demised to McVeity as tenant, under the overholding tenants provisions of the Landlord and Tenant Act.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL and LATCHFORD, JJ., and FERGUSON, J.A.

S. Clark, for the appellant.

T. R. Ferguson, for the tenant, respondent.

MEREDITH, C.J., in a written judgment, said that the question involved in this case was, whether the overholding tenant became a tenant from month to month or from year to year.

The origin of the tenancy was a lease, for a term of 14 months, of residential property, the rent payable monthly. During the long overholding the rent had been paid monthly.

The law in the case of overholding seemed to be yet that pronounced by Lord Mansfield in Right v. Darby (1786), 1 T.R. 159: "If there be a lease for a year, and by consent of both parties

the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year." See also Dougal v. McCarthy, [1893] 1 Q.B. 736; Oakley v. Monck (1866), L.R. 1 Ex. 159; Wedd v. Porter, [1916] 2 K.B. 91.

But, it need hardly be said, the supposition does not hold good against proof, direct or circumstantial, to the contrary. It is the agreement of the parties, not the dictation of Court or Judge, to which effect is to be given.

The mere fact that the rent was payable and was paid monthly is met by the fact that it was so when the term was one for 14 months; and the character of the property and length of possession were rather against than in favour of the contention for a monthly tenancy.

The presumption of a tenancy from year to year was not displaced, but seemed rather to be strengthened, by the evidence.

The appeal should be dismissed.

FERGUSON, J.A., agreed with the Chief Justice.

RIDDELL, J., agreed in the result, for reasons stated in writing.

LATCHFORD, J., read a dissenting judgment.

Appeal dismissed (LATCHFORD, J., *dissenting*).

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

*HERON v. COLEMAN.

Master and Servant—Liability of Master for Negligence of Servant—Passenger in Motor Vehicle Injured by Overturning of Vehicle—Hiring of Vehicle and Driver from Owner by Contractor for Supply of Vehicles—Owner of Vehicle Continuing to be Master—Finding of Trial Judge—Appeal.

Appeal by the defendant from the judgment of LOGIE, J., at the trial, in favour of the plaintiff, for the recovery of $500 damages and for costs. The action was for damages for injury sustained by the plaintiff by the overturning of the defendant's motor vehicle, in which the plaintiff was being carried as a passenger, by reason of the negligence of the driver, the servant of the defendant, as the plaintiff alleged.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

William Proudfoot, K.C., for the defendant.

G. S. Hodgson, for the plaintiff, respondent.

MIDDLETON, J., read a judgment in which he said that the trial Judge had found that the accident was caused by the negligence of the driver of the car, the defendant's servant; and the Court agreed with the trial Judge.

One Cullerton, who was in the livery business, was called upon to supply vehicles to convey guests from a wedding. He had not sufficient vehicles of his own; and, under some general understanding with the defendant, as the defendant said, Cullerton "ordered these two rigs to go to that address and get these people." The defendant's drivers went with his "rigs," and it was not suggested that Cullerton in any way assumed control of the cars or interfered with the drivers.

It was contended that the driver became the servant of Cullerton, and that Cullerton, and not the defendant, must be held liable for the driver's negligence.

The liability as master must cease when the relation of master and servant ceases; but, on the facts here, the defendant was always the master. He selected the driver, the driver was to be paid by him, and he alone had the judgment as to his fitness and the right to dismiss. The driver went, by the defendant's orders, to aid Cullerton in discharging his engagement to supply cars for the wedding, but the driver was still the defendant's servant.

Reference to Quarman v. Burnett (1840), 6 M. & W. 499; Laugher v. Pointer (1826), 5 B. & C. 547; Consolidated Plate Glass Co. of Canada v. Caston (1899), 29 Can. S.C.R. 624; Donovan v. Laing, [1893] 1 Q.B. 629.

Saunders v. City of Toronto (1899), 26 A.R. 265, distinguished.

The appeal should be dismissed.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

ROTHSCHILD v. TOWN OF COCHRANE.

Municipal Corporations—Destruction by Fire of Buildings in Town —By-laws Authorising Issue and Sale of Debentures to Provide Funds for Restoration—Validation by Statute—Remission of Taxes for one Year in Respect of Private Buildings Destroyed—Disposition of Surplus of Fund—Reduction of Taxation in Subsequent Years—Duty of Town Council.

Appeal by the plaintiff from the judgment of MASTEN, J., 16 O.W.N. 60.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellant.

E. G. Long, for the defendants, respondents.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the legislation contained in ch. 9 of the statutes of Ontario passed in 1917 permitted the defendants to borrow $40,000, in the manner in which they desired to do so as set out in the three by-laws of their council embodied in and confirmed by that legislation; and the substantial question raised by the plaintiff in this action was, whether they were bound to expend a large part of that borrowed money in reduction of the town's taxation in the years 1917 and 1918.

A substantial part of it was used in making good a deficiency in the taxes of the year 1916; and that the defendants admitted they were bound to do; but as to the other two years they asserted: (1) that they were under no such obligation; and (2) that there was no deficiency.

