The
# Ontario Weekly Notes

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## APPELLATE DIVISION.

JUNE 14TH, 1915.

### *AUGUSTINE AUTOMATIC ROTARY ENGINE CO. LIMITED v. SATURDAY NIGHT LIMITED.

*Libel—Newspaper—Security for Costs—Libel and Slander Act, R.S.O.* 1914 *ch.* 71, *sec.* 12—*Order of Judge—Appeal—Sec.* 12, *sub-sec.* 4.

Appeal by the plaintiff company from the order of MIDDLETON, J., in Chambers, ante 426, allowing an appeal by the defendant company from an order of the Master in Chambers refusing to require the plaintiff company to give security for costs under sec. 12 of the Libel and Slander Act, R.S.O. 1914 ch. 71, and ordering the plaintiff company to give security, and, in default, that the action should be dismissed.

Leave to appeal was given by an order of MEREDITH, C.J.C.P., ante 462.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

W. J. Elliott, for the appellant company.

G. M. Clark, for the respondent company.

THE COURT was of opinion that the order of MIDDLETON, J., was a substantive order made by a Judge under sec. 12, and was not subject to appeal: sub-sec. 4.

*Appeal dismissed with costs.*

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

JUNE 15TH, 1915.

## BELL v. SMITH.

*Partnership—Purchase of Farm by Syndicate—Profits Received by two Members—Concealment and Misrepresentation—Lien—Sale of Property—Dissolution of Partnership—Account—Parties—Costs—Forfeiture.*

Appeal by the defendants Smith and Coleridge from the judgment of LENNOX, J., ante 49.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

J. H. Rodd, for the appellant Smith.

F. D. Davis, for the appellant Coleridge.

D. L. McCarthy, K.C., for the plaintiff, respondent.

LATCHFORD, J., read a judgment in which he discussed the evidence and the findings of the trial Judge. He concluded by saying that the evidence established that, in the purchase of the land in question from the Morton syndicate, as well as in the sale to the plaintiff, the defendant Coleridge was the agent as well as partner of the defendant Smith. The evidence so connected Smith with Coleridge that the judgment against Coleridge in the former action (Bell v. Coleridge (1913-14), 5 O.W.N. 655, 6 O.W.N. 200) became in effect a judgment against Smith. Smith was answerable for the misrepresentation by which his agent and co-partner obtained $3,750 from the plaintiff. It was a hardship that the plaintiff must recognise as his partners in the ownership of the farm, two persons who had not paid a dollar towards the purchase-price except what they wrongfully procured from him; but there was no cross-appeal from the declaration that the rights of these defendants had not been forfeited. The plaintiff was not insisting on judgment and execution against Smith and Coleridge for the $3,750, but was content to have that amount, with interest, charged against them as a lien on the property on the taking of the partnership accounts. To that extent the judgment must be varied: otherwise it should be affirmed, and the appeal dismissed with costs.

FALCONBRIDGE, C.J.K.B., and RIDDELL and KELLY, JJ., agreed in the result.

*Judgment varied.*

JUNE 15TH, 1915.

## REAUME v. CITY OF WINDSOR.

*Highway—Dedication—Acceptance—By-law of Municipality—Waiver of Conveyance—Evidence—Findings of Trial Judge—Appeal.*

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 7 O.W.N. 647.

The appeal was heard by RIDDELL, LATCHFORD, KELLY, and LENNOX, JJ.

J. H. Rodd, for the appellants.

E. D. Armour, K.C., for the defendants, respondents.

KELLY, J., delivering the considered judgment of the Court, said that the rights of the parties had been determined by the trial Judge mainly on the ground, as he found the facts, of a dedication to and user by the public of what was known as Medbury street, in what is now the city of Windsor; and there was ample evidence to support the finding upon that question, and also the finding that the execution of a conveyance was waived. It was necessary to shew acceptance by the municipal corporation, by some corporate act. No by-law was in evidence; but the construction and maintenance of pavements and sidewalks by the corporation at its own expense was sufficient evidence of acceptance.

No sufficient reason was shewn for interfering with the result arrived at by the trial Judge, and the appeal should be dismissed with costs.

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JUNE 15TH, 1915.

## *YOUNG v. BANK OF NOVA SCOTIA.

*Landlord and Tenant — Tenant Overholding after Expiry of Term and Paying Rent—Presumption—Tenancy from Year to Year—Corporation as Tenant.*

Appeal by the defendants from the judgment of the District Court of the District of Thunder Bay.

By an indenture under seal the plaintiff leased to the defendants, a chartered bank, certain premises for a term of 18

months from the 1st September, 1912, at a rental, "yearly and for every year during the said term, . . . of $2,700 . . . payable . . . in even portions monthly of . . . $225 . . . each; the first of such payments to . . . be made on the 1st day of October, 1912." The defendants entered into possession and remained in occupation during the term. When the term was up, on the 1st March, 1914, the defendants, having paid rent according to the lease, continued on in possession, and paid (expressly as rent) $225 on the last day of each month from March to October, 1914, and on the 28th November, 1914. The defendants, having obtained other premises, and assuming that they were monthly tenants, on the 20th October, 1914, served notice of delivering up possession, and went out of possession before the end of November.

