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APPELLATE DIVISION.

APRIL 16TH, 1914.

MAHER v. ROBERTS.

Appeal—Motion to Quash—Action Brought in Name of Assignee for Benefit of Creditors—Order of County Court Judge Authorising Creditor to Proceed with Appeal in Name of Assignee—Assignments and Preferences Act, R.S.O. 1914 *ch.* 134, *sec.* 12(2)—*Jurisdiction of Judge—Proceedings to Found Jurisdiction not Taken—Adjournment of Motion to Enable Creditor to Take Proceedings—Costs.*

Motion by the defendant to quash the plaintiff's appeal from the judgment of LENNOX, J., 5 O.W.N. 603, upon the ground stated below.

The motion was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

E. E. A. DuVernet, K.C., and W. F. Kerr, for the defendant.

F. M. Field, K.C., for the plaintiff.

At the conclusion of the argument the judgment of the Court was delivered by MULOCK, C.J.Ex.:—This is an action brought by the plaintiff, as assignee of the estate of one Morley, who made an assignment under the Assignments and Preferences Act, to set aside a mortgage said to have been fraudulently made by the debtor. The trial Judge dismissed the action, and this appeal is from his judgment.

The appeal is nominally in the name of the assignee, but counsel for the appellant is met at the threshold with an objection taken by the defendant's counsel, that he has no retainer to

appear for the plaintiff on the record. The counsel replies: "It is true I am not appearing for the plaintiff on the record, but I am appearing for a creditor named Bennett, who has been authorised by the order of the County Court Judge to intervene and at his own expense to prosecute the appeal." To that answer the defendant's counsel raises the objection that, under the circumstances, the County Court Judge had no jurisdiction to make the order, and that it is invalid.

It thus becomes necessary for us to deal with this preliminary objection. The provision of the statute relied upon by counsel seeking to appeal in sub-sec. 2 of sec. 12 of R.S.O. 1914 ch. 134, and it reads as follows. "Where a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the assignee under the authority of the creditors or inspectors refuses or neglects to take such proceeding after being required so to do, the creditor shall have the right to obtain an order of the Judge authorising him to take the proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe, and thereupon any benefit derived from the proceeding shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same for his benefit, but if, before such order is obtained, the assignee signifies to the Judge his readiness to institute the proceeding for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall belong to the estate."

We are of opinion that the meaning of this section is, that, before a creditor can acquire control of the proceedings for his own benefit, he must proceed in the manner which we think is indicated by this section, namely, being of opinion that it is to the interest of the estate that some particular proceeding should be taken, it is his duty to move the estate to take that proceeding, not for his benefit, but for the estate's benefit, and not until he has adopted that preliminary course, and the estate has refused or neglected to comply with his request, is he entitled to an order, or has the County Court Judge any jurisdiction to grant him an order.

In this case the creditor Bennett did not in the first place move that the estate should prosecute this appeal; but, on learning that the assignee had notified the defendant that he, the assignee, did not intend to proceed with the appeal, then for the

first time did the creditor Bennett seek to intervene and obtain control of the proceedings. He has not done what he was bound to do before he was entitled to the order; and, therefore, we are of opinion that the order is void.

Then, as to the disposition of this motion. It was suggested that Mr. Field had no retainer; we have carefully considered the circumstances under which he gave his notice of appeal; and, though perhaps he may not have had unqualified authority, yet he acted with propriety, and his action was ratified by the plaintiff, which ratification relates back to the giving of the notice of appeal, and entitles us to hold that the appeal was well launched.

It may be that, if Mr. Bennett brings his view before the estate, it will be adopted, and in that event this appeal may be prosecuted for the benefit of the estate. It may be, on the other hand, that the estate will not see fit to accept Mr. Bennett's proposition that the suit be prosecuted for its benefit; and, in that event, the estate having practically abandoned any interest in the fruits, or possible fruits, of this litigation, then there may be jurisdiction in the Judge to make an order (I speak now in the abstract). It is possible that there may be no jurisdiction to make an order in a suit that has gone as far as this; we offer no opinion.

The only point that we decide is, that Bennett, the intervening creditor, not having put himself in order in the manner indicated, the Judge was not entitled at that stage to make the order.

We will allow this motion to stand until a day to suit the convenience of the parties to enable this question to be brought before the creditors.

With regard to the costs of this motion, unless the Court that finally determines this appeal otherwise orders, these costs should be paid by the assignee, and may perhaps be recoverable by him under the bond given him by the creditor Bennett.

APRIL 21ST, 1914.

REICHNITZER v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Fidelity Guarantee Policy—Defalcation of Partner—Evidence—Non-disclosure of Indebtedness—Answers of Person Insured to Questions of Insurer—Non-fulfilment of Promises—Change in Salary and Position of Partner without Notice to Insurer—Concealment of Defalcation—Duty to Supply Information not Asked for—Failure to Give Prompt Notice of Defalcation—Extent of Liability—Reference.

