The
Ontario Weekly Notes

VOL. VIII. TORONTO, JUNE 18, 1915. No. 14

APPELLATE DIVISION.

JUNE 7TH, 1915.

*MORRISBURGH AND OTTAWA ELECTRIC R.W. CO. v. O'CONNOR.

Company—Shareholders—Act respecting Prospectuses Issued by Companies, 6 Edw. VII. ch. 27, sec. 3(3)—Effect upon Subscription for Shares of Non-delivery of Prospectus—Shareholders Acting as such—Ratification—Voidable Subscription—Delay in Repudiating.

Appeals by the defendants, in the above and nine other actions brought by the same plaintiffs, from the judgments of the County Court of the County of Carleton in favour of the plaintiffs.

The actions were brought to recover the amounts of calls made upon the defendants respectively as holders of shares of the capital of the plaintiffs, an incorporated company.

The defendants relied on sec. 3(3) of an Act respecting Prospectuses issued by Companies, 6 Edw. VII. ch. 27(O.): "No subscription for stock . . . induced or obtained by verbal representations, shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus."

The appeals were heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., RIDDELL and LATCHFORD, JJ.

G. Powell, for the appellants.

G. D. Kelley, for the plaintiffs, respondents.

RIDDELL, J., read a judgment, in which he said that in nine of the cases the defendants had, with full knowledge of the facts, accepted and taken the status of shareholders, by acting as directors, attending meetings of shareholders, giving proxies, paying calls on the stock or the like unequivocal acts; that the

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

most that sec. 3(3) of the Act could effect would be to wipe out the subscriptions altogether; that these defendants had bound themselves without subscription and were shareholders; and so their appeals were dismissed.

The case of the defendant O'Connor was different: he had done no act to establish his status as a shareholder; but he had allowed his name to be on the list of shareholders for two years and more without objection, and he could not now be relieved. His subscription was voidable only, not void; and his right to avoid should have been exercised promptly on discovering the facts.

Reference to Oakes v. Turquand (1867), L.R. 2 H.L. 325; Palmer's Company Precedents, 11th ed., pp. 196, 197; Carrique v. Catts and Hill (1914), 32 O.L.R. 548.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

HODGINS, J.A., read a dissenting judgment in regard to O'Connor's appeal. He was of opinion that the effect of the section referred to was to wipe out the subscription or make it legally non-existent.

Appeal dismissed with costs; HODGINS, J.A., *dissenting in the O'Connor case.*

JUNE 9TH, 1915.

CITY OF TORONTO v. PILKINGTON BROTHERS LIMITED AND WEBER.

Highway—Encroachment of Building upon City Street—Failure to Prove Boundary of Street—Evidence—Plans and Surveys.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 7 O.W.N. 806.

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

C. M. Colquhoun, for the appellants.

Joseph Montgomery, for the defendant company, respondents.

Z. Gallagher, for the defendant Weber, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J. JUNE 7TH, 1915.

COOPER v. PARSONS REALTY CO.

Principal and Agent—Fraud of Agent—Purchase of Land for Principal—Responsibility of Vendor for Fraud of Purchaser's Agent—Evidence — Secret Commission — Rescission.

Action against the Parsons Realty Company and also against one Burnaby and wife to recover moneys which had been paid by the plaintiff to the Parsons Realty Company or to one Parsons, and part of which had been paid over to the Burnabys by Parsons for a conveyance of land made by them to the plaintiff.

The amount obtained by Parsons from the plaintiff was $8,350, and the amount paid to the Burnabys was $5,400.

The transaction was fradulent on the part of Parsons; and the plaintiff at first charged that the Burnabys were parties to the fraud; but at the trial all charges of personal fraud against the Burnabys were expressly withdrawn; and the claim against them was confined to the allegation that they were responsible for the fraud of Parsons.

The action was tried without a jury at Toronto.

J. W. Bain, K.C., and Christopher C. Robinson, for the plaintiff.

J. E. Jones and V. H. Hattin, for the defendants the Burnabys.

The other defendants did not appear.