If the tenancy was a monthly tenancy, the notice was admittedly sufficient; but the plaintiff set up that the tenancy was from year to year; and on the 13th January, 1915, began this action to recover $225 for the rent due on the 1st January, 1915.

The District Court Judge held that a tenancy from year to year had been created, and gave judgment for the plaintiff.

The defendants' appeal was heard by FALCONBRIDGE, C.J. K.B., HODGINS, J.A., RIDDELL and LATCHFORD, JJ.

C. A. Masten, K.C., for the appellants.

W. N. Tilley, for the plaintiff, respondent.

RIDDELL, J., delivering the judgment of the Court, said that it was contended that, under the facts, no implication of tenancy from year to year could arise, even if the tenant were not a corporation. Upon this point reference was made to Woodfall's Landlord and Tenant, 19th ed., p. 257; Bishop v. Howard (1823), 2 B. & C. 100; Hyatt v. Griffiths (1851), 17 Q.B. 505; Thetford (Mayor of) v. Tyler (1845), 8 Q.B. 95; Idington v. Douglas (1903), 6 O.L.R. 266; St. George Mansions v. King (1910), 1 O.W.N. 501, 15 O.W.R. 427; Roe dem. Brune v. Prideaux (1808), 10 East 158, 187, where Lord Ellenborough says that the receipt of rent is evidence to be left to a jury that a tenancy was subsisting; and, if no other tenancy appear, the presumption is that that tenancy was from year to year. Here no other tenancy was made to appear, and the presumption was not met.

The other point raised was, that a corporation cannot be held liable as a tenant from year to year; and the cases relied on were Finlay v. Bristol and Exeter R.W. Co. (1852), 7 Ex. 409, and

Garland Manufacturing Co. v. Northumberland Paper and Electric Co. Limited (1899), 31 O.R. 40. The learned Judge considered and distinguished these cases, and also pointed out that they had been doubted. He referred to Doe dem. Pennington v. Taniere (1848), 12 Q.B. 998, as in point. His conclusion was, that, a valid tenancy actually existing, the consesquences of overholding and paying rent were the same for a corporation tenant as for any other.

*Appeal dismissed with costs.*

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JUNE 18TH, 1915.

## *RE SHARP AND VILLAGE OF HOLLAND LANDING.

*Municipal Corporations—Local Option By-law—Motion to Quash — Voting on By-law — Voters' List — Disqualification of Voters—Council Meeting—Third Reading of By-law.*

Appeal by Sharp, the applicant, from the order of HODGINS, J.A., ante 386, dismissing a motion to quash a local option by-law.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

J. B. Mackenzie, for the appellant.

W. E. Raney, K.C., and E. F. Raney, for the village corporation, respondent.

FALCONBRIDGE, C.J.K.B., delivering the judgment of the Court, said that the votes of two men named Oster were not successfully impeached, and the Court did not find that there was evidence or any legal ground upon which to kill a sufficient number of other votes—without reference to the fact that it cannot appear how any of them voted.

As to the alleged defect in the third reading of the by-law: if the council thought a new third reading was necessary, in view of the fact that sufficient time had not been allowed to elapse, it was competent for the council to give it.

As to there not being a separate list of voters, the Court was of opinion that this was not left undone with a view of preventing any one from voting. The list was the same, and the result could not be affected.

*Appeal dismissed with costs.*

## HIGH COURT DIVISION.

CLUTE, J., IN CHAMBERS. JUNE 14TH, 1915.

### AUGUSTINE AUTOMATIC ROTARY ENGINE CO. LIMITED v. SATURDAY NIGHT LIMITED.

*Libel — Newspaper — Pleading — Statement of Defence — Fair Comment—Particulars.*

Appeal by the plaintiff company from an order of the Master in Chambers refusing a motion by the plaintiff company to strike out the particulars delivered by the defendant company or for better particulars under a paragraph of the statement of defence.

The action was for libel, the writing complained of being an article published in the defendant company's newspaper.

The defendant company denied the publication and the innuendo alleged by the plaintiff company, and pleaded that, if the defendant company did publish the words complained of, "the said words, in so far as they consist of allegations of fact, are true in substance and in fact, and, in so far as they consist of expressions of opinion, are fair and bonâ fide comments, made in good faith and without malice upon the said facts, which are matters of public interest, and the publication of the same was for the public benefit."

An order was made by the Master in Chambers directing the defendant company to deliver particulars under the paragraph quoted, and the particulars now complained of were delivered pursuant to that order, which was not appealed against.