No obligation in respect of the taxes for either of the years 1917 and 1918 was even mentioned in any of the by-laws; and the last two expressly related to and made provision respecting the taxes in 1916 only. But, if either of the first two had created any such obligation, it would be controlled by the last, which alone provided for the circumstances with which the parties to this action were in this action concerned—that is, the disposition of the surplus of such moneys in the defendants' hands; and the last by-law expressly made very plain, in sec. 1, that that surplus which was to be disposed of as set out in it, was what was left of the borrowed $40,000 after taking out of it the defendants' loss resulting from the forest fires in 1916, and their deficit in 1916 by reason of the cancelling and rebating of part of that year's taxes.

In that year, taxes to the amount of about $5,000 were remitted on account of injuries sustained by the fires of that year, and to that extent there was necessarily a deficit to that amount; but there was no deficit in the succeeding years, and so no reason or excuse for the defendants using any of the borrowed money as if for taxation losses, even if they would have had power to do so had there been any such losses.

The defendants had been throughout, in good faith, giving effect to the legislation referred to; and there was no good reason or excuse for this litigation.

The learned Chief Justice stated and negatived the contentions made in support of the appeal and of the action.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

*CATALANO & SANSONE v. CUNEO FRUIT AND IMPORTING CO.

Sale of Goods—Contract for Supply of Fresh Fruit of Specified Size and Quality—Delivery of Fruit of Inferior Size and Quality—Action for Price—Representation and Warranty—Breach—Deduction from Contract-price—Ascertainment of Amount to be Deducted—Evidence—Allowances—Set-off—Damages—Payment into Court—Offer before Action—Costs—Appeal and Cross-appeal.

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of KELLY, J., 16 O.W.N. 109.

The appeal and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

R. S. Robertson, for the plaintiff.

D. B. Goodman, for the defendants.

RIDDELL, J., read a judgment in which he said that the plaintiffs were a firm of fruit-merchants, carrying on business in London, Ontario; the defendants were wholesale fruit-dealers, carrying on business in Toronto, who bought from the plaintiffs 700 crates of peaches in Toronto, the peaches to be of a specified size and quality. The plaintiffs sued for the price of the peaches, and the defendants set up a partial defence that the peaches were not as agreed. The trial Judge gave effect to the defendants' contention,

and directed judgment to be entered for the plaintiffs for $746.37, a sum considerably less than the amount sued for. Neither party was satisfied with this adjudication.

It was rightly found by the trial Judge that there was a representation and warranty, that the warranty was broken, and that the defendants were entitled to a reduction in the contract-price. This was not seriously disputed—the whole question was as to the amount of the reduction to be allowed.

The abatement of the price to be allowed on a breach of warranty is the amount by which the subject-matter is reduced in worth by reason of the breach of contract: Mondel v. Steel (1841), 8 M. & W. 858; cf. Davis v. Hedges (1871), L.R. 6 Q.B. 687.

It is the actual reduction in value that must be considered, not an estimate made by either party. The price obtainable for the goods may not be quite conclusive of the actual value, but it is strong evidence, and in case of doubt may be practically conclusive. It was fairly proved that the selling price of these peaches, as they should have been, was at least $2 per box.

The defendants used their best endeavours to sell the fruit to the best advantage, and the price realised might fairly be taken as the actual value, subject to what should be said as to claims by purchasers from the defendants.

The gross amount ralised was $1,023.60; but the defendants were obliged to make an allowance to certain of their customers by reason of the defects in the fruit, in all $69.35, making the net proceeds $954.25. Had the peaches been as they were represented, the amount would have been at least $1,400. The defendants then were damaged to the extent of $445.75, but of this $17.75 was due to damaged boxes, for which the plaintiffs were not responsible. At least $428 must be deducted from the purchase-price.

Reference to Dingle v. Hare (1859), 7 C.B.N.S. 145, and Randall v. Raper (1858), E.B. & E. 84.

There did not seem to be any probability of further claims being made, and there was no evidence of any sales that might result in claims. Nothing purely hypothetical should be taken into account.

The defendants were entitled also to an admitted set-off of $32, thus reducing the claim of the plaintiffs by $460, and making the amount to which they were entitled $709, which was $72.07 less than the amount paid into Court. The defendants should have the $72.07.

When it became apparent that the peaches were not up to warranty, the defendants sent their cheque for $740.25, asking the plaintiffs to accept it in full. On the evidence, it was doubtful whether this offer was formally without prejudice; but, in any

event, it was evidence only. Had the plaintiffs accepted the cheque, as the result shewed they should have, the matter would have been settled; but, having rejected it, they could not maintain that the defendants were in a worse legal position in fact than they would have been without it.

The statement of defence shewed that the defendants thought they were liable for $781.08. If the plaintiffs had accepted that sum, the action would have ended; but, as they did not, the defendants were not bound by their estimate.

The defendants paid $781.08 into Court, but that was not prejudicial to them, not being accepted in full: Rule 308; Barrie v. Toronto and Niagara Power Co. (1905), 11 O.L.R. 48.

The plaintiffs had recovered less than the amount paid into Court: they should pay the costs of the action subsequent to the payment in. They were offered, before action, more than they were entitled to: they should have no costs of the action up to the time of payment in.