Appeal by the defendant corporation from the judgment of BOYD, C., 4 O.W.N. 875.

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

I. F. Hellmuth, K.C., for the appellant corporation.

Sir George C. Gibbons, K.C., and G. S. Gibbons, for the plaintiff, the respondent.

The judgment of the Court was delivered by MACLAREN, J.A.:—Counsel for the respondent, at the opening of the argument, asked leave to produce evidence discovered since the trial, with a view of shewing that the appellant corporation was fully aware of the relation of Mumme to the respondent before the issue of the policy, and that it was intended to secure the respondent against loss in that relation. After some discussion, counsel for the appellant corporation stated that he did not intend to press technical objections to the form of action, and was content to treat the question of indemnity as if the relation of the parties were the same as that of employer and employee.

The action was brought upon a fidelity guarantee policy issued by the appellant corporation, whereby it agreed to reimburse the Dominion Dressed Casing Company of London, Ontario, to the amount of $5,000, for the pecuniary loss, amounting to embezzlement or larceny, that it might sustain by the fraud or dishonesty of Martin Mumme, its manager at Hamburg, Germany.

The casing company was composed of the respondent and Mumme, the latter being the agent for the sale of sausage casings shipped to him from London. The policy was issued on an

application form of the appellant corporation prepared for employees, and containing the usual questions, which were answered and signed by Mumme. Among these questions and answers were the following:—

"2. Employment for which this guarantee is required. A. Representative Dominion Dressed Casing Co., London, Canada.

"3. Full name, address, and business of employer for whom this guarantee is required. A. Dominion Dressed Casing Co., London, Canada.

"4. Salary and full particulars of other remuneration from this appointment. A. Salary, commission on sales, and participation in profits.

"Reason for leaving former employment. A. To become partner of the Dominion Dressed Casing Co., London, Ont."

The appellant corporation sent to the casing company a letter with the usual questions to be answered by an employer, with the statement that the replies would form the basis of the contract. Among these questions and answers were the following:—

"Q. (a) In what capacity or office will the applicant be engaged, and where? A. As representative in Hamburg, Germany."

"Q. (e) How often will you require him to render an account of cash received and pay the same to you? A. Monthly or oftener if necessary."

"Q. (g) How often will you balance his cash accounts, and how will you check their accuracy? A. Account sales rendered weekly. Balance sheet monthly."

"Q. (i) Will he at any time hold power of attorney on behalf of the employer? A. He is part owner of the business."

"Q. (k) What salary will he be paid, and how will it be paid, and if subject to any deduction? A. Paid salary and commission on sales and participation in profits."

From the questions and answers contained in these two documents it is quite clear that what was asked for was a policy guaranteeing the honesty and fidelity of Mumme to his partner in the part of the business to be conducted by him at Hamburg. The use of forms which had manifestly been prepared for and were better adapted to the ordinary relation of employer and employee would have raised some technical difficulties as to the form of the action, but we are relieved from considering these by the admissions made by the counsel for the appellant corporation above referred to. Even without these admissions,

however, I should probably have come to the same conclusion as did the learned Chancellor, who tried the case, as to what was the intention of all the parties to the contract, although some of the words used are inapt to the real relations existing between them.

The appellant corporation contended before us that the appeal should be allowed on the ground that a full disclosure was not made as to the indebtedness of Mumme at the time of the application, and that the policy was voided by the respondent not fulfilling the promises contained in the answers, but changing the salary and position of Mumme without notice to the appellant corporation, and not disclosing but concealing his defalcations.

The first of these complaints is, that it was not disclosed that Mumme had not contributed his share towards the capital of the firm, and that the firm was indebted to the Canadian Packing Company of London, of which the plaintiff was a member. As to this, it is a sufficient answer to say that neither in the questions put to Mumme nor in those put to the Dominion Dressed Casing Company was there any question that would require or suggest the necessity for such an answer. In both papers the answers disclosed, and were based upon, the fact that Mumme was a member of the firm and was to share in the profits, but no inquiry was made at any time as to his contribution to the capital or whether he was to contribute anything toward it.

As a matter of fact, although the articles of partnership provided that the two partners should contribute equally to the capital of the firm, they are entirely silent as to amount, and the evidence discloses the reason given by Mumme why he did not contribute, in which his partner acquiesced. The appellant corporation, however, did not ask any question on this point, so that it would appear that it did not consider it material or relevant. In the absence of any question on the point, I do not think it was incumbent on the respondent to volunteer the information. The case of Hamilton v. Watson (1845), 12 Cl. & F. 109, clearly shews that such non-disclosure would not void the policy in a case like the present. See also Seaton v. Burnand, [1900] A.C. 135.