MIDDLETON, J., said that the Burnabys had acted in good faith throughout; but it was argued that Parsons became the agent of Burnaby by his receipt of a commission from Burnaby, and in that case Burnaby must be taken to have notice of Parsons's fraud; or that Burnaby, by paying a commission to the plaintiff's agent, Parsons, made the transaction voidable at the plaintiff's option: Hitchcock v. Sykes (1914), 49 S.C.R. 403. In regard to the latter contention, the learned Judge said that no such case was made upon the pleadings, and, having regard to the admissions made at the trial, it was not open to the plaintiff to rest his case upon this ground. Apart from that,

it should not be found as a fact that the payment was made with any corrupt purpose. The so-called commission was in truth an abatement of the price, equivalent to a commission that might have been expected to be paid if an agent intervened—a device sometimes resorted to in order to make a reduction of price more palatable. Even if Parsons did, in some sense, become Burnaby's agent, there was no principle upon which Burnaby could be supposed to have had knowledge of Parsons's fraud. The rule that the knowledge of the agent is the knowledge of the principal is not of universal application, and does not apply where the agent is engaged in a fraudulent course of conduct, and disclosure would mean disclosure of his own fraud: American Surety Co. v. Pauly (1898), 170 U.S. 133.

Then it was said that there was a right to follow the plaintiff's money into the hands of Burnaby. But the agent was entrusted with the possession of the money, and the transaction, being carried out by Burnaby in good faith, could not be attacked in this way. The statement in Bowstead's Law of Agency, art. 110, must be taken subject to the introductory proviso.

Finally, it was argued that the transaction carried out by Parsons was with regard to a totally different subject-matter than that contemplated by his agency; and, therefore, there was a right to rescind. But the case was this: an agent entrusted with money to purchase a thing for his principal purchases something entirely different from a vendor who is in no way in fault. The transaction must be maintained in favour of the innocent vendor. The agent who made the contract for the plaintiff received exactly what he bargained for; and there was no mistake as to the subject-matter.

Action dismissed with costs to the defendants the Burnabys.

MIDDLETON, J. JUNE 8TH, 1915.

JESS v. CITY OF HAMILTON.

Evidence—Action for Money Due under Contract with Municipal Corporation—False Receipts—Fraudulent Conspiracy—Onus—Weight of Evidence—Testimony of Accomplices—Corroboration—Finding of Fact of Trial Judge.

The plaintiff sued for a balance of money alleged to be due for sand and gravel supplied by him to the defendant corporation during the year 1914, under a contract dated the 24th March, 1914.

The contract was not disputed, and the defendant corporation's books shewed a balance of $5,315.75 due to the plaintiff, upon accounts rendered and audited, in respect of sand and gravel delivered in 1914.

There was a similar contract between the parties for the year 1913, and upon that contract a large quantity of sand and gravel had been delivered, the price totalling $62,512.30. The defence to the action was based upon things that happened in 1913, as well as in 1914:—

(1) It was alleged that during 1913 the plaintiff fraudulently and corruptly conspired with civic officers to have issued to him false receipts for the delivery of gravel. The evidence as to this related to about 50 loads, worth $300.

(2) That, during 1913 and 1914, the loads delivered did not contain two cubic yards—there was a shortage of 5 per cent.

(3) That, during both years, the waggons, even when loaded to capacity and of sufficient capacity, while they contained the requisite two cubic yards at the point of loading, were short 12 per cent. upon delivery, because the loads settled during transit.

The action was tried without a jury at Hamilton.

G. Lynch-Staunton, K.C., C. W. Bell, and W. L. Ross, for the plaintiff.

M. K. Cowan, K.C., and F. R. Waddell, K.C., for the defendant corporation.

MIDDLETON, J., dealing with the facts, said that all the evidence against the plaintiff consisted of the statements of two men who had been in the employ of the defendant corporation as foremen upon the works. One of these men, Mason, stated that

he issued false tickets to the number of about 50 to the plaintiff, for which he received $1 each. Smith, the other witness, told a similar story with regard to other loads: he said he received $10 for 8 tickets. If the evidence of either of these witnesses had been contradicted, the learned Judge would have had no hesitation in refusing to accept it. The stories were full of contradictions, and the witnesses did not impress him as being reliable; but the plaintiff was not called upon to testify in his own behalf.