W. J. Elliott, for the plaintiff company.
G. M. Clark, for the defendant company.

CLUTE, J., said that the plea under which the particulars were delivered was not one of justification but of fair comment: Digby v. Financial News Limited, [1907] 1 K.B. 502; Peter Walker & Son Limited v. Hodgson, [1909] 1 K.B. 239; Lyons v. Financial News Limited (1909), 53 Sol. J. 671. Particulars must be relevant to the issue; if they are irrelevant or vague or embarrassing, they will be struck out: Markham v. Wernher Beit and Co. (1902), 18 Times L.R. 763 (H.L.); Higginbotham v. Leach (1842), 10 M. & W. 363. A defence which leaves it in doubt what the defendant justifies and what he does not will

be struck out as embarrassing: Fleming v. Dollar (1889), 23 Q.B.D. 388; Halsbury's Laws of England, vol. 18, para. 1245, p. 674. The plaintiff company complained that it was not sufficient to state, as the defendant company did in paragraph 1 (c) of the particulars, that the financial editor of the defendant company's newspaper was informed of certain things by one Simons, but should state whether he averred that the statements made were true in substance and in fact; and so of clauses (d), (e), and (f). It was incumbent upon the defendant company in its particulars to point out with clearness the facts upon which it intended that to point out with clearness the facts upon which it intended to rely as the facts upon which it pleaded that it made fair comment.

The particulars were insufficient and embarrassing. The plaintiff company was entitled to know what the defendant company alleged to be the facts upon which fair comment was said to have been made and which were said to be in the public interest and for the public benefit.

Clauses (c), (d), (e), and (f) of paragraph 1 of the particulars should be struck out, with liberty to the defendant company to amend by stating the allegations of facts which it alleged to be true in substance and in fact.

Under paragraph 2 (a), (b), and (c) of the particulars, the defendant company should state what the allegations were which were said to be fair and bonâ fide, or mark the same in his particulars with red ink.

To this extent the appeal should be allowed; costs of the appeal to the plaintiff company in any event of the cause.

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LENNOX, J. JUNE 16TH, 1915.

## *RE STEWART AND TOWN OF ST. MARY'S.

*Municipal Corporations—By-law Limiting Pool-room Licenses in Town to one—Monopoly—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 254—*Effect of secs.* 249, 250—*Motion to Quash By-law.*

Motion by Stewart to quash by-law No. 297 passed by the Council of the Town of St. Mary's, providing that the billiard- and pool-room licenses to be issued in the town for the license

year beginning on the 1st May, 1915, shall be limited to one, and that for such license the licensee shall pay $72.

J. C. Makins, for the applicant.

No one appeared for the town corporation.

LENNOX, J., said that the population of St. Mary's was about 4,000, and it was not pretended that one license was not sufficient for the requirements of the town, or that the by-law was not passed in good faith.

Reference was made to Re McCracken and United Townships of Sherborne et al. (1911), 23 O.L.R. 81, and the cases upon which the decision in that case was founded, distinguishing them.

The applicant relied upon sec. 254 of the Municipal Act, R.S.O. 1914 ch. 192, providing against the creation of monopolies.

The learned Judge quoted sub-sec. 2 of sec. 249 of the same Act, a provision first found in the Municipal Act of 1913, as follows: "A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them." This provision, he said, eliminated the difficulties referred to in the McCracken case, at pp. 100, 101. He referred, in addition, to sec. 250 of the same Act, also introduced in 1913.

"Taking into account," he said, "the very large discretionary powers conferred upon the council by these provisions, and that incidental monopoly, even where it is to be enjoyed by one individual or company, is not foreign to our statutory municipal law. . . I cannot read sec. 254 as necessarily compelling a municipal council to issue licenses for a multitude of pool-rooms, slaughter-houses, pounds, and livery-stables, within the municipality . . . beyond the reasonable requirements of the municipality, even if it may be argued that the reasonable and proper limitation fixed by the council may incidentally and unavoidably result in individual monopoly. . . . There is here no question of practical prohibition, as in Rowland v. Town of Collingwood (1908), 16 O.L.R. 272."

Motion dismissed; no costs.

BRITTON, J. JUNE 17TH, 1915.

## CHILDS v. KING.

*Landlord and Tenant—Lease—Assignment without Leave—Unreasonable Refusal of Lessor to Consent—Right to Assign—Declaration—Damages—Costs.*

Action for a declaration that the plaintiff was entitled, without the written consent of the defendant, the lessor, to make a valid assignment of the lease of certain premises to the plaintiff; and for damages.

The lease provided that the plaintiff, the lessee, should not sublet or assign the lease without the consent in writing of the defendant, but that consent should not be unreasonably refused.

The plaintiff agreed to sell and assign the lease to Rose Plesky, and applied to the defendant for her consent, which was refused. The defendant brought an action against Plesky for possession, which was settled. The defendant then gave her consent to the assignment, but refused to pay any damages or costs of this action (which was then pending) to the plaintiff.

The action was tried without a jury at Toronto.