Complaint is also made of the non-disclosure of the indebtedness of the casing company to the Canadian Packing Company, and the Hamburg branch to the head office at London. All that has been said above applies with even greater force to both these

claims. In addition, the alleged indebtedness of the Hamburg branch was only the ordinary method of bookkeeping, that the branch was charged with all the goods that were shipped to it, and the amount was in no sense a debt, and the matter was wholly irrelevant.

Another point raised is, that the respondent did not exact from Mumme the monthly cash account and balance sheets and the weekly account sales promised in the answers. The evidence shews that sales were not made every week, but it also shews that the respondent did all that he reasonably could to obtain such statements from Mumme. Sometimes they were furnished regularly; at other times he was dilatory in forwarding them. The respondent appears, however, to have done his full duty in urging Mumme to send them regularly. His only promise was that he would require Mumme to render his accounts monthly or oftener, and this he did. It was not through any fault or delinquency of his that they were not always forthcoming. Besides, there was no promise in his answers nor any condition in the policy that the defendant company should be notified of any dilatoriness of Mumme in this regard. This ground also should be disallowed. See Mactaggart v. Watson (1835), 3 Cl. & F. 525, and Creighton v. Rankin (1840), 7 Cl. & F. 325.

Another ground urged is, that the respondent reduced the salary of Mumme and altered his position without notifying the appellant corporation. The partnership was formed for three years from the 1st February, 1907. The complaint is made respecting an agreement of the 23rd September, 1909, whereby the parties agreed to wind up the Hamburg branch of the business, which was found to be unprofitable; Mumme to draw his regular salary during the three months allowed for the winding-up. His salary was not reduced, and he continued to draw it until the beginning of March, as the winding-up was not completed as expected, although the term fixed for the partnership ended on the 1st February, 1910. All the information given to the appellant corporation in the answers was that Mumme was to be paid a salary, commission on sales, and a share of the profits. No amounts were mentioned either as to salary or commission, and the appellant corporation did not inquire further; so that its complaints on this score are quite unfounded.

Its chief ground of complaint, however, is that it was not advised promptly of the embezzlement and dishonesty of Mumme. The evidence shews that, when returns were not coming in as rapidly as expected, the respondent sent his agent

Hay, who organised the Hamburg business on a new basis, and endeavoured to have the terms of credit shortened. In his examination he states that he was fully satisfied of Mumme's honesty, and so advised the respondent. Matters not improving, the respondent himself went to Hamburg in March, 1910, and states that then for the first time he became aware of the dishonesty of Mumme. He at once advised his London house, which promptly notified the appellant corporation. In my opinion, the requirements of the policy were fully complied with in this respect.

The appellant corporation sent its auditor to London, who spent a part of two days examining the books and papers of the respondent and questioning him and his staff. A lengthy paper was drawn up by him purporting to give a summary of the dealings between the respondent and Mumme. This document he induced the respondent to sign, and stress has been laid upon certain admissions and statements made by the respondent therein. The circumstances connected with the obtaining of the respondent's signature detract from the value of any admissions; and, in my opinion, the trial Judge was quite justified in not attaching much importance to it.

Reliance was also placed upon a clause inserted in the policy that it did not cover loss of stock, but only such moneys as it could be proved that Mumme had received. This refers to the fact that when the respondent went to Hamburg in March, 1910, and examined the stock in hand, he found that the barrels and tierces supposed to contain casings contained only a layer of these on top, the lower part of the packages being filled with stones. The presumption would be that Mumme had sold the abstracted casings; but it is not proved that he was paid for the whole of them. The appellant corporation, under the policy, would be liable only for the money which Mumme actually received. The exact amount can be ascertained on the reference.

The amount of the policy was $5,000. The respondent swore that the defalcation amounted to $7,102.01. The Chancellor gave judgment for $2,000, subject to variation at the instance of either party by reference to the Master at London.

In my opinion, there is ample evidence to sustain this judgment, and the appeal should be dismissed.

APRIL 22ND, 1914.

RUDDY v. TOWN OF MILTON.

Municipal Corporation—Drainage—Natural Watercourse—Obstruction by Inadequate Culvert—Injury to Private Property—Negligence—Placing of Proper Culvert—Mandatory Order—Damages—Costs.

Appeal by the defendants from the judgment of MIDDLETON, J., 5 O.W.N. 525.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

A. McLean Macdonell, K.C., and W. I. Dick, for the appellants.

George Bell, K.C., for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

APRIL 23RD, 1914.

BECK v. LANG.

Solicitor—Action for Bill of Costs—Husband and Wife—Action Brought in Name of Wife—Liability of Husband—Absence of Written Retainer—Finding of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 5 O.W.N. 900.

