THE ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM MARCH, 1917, TO THE END OF JULY, 1917.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

VOL. XII.

Editor:

Edward B. Brown, K.C.

1917:
CANADA LAW BOOK CO., LTD.
LAW BOOK PUBLISHERS
TORONTO

CASES NOTED.

(Cases marked * are reported or to be reported in the Ontario Law Reports.)

F.

G.

H.

K.

L.

N.

O.

P.

Q.

R.

S.

T.

U.

V.

W.

Y.

CASES CITED.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

R.

S.

T.

U.

V.

W.

Y.

Z.

The
Ontario Weekly Notes

VOL. XII. TORONTO, MARCH 16, 1917. No. 1

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JANUARY 25TH, 1917.

WOOD v. HAINES.

Principal and Agent—Fiduciary Agent—Moneys Paid by Principal to Agent—Misapplication by Agent—Judgment for Return of Moneys Paid—Undertaking to Return Company-shares Received by Principal—Evidence—Findings of Fact of Trial Judge—Reversal by Appellate Court—Restoration by Judicial Committee.

Appeal by Mary Wood and others, executors of James Johnston, the original plaintiff, from the judgment of the First Divisional Court of the Appellate Division, Johnston v. Haines (1916), 10 O.W.N. 46, reversing the judgment of LENNOX, J., 8 O.W.N. 551, and dismissing the action.

The appeal was heard by a Board composed of VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD WRENBURY.

P. O. Lawrence, K.C., and W. J. Elliott, for the appellants.

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

The judgment of the Board was delivered by LORD WRENBURY, who said, after stating the facts and referring to the evidence, that the Board believed the story of the plaintiff and not that of the defendant. The case was one of payment by the plaintiff to the defendant, as his fiduciary agent, of a sum of $29,000, which the latter had misapplied. As a result, the plaintiff had received certain shares. These his executors, the appellants, must return, so far as they had not been returned already. The appeal must be allowed, and the appellants should have judgment declaring that the moneys paid by the plaintiff to the defendant were paid to him as the fiduciary agent of the plaintiff, and had

been misapplied; that the defendant must account for such moneys with interest—the appellants undertaking to return to the defendant the shares not already returned. The appellants should recover $39,600.17, that is, the $29,000 and interest. The defendant must pay to the appellants the costs of the action in the Courts below and before this Board.

Appeal allowed.

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 1ST, 1917.

*TORONTO FREE HOSPITAL FOR CONSUMPTIVES v. TOWN OF BARRIE.

Municipal Corporations—Liability for Maintenance of Consumptive in Hospital—"Resident"—Local Municipality—County Municipality—Hospitals and Charitable Institutions Act, R.S.O. 1914 ch. 300, sec. 23 (1)—Dual Residence—Indigent Child Incapable of Choosing Residence—Children's Aid Society—Children's Protection Act, R.S.O. 1914 ch. 231.

Appeal by the defendants the Corporation of the Town of Barrie from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiffs in an action in the County Court of the County of York.

Hazel Thomas was born in the township of Vespra in 1902; her mother died in 1910 and her father in 1911; she then went to Collingwood, where she lived with her paternal grandmother for a short time. In April, 1911, by the order of the Police Magistrate for the Town of Collingwood, she was committed to the care of the Barrie branch of the Children's Aid Society for the County of Simcoe (Children's Protection Act, R.S.O. 1914, ch. 231, sec. 9 (5)). The magistrate also ordered (sec. 12 (1)) that the Corporation of the County of Simcoe should pay $2 per week for her support. In October, 1912, she was removed to the shelter of the society at Barrie. She remained at the shelter and in houses in Barrie where she was employed for some years and until, on the instructions of an official of the plaintiffs, she was taken to

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

the King Edward Sanitarium, Weston, as she was suffering from tuberculosis.