S. H. Bradford, K.C., and H. J. Martin, for the plaintiff.

G. H. Watson, K.C., and N. Sinclair, for the defendant.

BRITTON, J., said that the defendant was entitled to a reasonable time to make inquiry as to the character of the assignee, the use intended, and other matters material to be known. The plaintiff was ready to give and did give such information as was necessary, and the defendant had ample time to verify that information before the commencement of this action. The defendant took the position that she had the right to have the assignee enter into covenant relations with her as lessor. The defendant was wrong in this, and unreasonably refused to consent to the assignment. The defendant having so acted, the plaintiff had the right to complete and deliver the assignment, and to allow the assignee to go into possession: Evans v. Levy, [1910] 1 Ch. 452; West v. Gwynne, [1911] 2 Ch. 1; Waite v. Jennings, [1906] 2 K.B. 11.

The assignee claimed damages from the plaintiff for delay and loss of business, and the plaintiff, in settlement of that claim, paid $150, which he now claimed from the defendant. The plaintiff was not obliged to pay that sum, and could not recover it from the defendant.

The plaintiff, however, suffered some damage by reason of the defendant's unreasonable and wrongful refusal to consent to the assignment; and his damages should be assessed at $40.

Judgment for the plaintiff for $40, with a declaration that the plaintiff, at the time he delivered the assignment of the lease to Plesky, was entitled to grant a valid assignment without the written consent of the defendant. The plaintiff's costs, on the County Court scale, to be paid by the defendant, without any set-off of costs to the defendant.

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LENNOX, J., IN CHAMBERS. JUNE 17TH, 1915.

## REX v. CURRY.

*Criminal Law—Depriving Children of Parental Control—Enticement of Father — Contributing to Making Children Juvenile Delinquents—Offence not Known to Law—Juvenile Delinquents Act*, 1908, 7 & 8 *Edw. VII. ch.* 40, *sec.* 29 (*D.*)—*Scope of—Evidence—Fair Trial—Conviction — Imprisonment—Habeas Corpus—Discharge.*

Mabel Curry, the prisoner, was brought before the Juvenile Court in the city of Toronto—Deputy Commissioner Graham presiding—to answer the charge "that on the 25th day of May, 1915, and previously, she did contribute to Dorothy and Gordon Wilson, children under sixteen years of age, being or becoming juvenile delinquents, in that she did knowingly and wilfully keep company with Roy Wilson and did thereby deprive the said Roy Wilson from keeping Dorothy and Gordon, his children, under proper parental control, and did contribute to the said Dorothy and Gordon Wilson being or becoming juvenile delinquents."

The prisoner pleaded "not guilty," was found guilty, and committed to gaol for three months.

The prisoner obtained a writ of habeas corpus, upon the return of which she was brought before LENNOX, J., in Chambers, and a motion was made for her discharge.

W. K. Murphy, for the prisoner.

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

LENNOX, J., said that the prisoner had a statutory right to be allowed to make her full answer and defence to the charge

by her own evidence and the testimony of other witnesses, if present: Criminal Code, sec. 715; and she should have been distinctly asked whether she desired to give evidence before the charge was adjudicated upon. There was every reason to believe that the prisoner's evidence was shut out; but that was not the determining factor.

There was no offence charged to support the conviction, and no evidence to support the charge as laid. There was not one word of evidence to shew that either Dorothy or Gordon Neville was a juvenile delinquent. And there was no legal offence charged. The only provision of law referred to as affording any support was sec. 29 of the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. ch. 40, and that was manifestly insufficient.

The prisoner was not properly before the Court, and there was no jurisdiction to reprimand or punish.

The Deputy Commissioner acted in good faith.

*Prisoner discharged.*

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BRITTON, J. JUNE 18TH, 1915.

## DUBE v. ALGOMA STEEL CORPORATION LIMITED.

*Negligence—Death of Person Operating Derrick—Negligence of Owner of Derrick—Negligence of Hirer—Findings of Jury—Evidence—Contributory Negligence.*

Action by Mary Dube, widow and administratrix of the estate of Martin P. Dube, deceased, on behalf of herself and children, to recover damages resulting from the death of Dube from one or both of the two defendants, the Algoma Steel Corporation Limited and the Lake Superior Paper Company Limited.

A travelling derrick owned by the paper company was, with its crew—consisting of the deceased, as engineer, and a fireman—hired by the steel corporation to do some work upon its premises. The derrick was taken by the crew to the steel corporation's premises; and, while it was upon those premises, and while Dube was lifting by the derrick an iron tank of the steel corporation from one side of the track to replace it upon a flat car on the other side of the track, the derrick was overturned and fell, in its fall instantly killing Dube.

The plaintiff alleged negligence on the part of both defendants.