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

H. T. Beck, the appellant, in person.

A. B. Armstrong, for the defendant, the respondent.

THE COURT allowed the appeal with costs, and ordered that judgment should be entered for such amount as should be found due by a Taxing Officer, or such amount as the parties should agree upon.

APRIL 23RD, 1914.

LIMEREAUX v. VAUGHAN.

Trusts and Trustees—Conveyance to Daughter of Land Purchased by Mother—Improvidence—Absence of Independent Advice—Declaration of Trust—Charge for Advances—Conveyance on Payment of Amount Charged.

Appeal by the defendant from the judgment of BRITTON, J., 5 O.W.N. 978.

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

J. C. McRuer, for the defendant.

S. H. Bradford, K.C., for the plaintiff.

THE COURT dismissed the appeal with costs.

APRIL 24TH, 1914.

SNIDER v. SNIDER.

Pleading—Reply—Relevancy—Departure from Claim Originally Made—Conditional Appearance—Consolidation of Actions.

Appeal by the defendants the foreign executors of T. A. Snider, deceased, from the order of BRITTON, J., 5 O.W.N. 956, restoring certain paragraphs of the plaintiff's reply, which had been struck out by an order of the Master in Chambers.

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

W. J. Elliott, for the appellants.

G. H. Watson, K.C., and H. E. Irwin, K.C., for the plaintiff, the respondent.

F. C. Snider, for the defendant the Canadian executor.

THE COURT made an order consolidating this action with one subsequently brought by the same plaintiff, and varied the order

of BRITTON, J., by providing that the appellants should be in the same position as if they had entered a conditional appearance as to the claim made in the reply if and so far as it set up a claim different from that originally made by the plaintiff. Costs in the cause.

HIGH COURT DIVISION.

MIDDLETON, J. APRIL 22ND, 1914.

OCEAN-ACCIDENT AND GUARANTEE CORPORATION v. GILMORE.

Fraud and Misrepresentation—Action to Recover Moneys Paid by Insurance Company on Fraudulent Claim—Evidence—Discredited Witnesses—Inference from Admitted Facts—Duty of Trial Judge.

Action to recover $800 paid by the plaintiffs to the defendant for an automobile insured by the plaintiffs, and destroyed in the circumstances mentioned in the judgment, the plaintiffs alleging fraud on the part of the defendant.

The action was tried without a jury at Toronto.

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

J. M. Godfrey, for the defendant.

MIDDLETON, J.:—The action is brought to recover the amount paid by the plaintiffs to the defendant under a policy upon an automobile destroyed by being run down by a Grand Trunk train, the ground being that the payment was procured by the fraud of the defendant, who, it is said, placed the automobile upon the railway track for the purpose of bringing about its destruction, and that he falsely and fraudulently asserted that an accident had taken place.

The evidence in this case is extremely unsatisfactory.

On the evening of Sunday the 2nd November, 1913, at eight o'clock, Gilmore left his place in West Toronto, in company with Cochrane, a half brother of his brother-in-law, in the automobile, for the purpose of having Cochrane's assistance in the adjustment of the carburetor, which, it is said, was not working satis-

factorily. The night was dark and cold, with rain and snow. The automobile was an open roadster. Instead of contenting themselves with a trip upon the city streets, they headed for the country, along the Dundas road for some distance, turning south and reaching the Lake Shore road near Port Credit. Some time was spent in making adjustments to the carburetor, and finally in cleaning it out, as it became clogged with sand. In the result, they were at the Rifle Ranges near Port Credit at 11.30 p.m. This hour is fixed by two reliable witnesses, and is admitted by Gilmore.

The next thing known definitely is that at 1.40 a.m. the car was standing upon the Golf Club crossing of the Grand Trunk Railway, about half a mile from where it was two hours before. The car was then struck by a Grand Trunk freight train and destroyed. The train officials state that there were no lights upon the automobile at the time.

Gilmore can give no satisfactory account of what took place in these two hours. His efforts to excuse himself, and his version of the affair, are unworthy of belief. Both he and Cochrane stayed at the Port Credit station till morning, when they returned to town, and immediately a claim was made under the policy in question. Each gave to the insurance company a definite statement of what had taken place.

It should be mentioned that Gilmore had bought this car as a second-hand automobile in the previous July, for $900, paying $100 down, the balance secured by a note. He bought it as a speculation, expecting to sell it easily at an advance, but his expectations had not been realised. For two months prior to November, he had been using the car in his business and for pleasure, and had had some difficulty in its operation. He had insured it against accident for $1,200, and admits that he was under the impression, until after the night in question, that, on the happening of an accident resulting in total destruction, he could collect $1,200 from the company.