The girl being still in that retreat, this action was begun in January, 1916, against the Corporations of the Town of Barrie and County of Simcoe to recover $1 per day for board and medical treatment of the girl down to the 30th December, 1915.

The County Court Judge gave judgment against the town corporation and dismissed the action as against the county corporation.

The defendant town corporation appealed; but the plaintiffs did not appeal as against the county corporation.

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

W. A. Boys, K.C., for the appellants.

J. M. Godfrey, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., in a written judgment, quoted sec. 23 (1) of the Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 300: "The corporation of the municipality in which an indigent person admitted to a hospital . . . is at the time of his admission resident shall be liable . . ."

Residence was the only test. It was contended for the appellants that the liability ought to have been placed upon the Corporation of the Town of Collingwood or the Corporation of the County of Simcoe. But it was out of the question to shift the liability to Collingwood. The grandmother was under no obligation to maintain the child there. The residence with her grandmother ended completely when the child was sent to Barrie; and it was plain that the child's residence at the time of her admission to the hospital was in Barrie; and, as Barrie is part of the county of Simcoe, her residence was also in that county.

The words "is . . . resident" should be given their ordinary meaning. To say that the Act was applicable only to those capable of choosing, and who had voluntarily chosen, a residence, would exclude many to whom the benefits of the Act ought first to be given: see Edinburgh Parish Council v. Local Government Board for Scotland, [1915] A.C. 717.

The definition of the word "resides" in Rex v. Inhabitants of North Curry (1825), 4 B. & C. 953, 959, includes this child; and she was residing in Barrie at the time of her admission to the plaintiffs' hospital, within the meaning of sec. 23.

The Act does not contemplate a dual residence. One or other, but not both, of the municipalities, town and county, must be

liable; and there was no reason why the liability should be shifted to the county.

The amendment, at the last session of the Legislature (by sec. 46 of the Statute Law Amendment Act, 6 Geo. V. ch. 24) to sec. 23 made it plain that the Legislature meant to put the liability in question upon the local municipalities.

The appeal should be dismissed.

RIDDELL, J., with whom FERGUSON, J.A., concurred, read a judgment agreeing in the result.

LENNOX, J., also read a judgment agreeing in the result.

Appeal dismissed.

SECOND DIVISIONAL COURT. MARCH 2ND, 1917.

*AVERY & SON v. PARKS.

Costs—Scale of—Action in Supreme Court—Judgment Directing Reference to Assess Damages and for Payment of Costs forthwith—Damages Assessed at Sum within Jurisdiction of County Court—Rule 649—Application of—"Order to the Contrary"—Costs of Reference—Costs of Appeal.

Appeal by the defendant from the order of MIDDLETON, J., ante 285, allowing an appeal by the plaintiffs from the certificate of the Senior Taxing Officer, and directing that the costs of the plaintiffs be taxed on the Supreme Court scale without set-off.

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

H. H. Davis, for the appellant.

J. M. Ferguson, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment in which he pointed out that the costs were not taxed until after the Referee's report was confirmed, and it was finally settled that the proper amount of the plaintiffs' claim was within the jurisdiction of a County Court. The learned Chief Justice did not agree with the decision below as to the construction of the order of the Appellate Division under which the costs were taxed, nor as to the application of

Rule 649 so as to imply an "order to the contrary" The order of the Appellate Division was settled by one of the Judges, at the request of the parties. The words used in the order "payable forthwith after taxation" might mean "payable immediately after the order" or might mean "payable immediately after a taxation can properly be had," or might have the meaning attributed to them by the decision below.

In a case of ambiguity in a judgment, upon a question of costs, the Judge who made it should be applied to, to correct the ambiguity: Abbott v. Andrews (1882), 8 Q.B.D. 648. The Judge who settled the minutes of the order was alone able to say which of the several meanings of the words in question was intended; and, as that learned Judge was in favour of the meaning which gave the words the effect of "payable forthwith after taxation upon the Supreme Court scale without any set-off of costs," and as that was one of the meanings that might be attributed to them, it should be given to them. But the costs of the reference should not be taxed upon the Supreme Court scale; they came within the provisions of Rule 649, and should be taxed upon the County Court scale with set-off. They could not be taxed until after the report fixing the amount of damages had been confirmed, and the scale was settled by the amount allowed as damages.