At the trial before BRITTON, J., and a jury, at Sault Ste. Marie, both defendants, at the close of the evidence, asked to have the case withdrawn from the jury. Upon these motions judgment was reserved, and questions were submitted to the jury, upon which they found: (1) that the paper company was guilty of negligence which caused the death of Dube; (2) that the negligence was "not furnishing proper equipment, clamps, and ballast in deck of crane;" (3) that the crane was a dangerous machine at the time when used and as used by the steel corporation; (4) that it was dangerous "in not being properly clamped to track or blocked under decking—deck of crane not being properly ballasted;" (5) that the steel corporation was guilty of negligence which caused the death of Dube; (6) that the negligence was "in not having a proper rigger to superintend the work that had to be done;" (7) that Dube could not, by the exercise of reasonable care, have avoided the accident. The jury assessed the damages at $3,000, to be apportioned by the learned Judge; if both companies were liable, each was to pay $1,500; if only one, that company to pay $3,000.

U. McFadden and E. V. McMillan, for the plaintiff.

J. E. Irving, for the defendant the Algoma Steel Corporation Limited.

P. T. Rowland, for the defendant the Lake Superior Paper Company Limited.

BRITTON, J., said that no question was submitted to the jury as to whose servant Dube was at the time of the accident; the facts were not in dispute; and, upon the undisputed evidence, it was a question of law.

It was manifest that the danger was in the using of the crane, as and in the circumstances in which it was used, and not by reason of anything wrong or dangerous in the crane as it stood; and, in the opinion of the learned Judge, there was no evidence of negligence on the part of the paper company which should have been submitted to the jury.

Action against the paper company dismissed, but without costs.

There was evidence against the steel corporation that could not properly have been withdrawn from the jury; and judgment should go against that defendant for $3,000, with costs proper to an action in which there is only one defendant.

The $3,000 should be apportioned in the sums of $1,250 to the plaintiff and $1,750 divided equally among the children. If it should be necessary to deduct anything for costs between solicitor and client, the minutes may be spoken to and the apportionment varied. The moneys of the infant children to be paid into Court.

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LENNOX, J., IN CHAMBERS. JUNE 19TH, 1915.

## REX v. SINKOLO.

*Liquor License Act—Keeping Liquor for Sale on Unlicensed Premises—Conviction — Evidence — Liquor License Act, R.S.O.* 1914 *ch.* 215, *sec.* 102(2)—*Conviction for Selling on same Day—Separate Offences—Sec.* 88(3) *of Act—Motion to Quash Conviction—Notice—Judicature Act, R.S.O.* 1914 *ch.* 56, sec. 63(2).

Motion to quash a magistrate's conviction under the Liquor License Act for keeping intoxicating liquor for sale without a license.

J. H. Campbell, for the defendant.
J. R. Cartwright, K.C., for the Crown.

LENNOX, J., said that there was ample evidence to support the conclusion reached by the magistrate that the intoxicating liquor found upon the defendant's premises, or most of it, belonged to the defendant and that he had it there for the purpose of sale.

The defendant was the keeper of a store and boarding- and lodging-house; it was a quasi-public place; and the fact, as reasonably found, that there was more liquor discovered than could be reasonably supposed to be intended for the use of himself and his family was, by sec. 102, sub-sec. 2, of the Liquor License Act, R.S.O. 1914 ch. 215, conclusive evidence that it was kept for sale in contravention of the Act.

The main argument was, that keeping and selling make one offence, and that the defendant had been previously convicted for selling on the same day. The selling charged was at an earlier time of the day—the search apparently being made after the hour at which the sale took place. The only evidence of this was the conviction for selling—the other facts resting on the

statements of counsel. The motion did not cover the previous conviction; and, by sec. 63 (2) of the Judicature Act, R.S.O. 1914 ch. 56, under which the motion was made, the notice shall specify the objections intended to be raised. If the statements of counsel were not accepted, it did not appear that there was more than one conviction; and, if they were accepted, the fact of sales having been made was the most cogent evidence that liquor was being kept by the defendant for sale.

But, in any case, the offences were distinct. Both offences, as well as both hearings, were on the same day. That was not material: sec. 88, sub-sec. 3, of the Liquor License Act.

*Motion dismissed without costs.*

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LEADLAY v. UNION STOCKYARDS CO. LIMITED—BRITTON, J.—JUNE 14.

*Company—Shares—Transfer by Endorsement on Certificate—Failure to Record in Books of Company—Fraud of Transferor—Rights of Transferee against True Owner—Laches—Mandamus.*]—On the 13th May, 1904, William Levack & Co. assigned to the plaintiffs 80 shares of the common stock of the defendant company. The assignment was by endorsement upon two certificates, each for 40 shares. The plaintiffs did not ask to have the shares transferred on the books of the company until after all the assets of the company had been sold and the proceeds distributed. The plaintiffs alleged that William Levack & Co. were indebted to them in the sum of $4,300; that the sale of the assets of the company was for a sufficient sum to pay all the liabilities of the company and 60 cents on the dollar of the par value of the common stock; and the plaintiffs claimed payment of 60 cents on the dollar, namely, $4,800, and interest, or a mandamus to compel the defendants to register the transfer of the 80 shares on the books of the company, and (that transfer being made) an account of all the dealings by the defendants with the assets of the defendant company. The action was tried without a jury at Toronto. The learned Judge finds that the defendant Dods was the true owner of the 80 shares; that he lent the certificates to William Levack & Co. for a certain purpose; that a fraudulent use was made by Levack & Co. of the certificates; that the shares were not transferable, so as to bind the company, otherwise than on the books of the company; that the plaintiffs had

no right to retain the shares as against Dods; and that there had been such laches on the part of the plaintiffs in regard to the transfer that the case was not one for a mandamus. Action dismissed with costs. C. Kappele, for the plaintiffs. R. McKay, K.C., for the defendant company and the defendant Dods. G. W. Holmes, for the defendant Allan.