The company paid $800 as being the value of the car; payment being made on the 26th November, 1913. Cochrane claimed $300 from Gilmore, and Gilmore refused to pay this. In the result, Cochrane informed the company that the car had been intentionally destroyed. Gilmore on his part laid an information against Cochrane for endeavouring to extort money by threats. This charge was tried at the sessions, and the jury disagreed. Cochrane now tells a story shewing that the car was deliberately destroyed by Gilmore.

I find Cochrane to be an utterly unrealiable witness; and, if the case depended on his evidence alone, the plaintiffs would fail. An attempt was made to corroborate his evidence by his wife. I cannot believe her story either.

The counsel for Gilmore argues that, inasmuch as I do not believe Cochrane, and as Gilmore has denied the crime charged, and as the onus is upon the plaintiffs, I cannot make the necessary affirmative finding merely because I quite discredit Gilmore.

I think this is too narrow and wooden a view of my duties. While I do not believe either of the men who participated in the transaction of the night in question, I think the proper inference from the evidence is, that the car was wilfully destroyed by both. The extraordinary proceedings already outlined, of taking this sick automobile on a dark and wintry night to this lonely spot to adjust its carburetor, the unexplained proceedings between 11.30 and 1.40, the very unsatisfactory evidence of these two men at the trial, all point irresistibly to the one conclusion. I have a suspicion that the $300 which Cochrane expected to receive was the difference between the cost of the machine, $900, and the $1,200 insurance, and that the real trouble arose when it was found that the company would not pay anything beyond the value of the destroyed automobile. But this is really beside the mark.

I realise fully the difficulties suggested in making a finding such as this; but, I think, unless wilfully blind, no other conclusion is open to me.

Judgment will, therefore, be for the plaintiffs with costs.

MIDDLETON, J. APRIL 22ND, 1914.

LAWSON v. BULLEN.

Limitation of Actions—Title by Possession to Strip of Land Used as a Lane—Placing Gates at Ends of Strip—Equivocal Act—Acts of Possession—Entry—Interruption of Possession—Exclusion of Public only to Extent of Preventing Nuisance—Trespass.

Action for a declaration of the plaintiff's ownership of a strip of land and for damages for trespass and other relief.

H. R. Frost, for the plaintiff.
H. E. Rose, K.C., for the defendant.

MIDDLETON, J.:—The dispute in this action is concerning a strip of land used as a lane, immediately to the north of the recently constructed apartment house at the corner of Surrey place and Grosvenor street, Toronto. This house is erected upon a parcel of land long owned by the late Mr. Baird. This parcel was enclosed to the north by a high board fence, separating it from the lane in question. Mr. Baird never had or claimed to have any right with respect to this lane. The land north of Mr. Baird's property and south of Breadalbane street, according to the registered plan, was supposed to have a frontage of 135 feet by a depth of 80 feet. In fact, when a survey was made upon the ground it was found to overrun some two feet.

. . .

In 1870, Ross, the then owner, sold the whole 135 feet to Stevens, and, by divers mesne conveyances, the whole lot became vested in McLean. In July, 1877, McLean conveyed the south 85 feet of the 135 feet to McBean. McBean at this time built the four houses now found upon the land. These, fronting on Surrey place, occupy the northern portion, leaving a strip to the south, which is the lane in question, and a narrow strip running, four feet wide north and south at the rear, which has been called for convenience "the alley." This lane and alley were apparently designed to afford a means of access to the rear premises of the houses, which constituted a solid row, without any other entrance to the rear save through the houses.

In July, 1877, McBean mortgaged each of these four houses to the British Canadian Loan Company. The descriptions contained in the mortgages were very carelessly prepared, so far as the rights of way were concerned. According to these descriptions, and as the fact is, each house was given a frontage of nineteen feet six inches, which would have left seven feet out of the eighty-five for a lane. Owing to the overplus, the lane was actually approximately eight feet wide. In each of these mortgages the property was described as running to the westerly limit of an alleyway four feet in width, and it was conveyed with a right of way over and along the alley. The southerly house, known as number 21, was described as running to the lane. If one may speculate as to the intention, it was probably intended that the northern houses should have a right of way not only over the alley but also over the lane.

McBean afterwards conveyed the equity in the houses, deal-

ing with the northern pair and the southern pair separately. In these conveyances of the equity of redemption, provision is made for the user by the tenants of all four houses of both the alley and the lane. The conveyance of the southerly house covers also the fee simple of the lane, subject to the rights of way conferred. This lane, it must be borne in mind, had not been included in any of the mortgages to the British Canadian Loan Company.

Subsequently, the equity of redemption in all the properties became vested in Joseph Dickey; so that, save for the rights outstanding in the mortgagees, there was unity of seisin, and the rights of way as such would cease to exist. Dickey, however, made default in payment of the mortgages; and, in October of 1884, the three northern houses were sold to Mr. S. H. Janes, who subsequently conveyed to the late Mr. Gooch. About the same time, the southern house was sold to the late Mrs. Lawson; the conveyance being made a little later, the 19th January, 1885. In all these conveyances the description followed the description contained in the mortgages.