The order of Middleton, J., should be varied, and there should be no costs of the appeal.

RIDDELL, J., was of opinion, for reasons stated in writing, that Rule 649 had no bearing upon the present case—the costs covered by it are only such costs as can be disposed of by a Judge of the High Court Division, and do not include costs ordered by the Appellate Division: McIlhargey v. Queen (1911), 2 O.W.N. 781, 782, 916.

The appeal should be dismissed with costs.

LENNOX, J., also read a judgment. He was of opinion that, except as to the costs of the reference, the decision of Middleton, J., was right; and agreed in the result reached by the Chief Justice.

FERGUSON, J.A., in a short written judgment, said that he agreed with Middleton, J., and would dismiss the appeal with costs.

MEREDITH, C.J.C.P., said that the order of the Court was, that the costs down to and including the trial should be taxed

on the Supreme Court scale, as was directed by the order of Middleton, J.; that the costs of the former appeal should be taxed on the same scale; but that the costs subsequent to the trial should be taxed as provided for in Rule 649, as ruled by the Taxing Officer (RIDDELL, J., dissenting as to the costs subsequent to the trial, which he thought should be taxed on the Supreme Court scale). No costs of this appeal.

FIRST DIVISIONAL COURT. MARCH 5TH, 1917.

*TAYLOR HARDWARE CO. v. HUNT.

Contract—Work Done upon and Materials Supplied for Building —Substantial Completion when Building Destroyed by Fire—Right of Contractor to Recover Contract Price less Value of Work not Completed—Work and Materials as Delivered Becoming Property of Building Owner—Contract of Owner to Insure—Architect's Certificate—Mechanic's Lien—Enforcement.

Appeal by the plaintiff company from a judgment of the Judge of the District Court of the District of Temiskaming, in an action to enforce a mechanic's lien, in so far as the judgment disallowed the claim of the appellant company for a lien for the amount alleged to be due to it for work done and materials supplied to the defendant the Cochrane Public School Board under a contract between the appellant company and the Board dated the 22nd April, 1915.

The contract was for the plumbing and heating of a school-house which the Board was having erected.

The work for which the appellant company's contract provided was completed with the exception of the painting of a radiator, the cost of which would not have exceeded $5, when the school-building was destroyed by fire.

According to the terms of the contract, the appellant company was to have completed what it contracted to do by the 15th November, 1915.

Eighty per cent. of the value of the work done was to be paid monthly on progress certificates, and the remainder of the contract price was to be paid and payment for any extras to be made within 60 days after the completion of the works and after the

appellant company should have rendered to the architect "a statement of the balance due" to the appellant company.

The contract also provided that all work and material, as delivered on the premises to form part of the works, were to be considered the property of the proprietor, and that the proprietor should insure the building from time to time to the extent of at least two-thirds of its value during the course of erection.

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

A. G. Slaght, for the appellant company.

G. H. Kilmer, K.C., for the respondent the Cochrane Public School Board.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts, he said, referring to a clause in the contract as to the production of a final certificate from the architects, that that clause clearly did not make the production of the certificate a condition precedent to the right to sue for the balance of the contract price—the very opposite was what was provided for.

The main point was as to the right to recover for the work done and materials furnished—the fire occurring when the work was complete with one small exception; and upon that the case came clearly within the principle of H. Dakin & Co. Limited v. Lee, [1916] 1 K.B. 566, 579, 580.