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RE WARDLE—SUTHERLAND, J., IN CHAMBERS—JUNE 15.

*Infants—Custody—Children's Aid Society—Children's Protection Act of Ontario, R.S.O.* 1914 *ch.* 231.] — On the 23rd March, 1911, the Police Magistrate for the village of Otterville, in the county of Oxford, made an order for delivery to the Children's Aid Society of Woodstock and Oxford County of the four infant children of Frank Wardle and Jane Wardle, under the Children's Protection Act of Ontario, 8 Edw. VII. ch. 59. The parents on the 25th May, 1915, moved, under the Act now in force, R.S.O. 1914 ch. 231, for an order setting aside the order made by the magistrate and directing that the mother be entitled to the custody of the three younger children, the eldest being now 19 years of age. The learned Judge said that the evidence given on behalf of the applicants was abundant and conclusive that the parents were, at the date of the magistrate's order, maintaining and educating the children in a respectable, comfortable, and orderly way; and the society was not justified in doing as it did. The representatives of the society appeared to have acted over-zealously and without sufficient investigation into the facts or proper regard to the wishes of the parents and the conditions at their home. Order made as asked, with costs against the society, fixed at $50. W. C. Brown, for the applicants. J. B. McKillop, for the Children's Aid Society.

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PEPPIATT V. REEDER—SUTHERLAND, J., IN CHAMBERS—JUNE 15.

*Costs—Scale of—Taxation.*]—The judgment of LENNOX J., at the trial of this action (ante 84), in so far as it ordered rescission of the lease, bill of sale, and chattel mortgage in question therein, was set aside by a Divisional Court of the Appellate Division upon appeal by the defendant (ante 257), and a judgment for the plaintiff for the recovery of damages for deceit was substituted, with a reference to the Master to assess the damages. No costs of the appeal were allowed. Costs of the action up to

and inclusive of the trial were awarded to the plaintiff; and the costs of the reference were to be in the discretion of the Master. Upon appeal by the defendant from the taxation of the plaintiff's costs, it was held by SUTHERLAND, J., that the Taxing Officer was justified, having regard to the claim made and the disposition thereof (see ante 84), in taxing the costs on the scale of the Supreme Court. Held, also, as to other matters included in his notice of motion by way of appeal from the taxation, that the defendant was not entitled to any relief. Motion dismissed with costs. J. J. Gray, for the defendant. Edward Meek, K.C., for the plaintiff.

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KAMINISTIQUIA POWER CO. v. SUPERIOR ROLLING MILLS CO. LIMITED—BRITTON, J.—JUNE 16.

*Damages—Breach of Contract to Take Electric Energy Supplied by Power Company—Measure of Damages—Peculiar Commodity — Money Damages Equivalent to Stipulated Price.*]—Action for damages for the breach by the defendant company of a contract for the supply of electrical energy. The contract was in writing and dated the 30th June, 1911. The plaintiff company agreed to "furnish and have available for" the defendant company "at least 200 horse power," and granted the defendant company the option of taking a further quantity not to exceed 350 horse power. The main contest was as to the amount of the damages. The plaintiff company contended that, by the contract itself, the damages were liquidated or "stipulated." The defendant company, on the other hand, contended that the plaintiff company could not recover other than such damages as might be proved to have arisen by reason of the breach; or that the plaintiff company was at most entitled only to nominal damages. It was recited in the contract that the defendant company was desirous of obtaining at least the 200 horse power with the option of an additional 350 horse power, and that the plaintiff company had agreed to furnish the said 200 horse power and to grant the option required by the defendant company. And the contract was, that the plaintiff company should sell and have available or ready to deliver the said 200 horse power, and the defendant company agreed to purchase and take it from the plaintiff company for a period of 20 years, to be reckoned from the completion of the company's mills, but not later than 18 months from the date of execution of the contract. The power was to be delivered in accordance with the terms par-