In these circumstances, the learned Judge said, he had come to the conclusion, after giving proper weight to the fact that the plaintiff did not choose to deny the charges made against him, that upon this unsatisfactory evidence there should not be a finding in favour of the defendant corporation, upon whom the onus of proof lay.

Upon the question of the weight to be given to the testimony of accomplices, he referred to Rex v. McNulty (1910), 22 O.L.R. 350; Rex v. Christie, [1914] A.C. 545.

The learned Judge added that he was not prepared to say that there was not in the testimony of these two witnesses some corroboration by each of the story told by the other; but he was not dealing with the case in supposed obedience to any narrow or technical rule; his finding was in favour of the plaintiff because he (the learned Judge) was unable to say that he believed the story told by these two witnesses. His finding was upon a question of fact; he was not to be considered as laying down a rule of law. See Myers v. Toronto R.W. Co. (1913), 30 O.L.R. 263.

The other two defences failed upon the evidence.

Judgment for the plaintiff for the amount claimed, with interest from the 31st December, 1914, and costs.

MIDDLETON, J. JUNE 8TH, 1915.

MILK FARM PRODUCTS AND SUPPLY CO. LIMITED v. BUIST.

Contract—Sale of Land and Business—Mistake—Rescission—Inability of Purchaser to Make Restitution—Executed or Executory Contract—Absence of Fraud—Failure of Consideration.

The defendant, a dealer in milk in the city of Hamilton, on the 24th April, 1914, agreed to sell to the plaintiff company his land, factory, and entire outfit, including his goodwill, at a price of about $60,000, to be paid in two sums of $5,000 each in May and June, 1914, one-third of the price in shares of the plaintiff company, and the balance in 5 years. The defendant was to become manager of the company and to receive $3,600 a year salary. This action was begun on the 6th April, 1915, the plaintiff company seeking to rescind the agreement and to recover back $8,500 paid to the defendant under it, upon the grounds that the object and purpose of the agreement were frustrated, the consideration failed, the scheme had become illegal by reason of municipal action forbidding the erection of a factory building upon the land purchased from the defendant, and that the parties had acted under mutual mistake as to the legality and possibility of what was undertaken.

The action was tried without a jury at Hamilton.

S. F. Washington, K.C., and A. M. Lewis, for the plaintiff company.

Gideon Grant and D. Inglis Grant, for the defendant.

MIDDLETON, J., said (assuming that the contract was not to be treated as an executed one) that the plaintiffs were not in a position to make restitution so that the defendant might be placed in the same position as he occupied before the making of the agreement. The land could be reconveyed; but it was impossible, in June or even April, 1915, to give back to the defendant the business as it was in April, 1914. In order that there may be rescission there must be an ability to make restitution, and the defendant is entitled to receive back the thing he sold, and not something different, even plus compensation. Reference to Attwood v. Small (1838), 6 Cl. & F. 232; Vigers v.

Pike (1842), 8 Cl. & F. 562; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317. If there be fraud, the remedy is an action for deceit; where there is no fraud, but merely mistake, there is no recourse.

But, although no conveyance of the land had been made, possession had been taken, and in substance the contract was executed. If the contract is executed, and there is no fraud, there cannot be rescission unless it is shewn that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration: per Blackburn, J., in Kennedy v. Panama, etc., Mail Co. (1867), L.R. 2 Q.B. 580, 587; Angel v. Jay, [1911] 1 K.B. 666; Cole v. Pope (1898), 29 S.C.R. 291. It could not be said that there was a complete failure of consideration in this case.

Action dismissed without costs.

MIDDLETON, J. JUNE 11TH, 1915.

NAIMAN v. WRIGHT.