The plaintiffs failed on both the appeal and the cross-appeal; the defendants succeeded in both; and the plaintiffs should pay the defendants' costs of both.

The judgment should be that the defendants receive out of Court the sum of $72.07, also the amount of their costs from and after the payment into Court, including the costs of the appeal and cross-appeal. If the amount in Court is not sufficient to pay the $72.07 and the costs, the plaintiffs should pay the balance; if there should be any balance in Court after payment of the $72.07 and the costs, the plaintiffs should receive it.

Reference to Powell v. Vickers Sons & Maxim Limited, [1907] 1 K.B. 71; Best v. Osborne (1896), 12 Times L.R. 419.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., agreed in the result, with some hesitation, for reasons briefly stated in writing.

Judgment below varied in defendants' favour.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

*DAVIS v. BEGGS.

Principal and Agent—Agent's Commission on Exchange of Properties —Action for—Necessity to Shew Agreement in Writing Separate from Sale Agreement—Statute of Frauds, sec. 13—6 Geo. V. ch. 24, sec. 19—8 Geo. V. ch. 20, sec. 58—Sale Agreement Formed by Offer and Acceptance—Acceptance and Commission Agreement under one Signature of Party Charged—Necessity for Using Separate Pieces of Paper.

Appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff in an action by a land agent for commission on an exchange of properties. At the trial judgment was given for the plaintiff for $650 and costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. Singer, for the appellant.

A. A. Macdonald, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that a document was produced containing an offer by a person to exchange, and containing this clause: "I agree to pay the regular commission on execution of agreement hereof on total sale of my property herein mentioned, and the same shall form part of the purchase-money." This is the usual clause inserted in a land sale contract, and is intended to place the liability to pay a commission beyond doubt. The offer was not signed by the defendant but by the other party to the exchange. Below the offer so signed there was a typewritten clause containing an acceptance and the words: "I agree to pay a commission on $26,000 at 2½ per cent. my property herein mentioned on execution of this agreement to F. E. Davis, and the same shall form part of the purchase-money and also provided sale is not closed for any reason whatever no commission is to be paid or charged . . ." This was signed by the defendant.

The Legislature in 1916, by 6 Geo. V. ch. 24, sec. 19, amended the Statute of Frauds by adding the following: "13.—(1) No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith . . ."

In 1918 the Legislature amended the section by making it necessary that "the agreement upon which such action shall be

brought shall be in writing separate from the sale agreement and signed by the party," etc.: 8 Geo. V. ch. 20, sec. 58.

The agent, to succeed in an action for a commission, must have (1) an agreement, (2) in writing, (3) separate from the sale agreement.

Assuming that the plaintiff has an agreement in writing, the statute requires that this shall be separate from the sale agreement. The "sale agreement" is the offer to exchange and the acceptance of the offer. The agreement to pay commission is not separated from the acceptance, i.e., from the sale agreement—it is complicated with it in such a way that the signing of the one is the signing of the other.

It was argued that the agreement to pay commission was separate from the sale agreement because the signature of the defendant was to two separate and distinct agreements; but this could be said of any agreement to pay commission.

The statute must be given a common sense interpretation, and that could only be that the agreement must be so separate that the land-owner is not obliged to sign both when signing one, and is not obliged to pay a commission on penalty of not having a contract for sale.

It is not necessary to decide in this case that the agreements must be on separate sheets of paper. A land agent who fails so to separate them will, however, have no cause of complaint if a Court should so hold. There can be no possible objection to separate papers, and a contrary course would indicate a desire to get round the statute.

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

MIDDLETON, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., and LATCHFORD, J., agreed in the result, for reasons stated by each in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

CANADIAN FREEHOLD SECURITIES CO. LIMITED v. McDONALD.

Evidence—Assignment to Plaintiffs of Contract of Defendant to Purchase Land in Saskatchewan—Action for Specific Performance—Defence Based on Misrepresentation—Proof of—Conflict of Oral Testimony—Inferences from Documentary Evidence—Finding of Trial Judge—Reversal on Appeal—Equities Available against Assignees.

Appeal by the defendant from the judgment of ROSE, J., 16 O.W.N. 139.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

T. G. Meredith, K.C., for the appellant.

W. T. McMullen, for the plaintiffs, respondents.

LATCHFORD, J., reading the judgment of the Court, said that the learned trial Judge accepted Mr. Hegler's denial of the defendant's statement that Mr. Hegler represented that any defence based upon misrepresentation made by Marsden or Mountain would be open to the defendant as against the plaintiffs, if the defendant entered—as he did—into a covenant with the plaintiffs to pay them the amount payable under the original agreement with Mountain. Upon that covenant the plaintiffs' right of action depended.

The result arrived at was, no doubt, open to the Court below, notwithstanding the fact that Mr. Hegler was the solicitor on the record for the plaintiffs, and therefore materially interested in the outcome of the action, and that he testified to the good repute of the defendant.