It was assumed by both Gooch and Lawson, not unnaturally, that they alone were interested in this lane. The Lawsons knew quite well that the title to it had not been conveyed to them; but they assumed that the lane existed solely for the convenience of the four houses.

In 1888, it was found that this open lane had become somewhat of a nuisance, and it was agreed between Lawson and Gooch that gates should be erected, Gooch paying three-quarters of the expense, Lawson paying one-quarter. If it be material, it is quite clear that this was not done with any idea of affecting Dickey's rights in any way. It was, no doubt, thought that when the houses had been built and this strip had been set apart as a lane for the four houses, it had practically been dedicated to that purpose, and that no substantial interest remained in the owner of the fee.

When the houses were originally constructed, the back yard of the Lawson house was separated from the lane by a fence extending from the rear of the house to the alley. In this fence, opposite the back kitchen door, was a gate for the purpose of affording convenient access to the lane. After the gates were erected, this fence was suffered to fall into disrepair; the gate disappeared, the fence has gradually disappeared; and now nothing remains but a small portion near the other fence.

The tenants of the three northerly houses used this alley and

lane for the purpose for which it was originally intended, and brought their ashes and garbage out through the rear of their respective yards down the alleyway, depositing them in an unsightly and unsavoury heap in the corner of the alley and lane. The city scavengers periodically backed in through the lane and removed the accumulation. The gate was not always fastened, but, when closed, was always opened to enable the scavenger to discharge his functions.

The result of the enclosure by gates and the decay of the fence was practically to bring this laneway into the back premises appurtenant to the Lawson house. No doubt, they strung clothes lines across it and occasionally used it for various purposes. In the summer-time chairs were placed upon it; more recently a hammock was strung across part of it; and, no doubt, a sense of proprietorship has gradually sprung up in the minds of the Lawsons.

The Lawsons continued to live on the property until 1897, when they rented the house and went to live in Sherbourne street, returning to Surrey place in 1904. In the meantime the house was occupied by a series of tenants.

In 1894 or thereabouts, the ashes and garbage deposited at the corner of the lane had become a considerable nuisance, and the Lawsons complained to the city officials. The result was that from then onward the occupants of the northern houses were required to place their garbage and ashes in receptacles at their back doors in the alleyway. The scavenger, then, backing into the lane, went up the alleyway and removed the ashes and garbage.

I am asked to treat this as an assertion of exclusive title to the lane. I do not think that is so. What was done was not by way of assertion of title; it rather constituted an admission of the rights of the occupants of the houses at the north, and the city officials required this right to be exercised in a way that would not cause a nuisance.

As the process of garbage removal evolved, the practice of placing ashes, etc., to the rear was largely discontinued, and the ashes were carried, in most instances, from the front cellar entrance and placed upon the street. This again has, no doubt, contributed to the Lawsons' feeling of proprietorship.

Apart from what has been stated, there are one or two specific acts much relied upon. One of the owners stored a launch in the lane in 1905, during the winter months. During the winter of 1909-10, he stored a somewhat larger boat there. During these times the gate was, no doubt, kept closed.

Some time about 1904, the city officials started assessing the owners of the fee in lanes which had never been formally dedicated to the public. About that time, Mr. Dickey, on receiving his assessment notice, came up and looked at the property, no doubt going upon it. This is relied upon as an entry which would stop the statute from running.

Some other minor incidents have been mentioned, which appear to me to have no bearing whatever upon the dispute.

I am not here concerned with the question as to whether there ever was an easement in favour of the northern houses, nor am I here concerned with the question whether that easement has been extinguished. The dispute before me is, I think, quite apart from these questions.

When Mr. Baird recently sold to Mr. Bullen, Bullen undertook to erect his apartment house up to the northern boundary of his own land. He then found the so-called lane enclosed and apparently forming part of the Lawson property. He knew that he had no title of any kind to it, yet he took down the southern fence—as to which there is probably no objection—removed the gates, and proceeded to use the lane as a means of access to his property. He hunted up Mr. Dickey, and on the 18th March, 1912, obtained from him a conveyance of the lane, taken in the name of Mr. Ira Standish, his solicitor; and he justifies the user of this lane by his ownership under this conveyance. He is within his right, unless the Lawsons have acquired a possessory title, as against Dickey, his grantor.

I think it is very doubtful whether the plaintiff has shewn any such continuous possession as would in any aspect of the case establish a possessory title; but I need not discuss this at length, as Littledale v. Liverpool College, [1900] 1 Ch. 19, shews that the erection of gates at the ends of the lane over which the person erecting the gates has a right of way is an equivocal act which may have been done merely with the intention of protecting the right of way from invasion by the public, and does not amount to a dispossession of the owner, and so does not give a possessory title.