ticularly mentioned in the agreement. It was stated in the contract that, provided the plaintiff company was ready to deliver the 200 horse power, payments should be computed from a period commencing 18 months after the execution of the contract. And it was further provided that, if the defendant company was ready to receive it, the plaintiff company should deliver at an earlier period. The defendant company agreed to pay for the power in 12 monthly instalments, the amount of the monthly instalments to be readjusted at such time as the amount of power supplied was increased; and payments of all sums due for power were to be made on the 15th day of each month, for all power available, delivered, or ordered for use or used during the preceding month. As the defendant company required to have its supply of current continuous and uninterrupted, provision was made in the contract for damages in the event of the power not being so furnished, and provision was also made for discontinuance of power for repairs. The action was tried without a jury at Port Arthur. BRITTON, J., in a considered judgment, found that the defendant company never went into operation at Fort William so as to require this electrical energy, and in fact never was ready to receive and never did take any of it as contracted for; that, on the other hand, the plaintiff company was ready and willing at all times on and since the 30th December, 1912, to deliver the electrical energy. The damages should be the price the defendant company was to pay. Electrical energy is not like such commodities as cotton or sugar or anything of that kind. It is available for use only when generated and as required from day to day. If not taken on the day stipulated, it is of no value thereafter, and cannot enter into consideration in regard to the amount of damages. Judgment for the plaintiff company for $8,333.33 as claimed, without interest, and with costs. F. R. Morris, for the plaintiff company. W. A. Dowler, K.C., for the defendant company.

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DUNCAN v. COOPER—LENNOX, J., IN CHAMBERS—JUNE 17.

*Appeal—Motion for Leave to Appeal from Order of Judge in Chambers to Appellate Division—Rule* 507.]—Motion by the defendants for leave to appeal from two orders made by CLUTE, J., in Chambers, on the 11th June—the one dismissing the defendants' motion to set aside the writ of summons for irregularity; and the other (made upon an application by the defend-

ants for relief under the Mortgagors and Purchasers Relief Act, 1915), appointing the Woods Company receivers to receive rents of mortgaged premises and apply them on account of taxes, etc. LENNOX, J., said that, assuming that in both instances the defendants required leave in order to have the right to appeal—a point which might not be entirely free from doubt—the defendants had not brought themselves within Rule 507; for there were no conflicting decisions; and, in the opinion of the learned Judge, there was no reason to doubt the correctness of either of the orders nor to believe that the matters involved were of such importance as to justify an appeal. Motion refused, but without costs, as the the questions raised involved the construction of the recent statute above referred to. G. T. Walsh, for the defendants. F. J. Dyke, for the plaintiff.

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RE WARD—LENNOX, J.—JUNE 17.

*Will—Construction—Division of Estate—Period for—Vested Shares.*]—Motion by the executors of the will of Robert Ward, deceased, under the Trustee Act and Rule 600, for an order determining a question arising upon the terms of the will as to the distribution of the estate and for the advice and direction of the Court. The will provided that at the death of the testator's wife if she should survive him, or at his own death if he should survive her, the executors should, within one year thereafter, convert his estate into cash, and (1) pay debts and funeral and testamentary expenses; (2) pay the testator's son William Oswald Ward $1; (3) pay the balance to the testator's three daughters and one adopted daughter, share and share alike; (4) retain the share of his adopted daughter and invest it until she attains her majority; (5) in case any of the four should die leaving no issue, the share of that one should revert to the testator's estate and be divided "between my surviving heirs share and share alike;" (6) in case any of the four should die leaving issue "before the division of my estate," her share should be paid to her children, share and share alike; (7) in case none of the four "shall survive the division of my estate . . . my estate shall revert to my son William Oswald Ward absolutely." The testator's wife survived him and died on the 19th November, 1908. The beneficiaries named were, at the time of the application, all living and all of full age. LENNOX, J., was of opinion that the period of distribution arrived at the expiration of one

year after the death of the wife; the shares were vested in the four beneficiaries named; the event upon which the son might take had not happened and could not hereafter happen. Distribution should be made upon the basis of apportionment or division at the date provided for by the will, that is, about the 19th November, 1909, subject to the question of conversion without loss to the estate or the action or desire of the beneficiaries. Order declaring accordingly. Costs of all parties out of the estate. W. D. McPherson, K.C., for the executors and the four beneficiaries. A. J. Anderson, for William Oswald Ward.

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RE MORTON—LENNOX, J.—JUNE 17.

*Will—Construction—Bequest to Nephews and Nieces Living at Decease of Testator—Exclusion of Children of Nephews.*]—Motion by the executors of the will of Edward Morton, deceased, for an order, under the Trustee Act and Rule 600, determining a question arising upon the following clause of the will: "I devise and bequeath all the residue of my estate . . . unto such children of my brothers Thomas, William, and John Morton as may be living at my decease, such children to take among each other in equal shares the share their father if living would have taken had I died intestate. If any of my brothers shall have died without issue or without issue living at my decease then the share his children if living at my decease would have taken shall be divided among the children of the other brothers living at my decease in the proportions and in the manner above directed." The will was executed on the 29th March, 1912; the testator died on the 8th October, 1913. At the time the will was made, the three brothers were dead, as the testator knew. All the brothers had issue living at the time of the testator's death. No difficulty arose as to the children of Thomas and John; and they had been paid their shares. William had four children, but only one (William the younger) was alive at the date of the testator's death; two children of William the elder had married and left children who were alive at the date of the testator's death. LENNOX, J., was of opinion that William the younger was entitled to the whole third of the residue—the will made it quite clear that only such children of the brothers of the testator as survived the testator were directly or indirectly to take under the will. Costs of all parties to be paid out of the estate or out of William's third if the rest of the estate had been distributed. M. G. Cameron, K.C., for the executors. Alexander Smith, for the son and grandchildren of William Morton.