But the case did not turn wholly upon the credibility of these witnesses. Regard must be had to documentary evidence of the utmost significance, from which the proper inference had not been drawn—the letter addressed to the defendant by Mr. Hegler himself, on the 1st May, 1916, when he had no interest in the present litigation. Properly regarded, it directly contradicted Mr. Hegler's evidence at the trial, and confirmed the testimony of the defendant. "I told you," Mr. Hegler states, "that your acknowledgment would in no way affect your original contract with Mr. Mountain, and that, notwithstanding your executing that acknowledgment, any defence you might have as between you and Mountain would not be prejudiced by you signing the agreement in any way, because the Canadian Freehold, in taking

the assignment of this contract, would take it subject to all equities as between you and Mr. Mountain, because under that agreement I still consider and told you that you would in no way commit or obligate yourself as between them to the prejudice of any defence you might have upon the same as between you and Mr. Mountain."

Mr. Hegler was one of His Majesty's counsel learned in the law, and must be taken to have used the word "equities" in its ordinary legal sense. The context itself precluded other meaning. The conclusion that what Mr. Hegler in 1918 thought he said to the defendant in 1913 was to be believed as against what he wrote in 1916, could not be accepted.

The proper inference had not been drawn from this letter, and might now be drawn by this Court: Russell v. Lefrançois (1883), 8 Can. S.C.R. 335; Cameron v. Bickford (1884), 11 A.R. 52; Fleuty v. Orr (1907), 13 O.L.R. 59.

The defendant's covenant having been procured by Mr. Hegler on the representations stated in the letter of the 1st May, the defences open to the defendant as against Mountain, on whose behalf a material misrepresentation had been found to have been made, were open to the defendant as against the plaintiffs. The defendant was entitled to invoke against the plaintiffs all the equities he could have invoked against their assignor, and so was entitled to succeed in this action.

Appeal allowed with costs.

SECOND DIVISIONAL COURT. OCTOBER 3RD, 1919.

D'NELLY v. UNION CONE CO.

Trade Name—"Real Cake Cones"—"Ideal Cake Cones"—Secondary Meaning—Evidence—Deception—Passing off—Injunction.

Appeal by the defendants from the judgment of LOGIE, J., at the trial, in favour of the plaintiff, in an action to restrain the defendants from passing off their goods as those of the plaintiff.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

McGregor Young, K.C., and S. Factor, for the appellants.

J. M. Ferguson and J. P. Walsh, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the ground upon which the plaintiff sought relief was that the defendants were deceiving the public to the plaintiff's loss, and, at the trial, attention seemed to have been directed entirely to the

defendants' deliquencies: relief may of course, and ordinarily should, be granted against such deception causing such a loss; but, if in truth granting such relief should aid the plaintiff in a more serious deception of the public to their loss, such relief should not be granted.

The plaintiff's claim was a peculiar one: he had been for only a few years engaged in the business in question—indeed such a business had sprung into existence within a time which might be not inaccurately described as only a few years; and he had been carrying on that business in the name of a company, though he was not a company nor was he in company with any one in it.

The plaintiff claimed the exclusive right to the use of the words "real cake cones" in his business of a maker of ice-cream "cones."

With the past few years the making of such cones had begun and had since grown enormously. Originally, apparently, the cones were not made of cake, though they looked as if they were; and hence, apparently, the need for the use of the word "real" in connection with cake as descriptive of cones actually made of cake.

The combination of real cake and real ice-cream in a way in which both could be eaten together without the aid of a spoon, and standing or walking as well as sitting, and at any time, gave a great impetus to the trade in ice-cream and made an extensive new trade in "cones." So that now, if any one could by any means acquire a monopoly of the real cake cone trade, a fortune could be soon made by him out of that large portion of the public which indulged in ice-cream cones.

It was not contended that the plaintiff exclusively controlled the words "cake cones." But, if he should succeed in this action, he would be in substantially the same position as if he did rightly so claim, and so have a monopoly of the cake cone trade, through a deception of the public, to their loss, by means of the judgment and order of the Court.

For, if the Court restrain all other makers of cones from using the words "real cake" as descriptive of the material of which these cones are made, what conclusion is the public likely to draw except that the plaintiff is the only maker of real cake cones, that all other makers are at best makers only of imitation cake or false cake cones? And in these days, as well as others, it need hardly be said that a monopoly means higher prices.

No one has a right to appropriate to his own use such words as "real cake" and then ask any Court to aid him in putting them to any such possible base uses.

But, quite apart from any such considerations, how was it possible to say, upon any evidence adduced in this action, that the words "real cake," as applied to ice-cream cones, had, by reason of the plaintiff's use of them, lost their real meaning and acquired

instead the meaning of the plaintiff's cones only. Any such suggestion was preposterous. "Real cake" means real cake; that is all the public is concerned in. Is it real cake, the proper accompaniment of ice-cream, or is it some imitation or substitution uneatable or indigestible? As to shape, all cones are made in the same shape, and as to ornamentation there is nothing distinctively different.

The consumers know nothing and care nothing who the maker may be, so long as the cone is real cake; and no one, and especially no one in the ice-cream trade, could think from the name alone, that "Ideal cake cones" and "Real cake cones" were the same thing. "Cake cones" are admittedly free words, and, being so, how can the word "Ideal" bring them into a "Real" monopoly? In neither sound nor sight nor in meaning are they alike.