Here, as already pointed out, the inference from the facts proved is, that there was no intention of doing more than necessary to exclude those members of the public who were making this strip a nuisance; so the case in hand does not raise as many difficulties as there were in the English case.

In the use of the lane there was some injury to the building. The defendant has paid $25 into Court. I think this is enough to compensate for this damage.

Under all the circumstances, while I dismiss the action, I think it is not a case for costs.

Some question was raised as to the conveyance from Dickey to Standish, by reason of the description forming a cloud on the Lawsons' title to the land conveyed to them. No claim is made under it to more than the lane; and, if so desired, the judgment may declare that it does not form any cloud on the plaintiff's title to the land on which the house stands.

MIDDLETON, J. APRIL 24TH, 1914.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Reference—Stay pending Appeal to Supreme Court of Canada —Discretion—Balance of Convenience—Practice.

Motion by the defendant for an order staying the reference directed by the judgment of KELLY, J., 5 O.W.N. 183, affirmed with a variation by a Divisional Court of the Appellate Division, ante 100, pending an appeal by the defendant to the Supreme Court of Canada.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto, on the 21st April.

A. J. Russell Snow, K.C., for the defendant.

A. B. Cunningham, for the plaintiffs.

MIDDLETON, J.:—The judgment of the learned trial Judge directs payment by the defendant of an amount to be ascertained by the Master in Ordinary. Most of the items going into the account are determined. The reference is as to minor matters only.

The Court of Appeal has varied this judgment in some respects, and possibly the decision of the Supreme Court of Canada may either restore the original judgment or further vary it; but the matters that were argued before the Court of Appeal are not the sole matters or indeed the important matters so far as the reference is concerned.

In cases such as Monro v. Toronto R.W. Co., 5 O.L.R. 15, where the question in issue upon the appeal was the plaintiff's

right to have partition, it is quite plain that the partition proceedings should not have been allowed to proceed until this question had been determined. That is widely different from the situation here.

I have not attempted to deal with this matter upon the construction of the Rules, for it does not appear to me to be material whether the onus is upon the plaintiffs to obtain leave to proceed or upon the defendant to stay the reference. The main question is, whether, under the circumstances, the reference ought to go on or to be stayed; and the balance of convenience in this case clearly indicates that the reference ought to proceed.

Sharpe v. White, 20 O.L.R. 575, shews that the granting of a stay or of an order to proceed, whichever is necessary, is discretionary.

I have spoken to the Chief Justice of Ontario, who heard the appeals, and is therefore familiar with the questions involved; and he agrees with the view that I now express.

The motion will, therefore, he refused. Costs to the plaintiffs in any event.

KENNEDY v. SUYDAM REALTY CO.—BRITTON, J.—APRIL 20.

Interim Injunction—Application to Restrain Sale of Lands —Decision of Master of Titles—Application for Leave to Appeal —Adjournment till Trial of Action.]—Motion by the plaintiff for an injunction restraining the defendants and each of them from selling or attempting to sell the lands, or any of them, the subject of this action, or for an order granting the plaintiff leave to appeal from the order of the Master of Titles at Toronto, made on the 5th February, 1914, refusing an application to register a caution relating to the lands. BRITTON, J., said that, having regard to the litigation antecedent to the present motion, and in deference to what had been decided, he must dismiss the motion. What had been decided was set out in the reasons given by the Master of Titles for his judgment of the 6th February last. At this stage, and upon the present application, he should not give leave to appeal as asked, but should leave the parties to get to trial as speedily as possible and make the fight, which should be final, on the subject-matter of this action. Motion adjourned until the trial, and costs to be costs in the cause, unless otherwise ordered by the trial Judge. W. N. Tilley, for the plaintiff. E. D. Armour, K.C., for the defendants.

STIMSON v. BAUGH AND PROCTOR—MIDDLETON, J.—APRIL 22.