RE CENTRAL CANADA LOAN AND SAVINGS CO. AND YANOVER—LENNOX, J., IN CHAMBERS—JUNE 19.

*Mortgage—Mortgagors and Purchasers Relief Act, 1915—Interest—Leave to Proceed for Foreclosure or Sale.*]—Motion by the company, mortgagees, for an order under the Mortgagors and Purchasers Relief Act, 1915, allowing them to take proceedings for foreclosure or sale. LENNOX, J., said that the amount owing upon the several mortgages or charges held by the plaintiff company was $9,349.50 or upwards. Levinter, one of those liable upon the mortgage, swore that he was "engaged in the retail furniture business in Toronto, and, owing to the financial conditions brought about by the war, found it difficult to collect moneys owing for furniture sold." Assuming that he meant that he actually could not collect sums owing to him which but for the war he could have collected, he did not shew the amount of these assets, and it was hard to conceive that he could in any case be relying upon this source of supply to meet a claim of upwards of $9,000. But he also swore that the property was worth, as conditions were, as much as $31,000; so it was not a case of inability to meet the mortgagees' claim, but a question of who should be at the loss of the difference between 5½ per cent. and the interest value of money at the present time; the money could be obtained, but it would cost more for interest charges. There was no statutory intention, and no justice in holding, that the creditor was to be the one to bear the loss in such case. Order for leave to the company to proceed upon their several charges in the terms of the notice of motion after the expiration of 20 days, with $10 costs to be added to and recovered with the claim under the first charge. E. G. Long, for the company. M. H. Ludwig, K.C., for the persons to be made defendants.

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BRADSHAW V. GROSSMAN—MASTER IN CHAMBERS—JUNE 19.

*Pleading—Reply—Motion to Strike out Parts of—Questions of Law and Fact to be Disposed of at Trial—Leave to Rejoin—Notice of Trial—Motion to Strike out as Irregular.*]—Motion by the defendant Caplan to strike out the plaintiff's notice of trial as irregular and to strike out portions of the reply; and motion by the defendant Grossman to strike out a portion of the reply. The Master said that he was bound by the decision of MIDDLETON,

J., in Wingrove v. Wingrove (1915), ante 26, to hold that the parts of the reply attacked raised questions of law and fact which should be disposed of at the trial; and that no case had been made for striking out the notice of trial as irregular. The defendants might, if so advised, deliver a further pleading in rejoinder. Motions dismissed with costs. C. H. Kemp, for the defendants. G. T. Walsh, for the plaintiff.

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WASHINGTON AND JOHNSTON v. RAPER WASHINGTON AND FLURY BURIAL CO. LIMITED—MASTER IN CHAMBERS—JUNE 19.

*Pleading—Statement of Claim—Trade Name—Deception—Damages—Amounts Claimed—Rule* 145 — *Amendment — Particulars.*]—In an action for an injunction restraining the defendant company from advertising and representing itself as carrying on business under the name of the Raper Washington and Flury Burial Company Limited in such a manner as to deceive and give to the public the impression that the company was being carried on under the name of the Washington Burial Company Limited, and for damages, the defendant company moved to strike out paragraphs 2, 3, 4, 5, and 15 of the statement of claim, on the ground that the allegations therein contained were irrelevant and frivolous and disclosed no cause of action, and to strike out paragraphs 17 and 18, claiming damages, on the ground that the amount claimed was not stated; and the defendant company also moved for particulars of the alleged inconvenience, annoyance, and confusion to the plaintiffs' business, and for particulars of the plaintiffs' loss and damages. The Master said that paragraphs 2, 3, 4, and 5 were historical, and did not, at present, embarrass the defendant company, and were properly pleaded by the plaintiffs. Paragraph 15 should be struck out: it disclosed no cause of action against the defendant; the defendant was not a party to the agreement for the dissolution of the partnership. Paragraphs 17 and 18 were irregular. Damages were claimed, but the amounts were not given. These paragraphs should be amended by stating the amounts claimed, as required by Rule 145. Full particulars should be furnished of the loss and damages sustained and claimed by the plaintiffs, giving, if possible, the nature thereof, with dates, items, and amounts; and, if loss of specific customers was relied on, the names of the customers should be given, together with the amount of the loss thereby, if known to the plaintiffs. The

plaintiffs furnished the defendant company on the 20th April, 1915, with particulars of the statement of claim. The plaintiffs were to be bound by the particulars so furnished. The statement of claim should be amended and particulars delivered within ten days. Usual time for delivery of defence. Proceedings stayed until delivery of particulars. Costs of the motion to be costs in the cause. G. T. Walsh, for the defendant company. E. C. Ironside, for the plaintiffs.