Mortgage—Foreclosure—Covenant for Payment—Title — Quit-claim Deed—Mistake—Reformation—Husband and Wife—Fraud—Undue Influence—Evidence — Assignment of Interest by one of Several Mortgagees pendente Lite—Addition of Assignee as Party—Rule 300—Recovery on Covenant—Ability to Reconvey—Form of Judgment—Payment into Court—Lien for Unpaid Purchase-money—Costs.

Action to enforce a mortgage by foreclosure and by recovery upon the covenant.

The action was tried without a jury at Toronto.

A. C. McMaster, for the plaintiffs.

J. J. Gray, for the defendants the Wrights.

MIDDLETON, J., said that a motion was made at the trial to dismiss the action, upon the ground that the plaintiffs had assigned their interests pendente lite. It appeared that, as between the mortgagees, the $57,000 secured by the mortgage belonged to them in definite proportions. These mortgagees, owing to the default in payment of the mortgage-money, found

themselves in need, and secured advances on the strength of divers assignments by way of hypothecation—some of them absolute in form. These assignments, however, with the exception of an assignment by the plaintiff Bothneet to one Nelles, had been cleared up, and re-assignments had been executed and produced. The action should not, therefore, be dismissed or stayed.

The assignment to Nelles was in a different position. The defendant Wright (the mortgagor) and Nelles were business associates. The assignment to Nelles was of one undivided fifty-seventh part of the $57,000. He did not desire to be redeemed, but lent his aid to the Wrights to block the action, if possible. It was held, at the trial, that the assignment did not defeat the entire action; and that, under Rule 300, the action might be continued by or against the person upon whom the estate had devolved by the assignment; and that—the assignment having been made after the action was at issue and while it was on the list for trial—the assignee had no right to disturb the situation of the action; but he ought to be added as a party: and, as he did not desire to become a plaintiff, in accordance with the principle of In re Mathews, [1905] 2 Ch. 460, he was added as a defendant, and the trial was adjourned to allow him an opportunity of delivering a pleading. No pleading was delivered, and Nelles did not appear and was not represented at the adjourned sittings, though he was properly served.

The defendants the Wrights were husband and wife. The husband agreed to purchase the land. The mortgage for part of the purchase-money was executed by the husband and wife, she joining to bar her dower and also as a covenanting party. The conveyance was contemporaneously made to the husband. Some time after it had been registered, in order to rectify certain errors, a supplementary quit-claim deed was prepared, in which both the husband and wife were named as grantees. The plaintiffs alleged that this was by mistake, and asked (by amendment made at the trial) for rectification of the quit-claim deed. In answer to this, the wife denied that there was any mistake, and alleged that there was consideration; and she also set up that, at the time she signed the mortgage, she had no independent advice and signed owing to undue influence on the part of her husband, and that she received no consideration. The learned Judge said that, the wife not having testified, there was nothing on which he could find fraud or undue influence on the part of the husband. An attack upon the whole transaction which gave rise to the mortgage, upon the ground of fraud, also

failed upon the evidence; and all other charges of fraud and misrepresentation were negatived.

It was argued that, as one of the mortgagees had conveyed some interest in the land, there could not be a reconveyance, and therefore the personal remedy on the covenant had gone. But the mortgagees had not parted with any interest in the land except by the assignment to Nelles; and, Nelles being a defendant, a judgment could be aptly framed to provide for his joining in the reconveyance upon payment of the mortgage-money. An account should be taken to ascertain the amount due to the mortgagees, and this amount should be paid into Court to the credit of the action, subject to further order; and, upon payment into Court, the plaintiffs and the defendant Nelles should be ordered to reconvey the land. The respective rights of the plaintiffs and Nelles can then be ascertained upon motion for payment out. The personal recovery will be by a direction to pay into Court. The plaintiffs will, in that event, have the carriage of the execution; but Nelles's rights will be protected; and the sheriff's duty will be to pay the money into Court.

The quit-claim deed should be reformed by striking out the name of the wife as grantee therein and directing that any estate or interest which by the deed had become vested in her should be vested in the husband, subject to the rights of the plaintiffs and Nelles as mortgagees and to the lien for unpaid purchase-money.