The provisions of the contract as to work and materials becoming the property of the respondent Board and its contract to insure made the case against it stronger. The parties seemed to have contemplated that as the work was done the property in it should pass to the respondent Board with the obligation on its part to insure, that is, to insure for the benefit of the contractor; and it was difficult to see how, in view of these provisions, the respondent Board could be heard to say to the appellant company: "You have completed all the work you agreed to do for $5,982, except what would cost to complete $5, and because the $5 worth of work was not done we refuse to pay you any part of the $1,291 which we would have owed you had that $5 worth of work been done."

The appeal should be allowed with costs, the judgment as to this claim of the appellant company should be reversed, and a judgment should be substituted for it declaring a lien in favour of the appellant company on the land and the insurance moneys which the respondent Board had received, with consequent

provisions applicable in such cases, and the respondent Board should pay to the appellant company so much of the costs of the proceedings in the Court below as was incurred in connection with the contestation of the appellant company's claim.

Appeal allowed.

FIRST DIVISIONAL COURT. MARCH 5TH, 1917.

*TAYLOR HARDWARE CO. v. HUNT.

*COCHRANE HARDWARE CO.'S CLAIM.

Mechanics' Liens—Claim of Sub-contractor—Default of Principal Contractor—Completion of Work by Building Owner—Waiver of Terms of Contract—Indebtedness of Owner to Contractor for Value of Work Done—Lien of Sub-contractor to Extent of Value of Work Done, though Work not Completed—Realisation of Lien.

An appeal by the Cochrane Hardware Company from the judgment of the Judge of the District Court of the District of Temiskaming disallowing the claim of the appellant company to a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

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

A. G. Slaght, for the appellant company.

G. H. Kilmer, K.C., for the defendant the Cochrane Public School Board, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant company was a sub-contractor, having entered into a contract with the defendant Hunt, who was the principal contractor for the work of erecting a school-house for the respondent Board—the appellant company's contract being for part of the work which the defendant Hunt contracted to do.

Hunt's contract was dated the 22nd April, 1915; the contract price was $23,932, and the work was to be completed on or before the 15th November, 1915. The time for completion was extended till the 20th December, 1915. On the 16th December, 1915, Hunt informed the respondent Board that he was unable to com-

plete his work; and the respondent Board afterwards completed the work. After completion, the building was destroyed by fire.

Hunt had waived the notice to complete which the contract required and consented to the respondent Board completing the work in accordance with the terms of the contract; and, by virtue of one of the provisions of the contract, the respondent Board was indebted to Hunt in the amount which would have been payable to him if the terms of that provision had been literally followed.

There was no reason for treating what was done as a complete abandonment of the contract and of Hunt's rights under that provision, and the injustice of so treating it was manifest. And, in that view, the right of the appellant company and the other sub-contractors to a lien on the land and on the insurance money which the respondent Board had received, to the extent of what was owing to Hunt, was clear.

The fact that the appellant company had not completed the work it had contracted to do did not defeat or affect its claim. It was the act of the respondent Board in itself completing the work that rendered it impossible for the appellant company to complete it; and the respondent Board could not, therefore, be heard to rely upon the work not having been completed by the appellant company. Hunt was not objecting to the claim as against him; and there was no reason why the respondent Board should be at liberty to do so.

The appellant company's claim and lien must be limited to the value of the work done by it, calculated according to the contract price.

The appeal should be allowed with costs, the judgment should be reversed as to the claim of the appellant company, and there should be substituted for it a judgment declaring the rights of the parties as now found to be, with all necessary provisions for the realisation of the lien.

The appellant company's costs of the proceedings in the Court below, of and incidental to the contestation of its claim there, should be paid by the respondent Board.

Appeal allowed.

FIRST DIVISIONAL COURT. MARCH 5TH, 1917.

*RE TOWNSHIP OF GOSFIELD SOUTH AND TOWNSHIP OF GOSFIELD NORTH.