The injunction against actual deception was not moved against and should therefore stand: but the appeal should be allowed, and the action, in other respects, dismissed.

The plaintiff should have the general costs of the action; as to the issues upon which he fails there should be no order as to costs. The defendants should have their costs of this appeal.

Appeal allowed.

HIGH COURT DIVISION.

ROSE, J., IN CHAMBERS. SEPTEMBER 30TH, 1919.

REX v. BEARDEN.

Criminal Law—Magistrate's Conviction—Warrant of Commitment—Misnomer of Defendant—Habeas Corpus—Production of Warrant by Gaoler—Issue and Lodging of New Warrant Describing Defendan by True Name—Amendment—Criminal Code, sec. 1124.

Motion for the discharge of the defendant from custody under a warrant of commitment issued by a magistrate.

T. R. Morris, for the defendant.
Edward Bayly, K.C., for the Crown.

ROSE, J., in a written judgment, said that there had not been a formal return to the writ of habeas corpus, but upon the return of the motion for the discharge of the prisoner the gaoler appeared and produced the writ and the warrant of commitment.

Upon the hearing, all points taken upon behalf of the prisoner were disposed of adversely to him, except one point upon which judgment was reserved, viz., that, whereas his true name was Russell Bearden, he was called in the warrant of commitment "Russell Reardon."

Counsel for the Crown suggested that it was a case for the exercise of the power of amendment conferred upon the Court by sec. 1124 of the Criminal Code. The learned Judge thought that there was evidence which, if believed, justified the magistrate in convicting the prisoner; but felt that he could not say that upon perusal of the depositions he was satisfied that an offence of the nature described in the conviction had been committed: therefore, he thought that he had no power under sec. 1124.

Since the hearing of the motion, a warrant of commitment, bearing the same date as the one produced upon the hearing and describing the prisoner as Russell Bearden, had been handed in. There seemed to be no doubt as to the power of the magistrate to issue this new warrant; there was no necessity for the amendment of a return—there was no formal return—and, the only ground upon which judgment was reserved failing in fact, whatever might be its merit as a point of law, there was nothing to do but to remand the prisoner into custody.

Order accordingly.

SUTHERLAND, J., IN CHAMBERS. SEPTEMBER 30TH, 1919.

BRAGG v. ORAM.

Costs—Scale of Costs—Action Brought in Supreme Court—Injunction—Damages—Value of Land in Question—Jurisdiction of County Courts—County Courts Act, R.S.O. 1914 ch. 59, sec. 22 (c), (i).

Appeal by the defendant from the ruling of the Taxing Officer that the costs of this action, which was brought in the Supreme Court of Ontario, should be taxed on the scale of that Court.

W. E. Raney, K.C., for the defendant.
J. M. Ferguson, for the plaintiff.

SUTHERLAND, J., in a written judgment, said that the action was brought to restrain the defendant from obstructing certain streets shewn on a plan, by ploughing them and growing crops, and to compel the defendant to restore the streets to their former

condition, and for damages for the loss sustained by the plaintiff by reason of the blocking of the streets by the defendant. No particular sum was claimed as damages. See Bragg v. Oram (1919), 16 O.W.N. 222. The judgment in the action was for an injunction and that the defendant should pay to the plaintiff "his costs of the action."

Evidence taken before the Taxing Officer disclosed that the lands were worth from $700 to $1,800.

The defendant contended that the action was one for injury to land, and within the jurisdiction of a County Court, relying on sec. 22 of the County Courts Act, R.S.O. 1914 ch. 59, which provides that Courts shall have jurisdiction in "(*c*) Actions for trespass or injury to land where the sum claimed does not exceed $500, unless the title to the land is in question, and in that case also where the value of the land does not exceed $500, and the sum claimed does not exceed that amount."

The Taxing Officer was right in his conclusion that this action, though there was an incidental claim for damages, was in the main one to prevent the defendant from obstructing, to the detriment of the plaintiff, certain streets leading to his land and affording access thereto The injunction which was asked to restrain the defendant from this interference was the main thing in question. The judgment at the trial made this plain. Thus clause (*c*) of sec. 22 was not applicable nor conclusive against the plaintiff. Clause (*i*), "All other actions for equitable relief where the subject matter involved does not exceed in value or amount $500," did not apply because the subject-matter involved was the land of the plaintiff, which exceeded $500 in value.

Appeal dismissed with costs.

SUTHERLAND, J. SEPTEMBER 30TH, 1919.

RE MCDONALD.

Will—Construction—Bequest to Widow of Right of Occupancy of Dwelling-house for Life or until House Sold—Liability of Widow to Pay Taxes—Legacy of Lump-sum to Widow—Payment Made by Executor in Instalments—Payment of Interest from Death of Testator—Right of Executor to Recover Interest Paid for first Year—Right of Widow to Dower in Addition to Legacy.

Motion by the executor of the will of William McDonald, deceased, for the advice and opinion of the Court on certain questions arising upon the will.

The motion was heard in the Weekly Court, Toronto.
L. A. Landriau, for the executor.
R. McKay, K.C., for Bridget McDonald.