The Court has power to give time to a mortgagee to get back an estate he has parted with: In re Thuresson (1902), 3 O.L.R. 271.

The plaintiffs to have their costs throughout against the defendants the Wrights. As to Nelles, no costs.

LENNOX, J. JUNE 11TH, 1915.

KING v. CONSUMERS GAS CO. OF TORONTO.

Highway—Excavation in—Injury to Passer-by—Negligence of Gas Company—Finding of Jury—Possible Remedy against Municipal Corporation Lost by Failure to Give Notice under Municipal Act—Joint Tort-feasors—Effect of Release of one—Right of Contribution—Misfeasance—Nonfeasance.

Action by Lucinda King and William King, her husband, to recover damages for personal injuries sustained by her by falling into an excavation made by the defendants in a highway in

the township of York, near the city of Toronto, the plaintiffs alleging that the defendants were guilty of negligence.

The action was tried with a jury at Toronto.

H. J. Macdonald, for the plaintiffs.

E. F. B. Johnston, K.C., and W. B. Milliken, for the defendants.

LENNOX, J., said that the questions left to the jury were not objected to, and were answered in favour of the plaintiffs. The affirmative answer to the question, "Were the defendants guilty of negligence causing the injuries complained of?" prima facie excluded the contention of the defendants that the Corporation of the Township of York were, at the time of the accident, jointly, if not primarily, responsible for the injuries sustained. The township corporation, as well as the defendants, might have been liable; but the plaintiffs did not give the corporation the notice required by the Municipal Act; and the corporation were not sued.

The defendants contended that they and the township corporation were joint tort-feasors, and that the plaintiffs, having by laches released the one from liability, could not maintain an action against the other; for, amongst other reasons, the plaintiffs by their conduct prevented the defendants from raising any question of contribution. As to this the learned Judge said that at common law there was no right of contribution between joint tort-feasors; and the defendants had no statutory remedy over against the municipal corporation. Reference was made to Am. & Eng. Encyc. of Law, 2nd ed., vol. 24, pp. 306, 307, cited by counsel for the defendants; and it was pointed out that the plaintiffs had obtained no satisfaction, they had not been compensated, they had not executed a release, they had not dealt with either of the wrong-doers—there was at most a statutory bar of the right of action against one of them. The plaintiffs could not be said to be estopped.

Further, the learned Judge did not think that the defendants and the township corporation were joint tort-feasors: Addison on Torts, 6th ed., p. 94. The liability of the defendants was for misfeasance by original improper construction and misfeasance and nonfeasance by improperly repairing and neglecting to repair after notice; while the liability of the municipal corporation was for nonfeasance only.

Judgment for the plaintiff William King for $300 and for the plaintiff Lucinda King for $700, with costs.

CLUTE, J. JUNE 12TH, 1915.

RE DOMINION MILLING CO.

DENNIS'S CASE.

Company—Winding-up — Contributory — Agreement to Take Shares—Invalidity—Absence of Allotment—Issue of Certificates for Shares—Liability Confined to Shares for which Certificates Issued.

Appeal by George H. Dennis from the finding of the Master in Ordinary, in a reference for the winding-up of the company, that the appellant's name was properly placed upon the list of contributories in respect of the sum of $380 unpaid upon five shares of the capital stock of the company.

The company was incorporated on the 30th April, 1909. On the 23rd August, 1909, the appellant entered into an agreement with the company, whereby the company agreed to employ him in its flour-mill at a salary of $10 a week, and he agreed to buy 5 shares of the company's stock at $100 a share and to pay 50 per cent. of the price, "and balance of stock to be paid as he sees fit or otherwise to be paid weekly as convenient." The company also agreed, in case of dissatisfaction of either party, "by giving 60 days' notice, to withdraw this agreement," and the company to pay in cash to the appellant "the amount of stock he has paid up in said company." On the 28th August, 1909 (months after the incorporation of the company), the appellant signed the memorandum of agreement which had been signed by the incorporators before incorporation, by which he purported to agree to take 5 shares and to become a shareholder. On the same day, he paid $100, and was given a certificate for one share. Subsequently, he paid another $100, and was given a certificate for one share. He allowed a further sum of $50 to remain in the hands of the company from his wages; and he received back, under the agreement, $130. There was no evidence of allotment.