Municipal Corporations—Drainage—Authority for Construction of Drain Following Course of Existing Drain—"Drainage Work"—Municipal Drainage Act, R.S.O. 1914 ch. 198, secs. 3, 77——Variation of Assessments—6 Geo. V. ch. 43, sec. 5—Assessment of Lands in Adjoining Township—Agreement between Corporations.

An appeal by the Corporation of the Township of Gosfield South and certain land-owners from a judgment of the Drainage Referee affirming the report of a surveyor.

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

J. H. Rodd, for the appellants.

R. L. Brackin, for the respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the proceedings taken by the council of Gosfield North were founded upon a petition requesting that a certain area of land in Gosfield North might be drained by means of a drain on the 6th concession road from the road drain south of Talbot road lots west to the centre branch of old No. 47.

This petition was dated the 8th April, 1916: but when it was received by the council did not appear. Mr. Baird, an Ontario land surveyor, was instructed to report upon the petition, which he did on the 23rd June, 1916.

In his report Mr. Baird stated that "to give relief from flooding and enable the proper use and efficient drainage of the lands described in the petition and other lands in its vicinity," a drain commencing at and forming a junction with old No. 5 drain in the township of Gosfield North and extending westerly along the town-line to the middle branch of an existing drain called No. 47, which ran along the road allowance between lots 6 and 7, was much required, and he recommended its construction.

The proposed drain followed in the main the course of an existing drain which had been constructed under the provisions of the Municipal Drainage Act, departing from its course only for the purpose of connecting it at its easterly end with another drain which had also been constructed under the same Act.

There is no reason why the construction of a drain may not be authorised even though it follows in the main the course of an existing drain. There was no reason for so limiting the comprehensive words of sec. 3 of the Municipal Drainage Act, R.S.O. 1914 ch. 198, under which the respondents had proceeded, and no reason why the work which the surveyor had recommended was not a "drainage work" within the meaning of that section.

Section 77 of the Act was designed to afford an alternative mode of effecting the improvement of an existing drain, and to dispense, in the cases with which the section deals, with the necessity of the petition for which sec. 3 provides. There is nothing in sec. 77 which excludes the right to proceed under sec. 3. If an existing drain is made use of for the purpose of the new work, the value of it must be credited to the persons assessed for it in the proportions in which they were assessed.

Reference to Township of Dover v. Township of Chatham (1909), 15 O.W.R. 156, 161, 1 O.W.N. 327; Gibson v. West Luther (1911), 20 O.W.R. 405.

What was sought here was not a variation of the assessments, and none had been made. If the petition was received by the council before the 27th April, 1916, sec. 5 of 6 Geo. V. ch. 43 had no application.

It was argued that Mr. Baird had in this case in effect varied the original assessment, but that was not borne out by the evidence.

The agreement between the two corporations was not a bar to the assessment upon the lands in Gosfield South of any part of the cost of the works.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 5TH, 1917.

MANIE v. TOWN OF FORD.

Municipal Corporation—Street Drain in Town Designed for Carrying Storm-water—Improper Use for Carrying Sewage—Evidence—Permission to Connect House with Drain—Condition as to Risk—Negligence—New Trial.

An appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Essex dismissing an action brought in that Court to recover damages for injuries sustained by

the plaintiff by the overflowing into the cellar of his house of the contents of a drain or sewer constructed by the town corporation, the defendant, in the street upon which the plaintiff's land abutted, a connection with which was made, as the plaintiff alleged, with the consent of the defendant corporation.

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

J. Sale, for the appellant.

F. D. Davis, for the defendant corporation, respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that, upon the evidence, the drain was not designed, at all events in the first instance, for carrying sewage; and, even if the respondent corporation had established that the consent was given upon condition of the appellant assuming the risk of any injury that he might sustain owing to the connection having been made, the risk he was to take was the risk attendant upon the use of the drain for the purpose of carrying the storm-water, and not the risk attendant upon its carrying sewage, for which purpose it must have been in the contemplation of the parties that it would not be used. If the respondent corporation permitted the drain to be used for the purpose of carrying sewage—an improper and negligent use—it was liable for the loss which the appellant had sustained, even if the consent was subject to the condition mentioned.