SUTHERLAND, J., in a written judgment, said that the testator bequeathed $10,000 to his wife, Bridget McDonald; also all his household furniture; also the right to occupy free of rent the testator's dwelling-house during the remainder of her life or so long as she desired, "excepting as hereinafter provided." He then devised and bequeathed the "balance" of his estate, both real and personal, including all policies of life insurance, to his five children, naming them, to be divided equally among them—"If my executor deems it advisable at any time after my death to sell the property in which I am residing," that is, the dwelling-house first referred to, "he is to do so, and my widow is to give up immediate possession without any claim for dower, and the proceeds of the sale are to be divided equally between my five children above mentioned."

The first question was, whether the taxes on the dwelling-house should be paid by the widow or by the estate. The learned Judge said that it seemed clear that a tenant for life—unless the testator clearly indicated the contrary—must pay the "usual outgoings" such as land taxes: Jarman on Wills, 6th ed. (1910), p. 1214; and, if the widow was a life-tenant, she would be liable for the taxes. But her interest could not properly be called a life-interest. It was a mere right to occupy the property until a sale should be had, and there might be a sale whenever the executor deemed it advisable to sell. The taxes, therefore, should be paid by the estate.

The second question was, whether the widow was entitled to interest on her legacy of $10,000 before the expiration of one year from the death of the testator. It appeared that at the time of the testator's death there was no ready cash available from which to pay the legacy. The widow having represented to the executor that she had no money to live on, he began paying her interest on the legacy, monthly, at the rate of 5 per cent., during the first year. The testator died in July, 1915. Since that time he had been paying the legacy in instalments and paying interest on the balance thereof from time to time remaining unpaid.

The executor could not have been compelled to pay interest to the widow before the expiration of one year from the death of the testator: In re Whittaker (1882), 21 Ch. D. 657. It was contended, however, that the executor having paid interest expressly as interest, he could not now recover it from the recipient—he did not pay it under a mistake either of law or fact: Maskell v. Horner, [1915] 3 K.B. 106, at p. 117.

The learned Judge said that he had, with some hesitation, come to the conclusion that the executor could not recover the interest paid to the widow.

The testator died seised in fee simple of land other than that upon which the dwelling referred to stood. Prima facie any benefit given to a widow is in addition to her dower. No contrary intention being indicated in the will, the widow was entitled to dower in this other land and was not put to an election: Rudd v. Harper (1883), 16 O R. 422; Re Shunk (1899), 31 O.R. 175; Re Hurst (1905), 11 O.L.R. 6.

Order declaring accordingly; costs out of the estate—those of the executor as between solicitor and client.

SUTHERLAND, J., IN CHAMBERS. OCTOBER 1ST, 1919.

JARVIS v. O'HARA.

Assignments and Preferences—Action against Brokers for Money Claim—Assignment by Defendants for Benefit of Creditors pendente Lite—Claim Filed by Plaintiff in Action with Assignee—Identity of Claim with that Made in Action—Notice of Contestation Given by Assignee—Action not Brought to Establish Claim and Order of Judge Extending Time not Obtained within 30 Days—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 27—Order Adding Assignee as Defendant in Action and Amending Proceedings by Seeking Declaration of Right to Rank on Estate—Order Improperly Made.

Appeal by G. T. Clarkson, assignee for the benefit of creditors of the defendants, brokers, from an order of the Master in Chambers allowing the plaintiff to add the appellant as a party defendant and to amend the statement of claim by asking for a declaration that the plaintiff was entitled to rank upon the estate of the original defendants in the hands of the appellant.

Hamilton Cassels, K.C., for the appellant.
H. J. Scott, K.C., for the plaintiff.

SUTHERLAND, J., in a written judgment, said that the action was begun on the 12th December, 1917. The defendants were the firm of H. O'Hara & Co. and the individual members of the firm, Henry O'Hara and S. P. O'Hara. In August, 1918, Henry O'Hara died, and in the following month S. P. O'Hara, as sole surviving member of the firm, made an assignment for the benefit

of creditors to G. T. Clarkson. Thereafter, on the 18th September, 1918, the plaintiff filed with Clarkson a claim for moneys had and received by the firm to his use and other moneys. The plaintiff in an affidavit in support of his claim stated that he held no security therefor. At the instance of Clarkson, a notice of contestation of the claim was served upon the plaintiff on the 19th May, 1919; and no action was ever taken by the plaintiff thereafter to establish the claim against the assets of the defendant firm in the hands of the assignee.

The claim of the plaintiff in this action was undoubtedly the same as that filed with the assignee pursuant to the Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 26. By sec. 27 of the Act it is provided (1) that, at any time after the assignee receives proof of claim, notice of contestation may be served; and (2) within 30 days after the receipt of the notice, or within such further time as the Judge may allow, an action shall be brought by the claimant against the assignee to establish the claim; and, in default of such action being brought within that time, the claim to rank on the estate shall be forever barred. By sec. 2, "the Judge" means a Judge of the County or District Court. It appeared that no action was brought within the 30 days, and no order was obtained from a County Court Judge extending the time beyond 30 days.

In these circumstances, the Master could not properly make the order now in appeal, and it should be set aside with costs.

The learned Judge expressed no opinion as to whether the plaintiff could still properly apply to a County Court Judge for further time; but the order now made should be without prejudice to such an application.