The appeal was heard in the Weekly Court at Toronto.

D. Urquhart, for the appellant.

R. McKay, K.C., for the liquidator.

CLUTE, J., was of opinion, for reasons stated at length in writing, that the agreement did not amount to a subscription

or an application for stock to the company. Certainly he did not become a shareholder by being one of the original subscribers; and the agreement was not in form or substance one made with the company: Canadian Druggists' Syndicate Limited v. Thompson (1911), 24 O.L.R. 108. There having been no formal acceptance of an application and no allotment made, the appellant was bound only by the completed acts—that is, the payment for and the receipt of the two certificates for one share each. There was no estoppel. The first agreement was ultra vires, and was material only as shewing what took place between the parties in regard to the attempt to withdraw a portion of the amount paid in by the appellant. The certificates having been issued, the company could not cancel the stock or take it back; and the attempt to do so was void.

The defendant should be held a contributory for the balance unpaid upon the certificates issued. Having paid $200 and withdrawn $80, he was liable to be placed upon the list of contributories for $80; and to this extent the Master's ruling should be varied. No costs.

CLUTE, J. JUNE 12TH, 1915.

RE GRAHAM.

Will—Construction—Direction to Executors to Sell Farm and Divide Proceeds—Sale of Farm by Testator after Execution of Will—Effect of Codicil—Mortgage Standing in Place of Farm—Acquisition of other Real Estate not Mentioned in Will—Intestacy.

Motion by the executors of the will of John Graham, deceased, for an order determining certain questions as to the construction of the will arising in the administration of the estate.

The testator died on the 21st December, 1913. His will was dated the 25th March, 1907. He directed his executors to sell his farm one year after his decease; out of the proceeds of the sale he gave his son George $1,500, and the balance to his three daughters equally. By a codicil, dated the 24th August, 1910, he recited that one of his daughters had died, and he revoked the bequest to her, and, instead, he bequeathed $200 to a granddaughter, and directed that, after that payment and the payment to George had been made, the balance should be divided equally between his two surviving daughters. In other respects he confirmed his will.

The farm was sold by the testator on the 21st April, 1911, for $3,500, and on the same day a mortgage was given back to the testator for $3,000, part of the purchase-money; $500 being paid in cash. At the time of his death, the testator owned a lot of land in the city of Woodstock, valued at $800, and he had $53.85 in cash, the $3,000 mortgage, and no other estate, real or personal.

The questions raised were: (1) whether the son George was entitled to the legacy of $1,500; and (2) whether the lot in Woodstock passed under the will.

The motion was heard in the Weekly Court at Toronto.

W. T. McMullen, for the executors.

S. G. McKay, K.C., for George A. Graham.

R. N. Ball, for Percy Yeo.

E. C. Cattanach, for Irene Graham, an infant.

CLUTE, J., said that, reading the will and the codicil together, it could not be doubted that it was the intention of the testator that his son George and the two daughters and the granddaughter should be the beneficiaries of his estate to be realised from the sale of the farm. If the son George was not entitled, neither were the daughters, for they also were to be paid out of the proceeds of the farm. George was, therefore, entitled to his legacy of $1,500.

Reference was made to Re Dods (1901), 1 O.L.R. 7; Morgan v. Thomas (1877), 6 Ch.D. 176; In re Alexander, [1910] W.N. 36, 94; In re Clifford, [1912] 1 Ch. 29.

As to the Woodstock lot, there was an intestacy. The gift was not to the executors of all the real and personal estate; but the opening words of the will, "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following," were followed by a direction to the executors to sell the farm, and there were no words in the will or codicil to include the Woodstock lot.

Order declaring accordingly; costs of all parties out of the estate.