Contract—Promissory Note—Partnership—Liability—Fraud—Findings of Fact of Trial Judge.]—Action to recover $28,750, the price of certain shares in a mining company, payable under an agreement of the 7th December, 1911, represented by a promissory note bearing date the 8th December, 1911, given pursuant to this agreement. The note, though signed in the name of E. L. Baugh & Co., was signed by the defendant Proctor; and it was said that there was no partnership between Baugh and Proctor, and that Proctor had not in fact authority to sign the note. The defence filed on behalf of Baugh set out that he was the sole member of the firm of E. L. Baugh & Co., and that Proctor was authorised by him to obtain an option upon the shares in question, upon such terms that there should be no liability beyond the sum of $5,000 paid at the time of the giving of the option; that it was understood that the agreement which was executed was in truth an option, and, if it was not, there was no consideration for the payment of the $5,000; and Baugh counterclaimed for that sum. Proctor denied the agreement and denied all liability thereunder or upon the note which he signed. By an amendment to his defence, made before the trial, Proctor set out that he was acting as sales-agent for the stock, being employed by the plaintiff, the defendant Baugh, and one McCaffery, and that he entered into this employment upon certain representations as to the value of the property, and that the agreement of the 7th December was made in reliance upon these representations and in reliance upon the commissions paid under the other agreements as affording a source of payment of any obligation under the agreement in question. He set out that he had been associated with the defendant Baugh in certain other transactions in partnership; and, although there was no partnership agreement in writing with Baugh, he understood that he was a partner with Baugh in the matters dealt with in the agreement. He denied liability upon the agreement because of certain false and fraudulent representations which, he alleged, brought about its execution. At the hearing, further amendments were made which greatly enlarged the matters to be investigated. Baugh set up that he was induced to enter into the agreement in question and certain earlier agreements by the fraud of the plaintiff, or by the fraud of McCaffery, for whose conduct, he alleged, the plaintiff was responsible. The learned Judge, after a lengthy examin-

ation of the evidence, finds in favour of the plaintiff upon all the issues in the action, and directs judgment to be entered for the amount sued for (less $9), with interest from the 30th June, 1912, and costs. J. B. Clarke, K.C., for the plaintiff. J. M. Clark, K.C., for the defendant Baugh. C. Kappele, for the defendant Proctor.

COUNTY COURT OF THE UNITED COUNTIES OF LEEDS AND GRENVILLE.

McDONALD, Co.C.J. APRIL 14TH, 1914.

THORMIN AND RUBINO v. DONALDSON.

Jury Notice—Application by Plaintiffs to Strike out—Disagreement of Jury at Former Trial—Prejudice against Plaintiffs—Affidavits as to what Occurred in Jury-room—Admissibility.

This action was brought in the County Court to recover damages for injury to the plaintiffs' motor truck by the defendant's motor car, owing, as the plaintiffs alleged, to negligence in the management of the defendant's car. The defendant counterclaimed for damages for injury to his car by the motor truck, alleging negligence of the plaintiffs.

The action was tried before McDONALD, Co.C.J., and a jury, in December, 1913; the jury disagreed, and were discharged.

The plaintiffs then moved to strike out the defendant's jury notice, so that when the action came on for trial again it should be before a Judge without a jury.

H. A. Stewart, K.C., for the plaintiffs.
J. A. Hutcheson, K.C., for the defendant.

McDONALD, Co.C.J.:— . . . The affidavits of several deponents and their answers given upon cross-examination upon their affidavits made it very clear that in the minds of many persons there existed at the time of the trial a strong prejudice against the plaintiffs owing to their being Italians. The affidavits of Sheriff McCammon and Gordon VanCamp shew this prejudice to have been entertained by at least two members

of the jury panel, one of whom, the man referred to in Van Camp's affidavit, and who was one of the jury empanelled to try this action, having said: "The damn dago had no business running a 'bus in opposition to the regular 'busman and should have stuck to delivering fruit, as that is what his business was and the rig was for." Mr. Donaldson says in cross-examination upon his affidavit: "They had as good a right to carry passengers, in my estimation, as any one else so long as they had a proper conveyance."

Mr. Hutcheson, for the defendant, objected to VanCamp's affidavit as to what occurred in the jury-room being received; but I cannot bring myself to believe that the rule or principle invoked by him can be carried so far as to exclude the statement as to what this juror said. The truth of VanCamp's statement is not impugned; and it hardly lies in the mouth of the defendant, who wrote to the foreman of the jury a letter of inquiry as to what had occurred in the jury-room, and who made use of the information received in answer, to object to the admission of VanCamp's affidavit.

In hotels and barber shops, being places where "men most do congregate," this action was discussed, and evidently prejudice was manifested against the plaintiffs owing to their nationality. At the Central hotel in Brockville remarks were made in the hearing and presence of two members of the jury empanelled to try this case; while at the barber shop in Athens people said that if they were on a jury they would not give a verdict in favour of the plaintiffs because of the defendant being a home man. The situation being as above stated, how great will be the temptation—no matter to what extent the defendant personally may seek to keep himself from participation therein—to influence against the plaintiffs jurors on the panel at a future sitting of the Court. Under all the circumstances, I consider that this action is one which ought to be tried without a jury, and I do order and direct that the issues shall be tried and the damages (if any) shall be assessed without a jury, and that the jury notice shall be struck out.

Costs of this application to be costs in the cause.

CORRECTION.

In WHITNEY v. SMALL, ante 188, in the reasons for judgment of HODGINS, J.A., at p. 191, the word "appellant," wherever it occurs, should be "respondent."