ROSE, J., IN CHAMBERS. OCTOBER 1ST, 1919.

McKAY v. TORONTO R.W. CO.

Pleading—Statement of Claim—Action for Damages for Negligence Causing Personal Injuries—Particulars of Injuries Suffered.

Appeal by the plaintiff from so much of the order of one of the Registrars sitting in lieu of the Master in Chambers, as required the plaintiff to deliver particulars of the personal injuries alleged in para. 3 of the statement of claim to have been sustained by the plaintiff.

A. C. Heighington, for the plaintiff.

W. J. Beattie, for the defendants.

ROSE, J., in a written judgment, said that the allegation in the statement of claim was that by the negligence complained of the plaintiff "suffered personal injuries to the extent of $10,000." It was admitted that he must give particulars of any expense to which he had been put and of any money which he had lost, in so far as such expense and loss entered into the claim for $10,000 damages; but it was said that a description of his personal injuries was something which he, being unskilled in medicine and surgery, ought not to be required to give; that, upon examination for discovery, he would describe his symptoms to the best of his ability; and that, if a physical examination were ordered under sec. 70 of the Judicature Act, the defendants would be able to learn from the examining medical practitioner all that they would need to know before the trial about the plaintiff's present condition. With this argument the learned Judge did not agree. Without attempting to define the degree of exactness with which a plaintiff, in such a case as this, ought to state the injuries which he alleges he has suffered, it was safe to say that the present claim was altogether too vague: it left the defendants entirely in the dark as to whether what was alleged was, e.g., loss of limb or of sight or injury to the nervous system. A much more reasonable form of statement of claim is that of which a precedent is given in Odgers on Pleading and Practice, 8th ed., pp. 441-442.

The appeal should be dismissed. If any question arose as to the sufficiency of such particulars as might be delivered, the Master would, doubtless, see to it that the plaintiff would not be embarrassed by any attempt on the part of the defendants to compel him to be more exact in his statement than, in all the circumstances, it was reasonable to ask him to be.

Costs to the defendants in any event in the cause.

ROSE, J. OCTOBER 1ST, 1919.

RE WEBB.

Will—Construction—Benefits to Widow under Will—Exclusion from or Substitution for Dower—Power Given to Executors to "Lease, Let, and Manage" Lands—Election of Widow—Lands Sold by Executors—Lands Sold by Testator—Moneys Realised from Sales of Lands—Apportionment between Income and Capital—Payments of Income to Legatees—Year Immediately Succeeding Death of Testator.

Motion by the executors of the will of Thomas Webb, deceased, for an order determining certain questions as to the meaning and

effect of the will, arising in the administration and distribution of the estate.

The motion was heard in the Weekly Court, Toronto.

Charles Swabey, for the executors.

W. G. Thurston, K.C., for the widow of the testator and for Sarah Wolfe.

H. S. White, for Grace Bown and other adults in the same interest.

E.C.Cattanach, for John W.Wilkinson, Sydney Webb, Frederick Bown, Thomas N. Bown, and for the Official Guardian appointed to represent the unborn children of Grace Bown.

Rose, J., in a written judgment, said that the estate consisted chiefly of lands, some of which the testator had agreed to sell in parcels and the remainder of which he was endeavouring to sell. A large portion of that remainder had been sold by the executors. There was a small amount of cash, some investments, and a dwelling-house. The testator gave legacies amounting to $2,050; one legacy was $1,000 to his widow. The rest of his estate he gave to his executors in trust: (1) to permit the widow to occupy and use the dwelling-house with its contents during her lifetime, the estate keeping the house in repair and paying the taxes and insurance premiums, and upon her death to convey the house and its contents to Frederick Bown; (2) to call in and convert into money all the residue of the estate, real and personal, and to divide the proceeds into 40 equal shares and to hold these shares upon trust to pay to the widow the income from 14 of them and to pay to various named legatees the income from certain others, with provisions for the distribution of the shares after the deaths of the persons to whom the income was made payable. The executors were authorised to postpone the sale of any part of the real estate for such time as they should in their discretion think proper, and, pending the sale, "to lease, let, and manage the same in such manner and upon such terms as they shall think proper."

The learned Judge was of opinion that there was nothing in the will, except the power to lease, let, and manage, to indicate an intention to exclude the widow from or to shew that the gifts to her were in substitution for dower: Re Hurst (1905), 11 O.L.R. 6; Re Williamson (1916), 11 O.W.N. 142; Leys v. Toronto General Trusts Co. (1892), 22 O.R. 603.

As to the power to lease, let, and manage, the learned Judge felt the difficulty expressed in Laidlaw v. Jackes (1877), 25 Gr. 293; but thought he was bound by the cases to hold that the testator, by giving this express power to the executors, authorised them to do something which was so inconsistent with the setting

apart of one-third of the land by metes and bounds as to necessitate an election by the widow as to whether she would take her dower or the benefits given to her: Patrick v. Shaver (1874), 21 Gr. 123; Armstrong v. Armstrong (1874), 21 Gr. 351. The case of Parker v. Sowerby (1853), 1 Drew. 488, was followed in Patrick v. Shaver. Any argument based upon Warbutton v. Warbutton (1854), 2 Sm. & G. 163, was met by the fact that that case was cited upon the appeal in Parker v. Sowerby (1854), 4 DeG. M. & G. 321, and not followed—indeed treated as overruled by the Parker case: see 97 R.R. 147; Patrick v. Shaver, at p. 126.