R. WEDDELL & CO. v. LARKIN AND SANGSTER—CLUTE, J.—JUNE 8.

Contract — Work and Labour — Sub-contract — Sub-contractors Bound by Provisions of Main Contract—Items of Claim and Counterclaim—Findings of Fact—Reference—Costs.]—The plaintiffs brought this action to recover moneys alleged to be due for work done under a sub-contract, dated the 16th April, 1910, between them and the defendants, who were contractors with the Dominion Government for the construction of a section of the Trent Valley Canal. There was also a counterclaim by the defendants. The action and counterclaim were tried without a jury at Belleville. The principal question involved in the action was, whether, under the terms of the plaintiffs' sub-contract, they were bound by the provisions of the defendants' contract with the Government. This and other questions of fact arising were considered by the learned Judge in a written opinion of some length, and decided in favour of the defendants, with the exception of one item. Judgment directing a reference to ascertain the amount to which the plaintiffs are entitled for the portion of work done under a certain letter of the 25th July, 1913, subsequent to that date, and not paid for, and also to ascertain the amount due to the defendants under their counterclaim. Except as to the one item, the action is dismissed. Further directions and costs reserved. E. G. Porter, K.C., and W. Carnew, for the plaintiffs. A. M. Stewart, for the defendants.

CANADIAN PRESSED BRICK CO. v. COLE—MIDDLETON, J.—JUNE 9.

Fraudulent Conveyance—Husband and Wife—Intent to Defeat Creditors of Husband—Claim of Creditor against Husband— Contract — Novation — Evidence.]—Action to recover from the defendant George Cole $1,787.50, the price of bricks supplied to him by the plaintiff company, and to set aside a conveyance of the 24th July, 1914, from the defendant George Cole to the defendant Sarah Cole, his wife, of a house which was substantially his sole asset. The action was tried without a jury at Hamilton. An attempt was made by the defendant George Cole to establish that there was a novation by which the plaintiff company undertook to accept one Metherell as its debtor and to release Cole. This defence was not made out upon the evidence. As to the conveyance to the wife, the learned

Judge finds that it was made with the intention of defeating the plaintiff company's claim. The house conveyed really represented the bricks bought from the plaintiff company and used in building it and other houses. Stripped of form, and looking only at the substance, the arrangement was a dishonest one on behalf of both the husband and wife to give her the title through her husband to the house and enable him to escape payment of the price. Judgment for the plaintiff company for the amount claimed against the defendant George Cole, and declaring the conveyance fraudulent and void against the plaintiff company and the other creditors of the defendant George Cole; reference to the Local Master at Hamilton to sell the land and distribute the proceeds in the ordinary way. Costs to be paid by the defendants. A. M. Lewis, for the plaintiff company. C. W. Bell, for the defendant George Cole. P. R. Morris, for the defendant Sarah Cole.

CRANE v. HOFFMAN—MIDDLETON, J.—JUNE 9.

Sale of Goods—Conditional Sale of Machine—Contract—Provision for Sale upon Default of Payment and Application of Proceeds upon Promissory Note Given for Price—Liability of Person Endorsing as Surety—Repossession of Machine by Vendor and Use in Business—Action by Vendor upon Note.]—This action arose out of the same transactions as Wade v. Crane, ante 478, and was tried without a jury at Hamilton. The plaintiff, the owner of a brickyard, agreed to sell it. By the terms of the sale, the deed was to remain in escrow until payment of the purchase-price. The Excelsior Brick Company, the purchaser, made an assignment for the benefit of creditors; and the assignee, in carrying on the business of the company, desired to replace a broken-down machine by a new one. The plaintiff bought the machine, and agreed to sell it to the company, upon the terms of a conditional sale contract, by which the property was not to pass until the price was paid. A promissory note was given for the price, and this stipulation was added to the note. This action was brought to recover the amount of the note from the defendant, who endorsed it as surety. The machine was annexed to and became part of the realty; and, default having been made in carrying out the purchase of the land, the plaintiff took possession of the land, and, with the land, possession of the machine. The plaintiff operated the yard and treated the machine as his own property. The defendant set up that, the property not having passed, and the