This disposed of the question as to the lands which the testator did not himself agree to sell—aliter as to the lands which he had agreed to sell. The executors had no power of leasing these lands; and the legal estate continuing in the testator until the time of his death, there was nothing to exclude the widow's right to dower—she was not a party to the agreements for sale.

As to what portion of the moneys realised by the executors upon sales made by them was to be treated as capital and what portion as income, there was an agreement among the parties, and there should be a declaration in accordance therewith.

It was also agreed that the widow and two other legatees were entitled to payments of income for the year immediately succeeding the death of the testator, and there should be a declaration accordingly.

Costs of all parties to be paid out of the estate.

MIDDLETON, J. OCTOBER 2ND, 1919.

RE GORDON AND GORDON

Husband and Wife—Separation Agreement—Alimentary Allowance Made to Wife—Provision for Decrease or Increase—Application to Judge—Appointment of Arbitrator—Arbitration Act, R.S.O. 1914 ch. 65, sec. 9.

Motion by Edna Gordon, under the provisions of the Arbitration Act, R.S.O. 1914 ch. 65, sec. 9, for an order appointing an arbitrator to act under the terms of a separation agreement dated the 20th January, 1913, between the applicant and her husband.

The motion was heard in the Weekly Court, Toronto.

W. C. Mikel, K.C., for the appellant.

G. Hamilton, for the husband.

MIDDLETON, J., in a written judgment, said that by the agreement referred to the husband agreed to pay his wife $1,200 per annum; but, in the event of his income being reduced to such an extent as to render this allowance unreasonable, in view of altered conditions, the husband "may apply to a Judge of the High Court to reduce the said allowance to such an amount as may be just and equitable under the then existing conditions;" and the wife may thereafter "apply to a Judge of the High Court to have the same increased to an amount not exceeding the sum of $1,200 per annum as aforesaid." At the time of this agreement there was no action pending between the parties.

The agreement contained a further provision under which the husband's liability to pay the allowance would terminate upon certain misconduct upon the part of the wife. Instalments having fallen in arrear, an action was brought, which came on for hearing before Mulock, C.J. Ex., who found that the alleged misconduct of the wife set up as an answer to the claim did not constitute a defence; but, acting under the clause quoted, he reduced the amount payable to $800 per annum. The wife now asserted that her husband was better off than ever, and sought to have her allowance increased to $1,200. Her solicitor had asked the husband to name "some Judge or Judges" by whom he would desire to have the matter disposed of, but he had not answered this letter.

It was said but not shewn that no Judge could be found ready to mediate in this dispute. To do so was no part of the duty of a Judge. He must deal with all cases that come before him in the ordinary course, but the duty of interposing in a matrimonial dispute cannot be thrust upon him by agreement. To ascertain the true financial position of the husband might well involve prolonged and tedious inquiry. On this motion the learned Judge was asked to name a Judge who must act or to seek out a Judge willing to act. He declined to do either.

The husband took the position that this was not an agreement to arbitrate, and did not come under the Act at all; and, secondly, that this action was not brought within any of the provisions of sec. 9. In both contentions he was right.

It might be that the Judge who had once acted on this agreement, and reduced the wife's allowance, would, on her application, increase it; but the agreement contemplated a direct application by or on behalf of the wife, and not an application to another Judge.

Motion dismissed without costs.

RICHARDSON v. MCCAFFREY—SUTHERLAND, J., IN CHAMBERS—OCT. 2.

Report—Settlement of by Master, in Absence of Defendants and without Notice to them—Rule 424—Report Set aside.]—On the 19th July, 1919, the Master in Chambers, acting as an Official Referee, made a report, the last paragraph whereof was as follows: "I certify that I have settled this report in the presence of the plaintiffs, the defendants not being present, although duly notified." The defendants moved before one of the Registrars, sitting in place of the Master in Chambers, for an order setting aside the notice of filing of the report and the report, as irregular, in that no notice of settling the same had been given to the defendants, and, alternatively, on the ground that the report had been settled and signed in the absence of the defendants. The Registrar dismissed the motion with costs. The defendants now appealed from the order of dismissal. The appeal was heard in Chambers by SUTHERLAND, J., who said that Rule 424 was applicable: "424. As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book; and after such entry no further evidence shall be received, or proceedings had, without the special permission of the Master; and the Master shall then fix a day to settle his report and shall cause notice of such day to be given to all parties interested not then in attendance, unless for special reason such notice is dispensed with." No notice of the settlement of the report was given to the defendants, and the statement to the contrary in the report was erroneous. The report had been settled irregularly, and should not be allowed to stand; the case should go back to the Master to enable him to do what is required to be done by Rule 424. There should be an order accordingly with costs to the defendants of the motion and appeal. H. J. Scott, K.C., for the defendants. A. C. Heighington, for the plaintiffs.