plaintiff having repossessed and treated the machine as his own, he could not recover the price. The contract contained a provision that, upon default in payment of the note, the plaintiff should be at liberty to take possession of and sell the machine and apply the proceeds upon the note, after deducting costs of repossessing and selling. The learned Judge said that the plaintiff could not recover that which was in truth the price of the chattel sold, because his conduct had been inconsistent with his obligations as vendor. He was at liberty, under the contract, on resuming possession, to sell the property and apply the proceeds upon the note. He had not sold the machine, but had used it as part of his own plant; and he could not now call upon the purchaser to accept a machine which he had applied to his own purposes. It was no answer to say that the machine had not been much depreciated by the user of it, and that compensation could be made. It was sufficient that the use made of the machine was not contemplated by the contract, and was inconsistent with the obligation to hold it ready for delivery. Action dismissed with costs. W. M. McClemont, for the plaintiff. S. H. Bradford, K.C., for the defendant.

CAMPBELL v. DOUGLAS—LENNOX, J.—JUNE 12.

Vendor and Purchaser—Exchange of Lands—Retention of Money to Pay off Mortgages—Right of Covenantor to be Indemnified against Obligations.]—Action to recover $4,911.74 and interest as damages for the breach by the defendant of a covenant or obligation to pay off and discharge the plaintiff's liability under certain mortgages, as part of the consideration upon an exchange of lands between the plaintiff and defendant. The action was tried without a jury at Ottawa. The learned Judge finds that the defendant was not a mere nominee, and that the plaintiff was not unconditionally bound to convey to him, and the plaintiff did so, as he stated, only because the defendant was a man of substance and undertook by the conveyance to apply the consideration money retained in discharge of the plaintiff's obligation under the mortgages. It was an exchange of lands—practically an exchange of obligations—and the defendant reaped the full benefit of the obligations undertaken by the plaintiff. Walker v. Dickson (1912), 20 A.R. 96, distinguished. Small v. Thompson (1897), 28 S.C.R. 219, followed. Judgment for the plaintiff for $4,911.74, with interest and costs. J. R. Osborne, for the plaintiff. W. D. Hogg, K.C., for the defendant.

BARE v. BARE—BRITTON, J.—JUNE 12.

Deed—Conveyance of Land by Aged Person—Improvidence—Absence of Independent Advice—Consideration—Deed Set aside—Moneys Expended in Maintaining Grantor—Allowance for—Costs.]—Action to set aside a conveyance of a lot in the village of Cardinal, in the county of Grenville, made by the plaintiff in favour of the defendant, bearing date the 30th March, 1914, and purporting to be in consideration of the sum of $1,500. The action was tried without a jury at Brockville. At the close of the evidence and argument at the trial, the learned Judge was of opinion that the plaintiff was entitled to succeed; but he reserved the case for further consideration as to costs, and as to whether the defendant was or was not entitled to any relief for the money he had expended in maintaining the plaintiff while she was residing in the defendant's house, and being cared for by the defendant and his wife. Dealing with these questions, the learned Judge stated that he was of opinion that there was no intention on the part of the defendant to defraud the plaintiff, but the conveyance was not in accordance with the defendant's own admission of the real arrangement between him and the plaintiff. Making such a conveyance of the plaintiff's property was an improvident thing for the plaintiff to do, and she acted without any independent advice, at a time when, by reason of her age and failing mental power, she was unable to understand what she was doing or the effect of making such a conveyance. Judgment directing that the conveyance be set aside and the registry of it vacated; the defendant to be entitled to retain, without accounting for it to the plaintiff, the rent collected by him up to the time of plaintiff's leaving the defendant's house; all the rent from that time to be paid to the plaintiff; the note for $100 alleged to have been made by the plaintiff in favour of the defendant, dated the 6th December, 1912, to be given up to the plaintiff to be cancelled; and the alleged debt of the plaintiff to the defendant not to be collected or attempted to be collected by the defendant. No costs. Irwin Hilliard, K.C., for the plaintiff. H. A. Stewart, for the defendant.