There was some evidence that it was known to the council that one Greenberg was draining his sewage into the drain, and that, after that had come to the respondent corporation's knowledge, it permitted him to continue to do so; and that aspect of the case was not considered by the County Court Judge.

There should, therefore, be a new trial, with costs of the last trial and appeal to the appellant in the cause, unless the Judge at the new trial should otherwise direct.

The Court said nothing as to what the result should be if upon the new trial it should be shewn that, to the knowledge of the appellant, when he got permission to make the connection, the drain was being used for carrying sewage, and that the permission to connect was given on condition that he should take all the risk of its being used for that purpose. That aspect of the case was open for consideration unaffected by anything said in the present deliverance.

New trial ordered.

FIRST DIVISIONAL COURT. MARCH 5TH, 1917.

*WARWICK v. SHEPPARD.

Mechanics' Liens—Claim of Mortgagee—Claims of Lien-holders——Priority—Dates of Registration—Increased Selling Value—Mechanics and Wage-Earners Lien Act, secs. 8, 14—Parties—Purchaser from Mortgagee—Personal Order for Payment by Mortgagee and Purchaser.

Appeal by mortgagees from the judgment of J. A. C. Cameron, an Official Referee, in a mechanic's lien action, declaring that certain lien-holders had priority to the extent of their liens on the increased selling value, over the mortgagees.

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

B. N. Davis, for the appellants and the owner.

W. H. Wallbridge, A. L. Fleming, T. H. Barton, and G. H. Shaver, for the plaintiff and other lien-holders, respondents.

HODGINS, J.A., in a written judgment, said that the Referee had found that the mortgagees were prior to the liens to the extent of $7,462.62, the amount of a mortgage existing before the work began, which the mortgagees paid off on the 4th May, 1914, and that the mortgagees had sold the property for $45,942, the purchaser agreeing to take the property "subject to the payment of any claims arising between the vendors and the holders of any liens on the property which may be declared by the Court to rank in priority to the mortgage claim of the said vendors, either as to increased selling value or otherwise."

The judgment contained an order against the mortgagees to pay the amount of the liens, and likewise against the purchaser in case the mortgagees should not pay. If the lien-holders were not paid off, a sale was ordered, the purchaser having been added as a party.

The appeal must succeed as to the personal orders for payment, as such orders are not warranted. The purchaser, who acquired her status pendente lite, should not have been added as a party.

The liens were all in respect of work done after the 19th February, 1915, but their inception dated back to June and July, 1914; they were registered respectively in April, May, June, and

August, 1915. The appellants' mortgage for $50,000 was dated the 24th March, 1914, and was registered on the 1st April, 1914.

In addition to $7,462.62 advanced on this mortgage on the 4th May, 1914, there were paid out on account sums amounting to $20,537.33 up to and including the 22nd May, 1914; so that to the extent of $27,999.95 there was no doubt of the priority of the $50,000 mortgage. After the liens had arisen by the doing of work and delivery of materials in June and July, 1914, but were unregistered, the balance of the moneys was advanced on the mortgage between the 8th December, 1914, and the 26th January, 1915, on which day the final payment was made. There was, therefore, between June and July, 1914, and the earliest registration of any of the liens, a period in which written notice or registration of the lien could have been given or made, in default of which advances under the mortgage would have priority: Sterling Lumber Co. v. Jones (1916), 36 O.L.R. 153; Charters v. McCracken (1916), ib. 260. The liens were postponed to the $50,000 mortgage to its full extent.

Assuming that the $7,462.62 was a prior mortgage within sec. 8 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, or that the $50,000 mortgage, to the extent mentioned, might be so treated, yet where one was dealing with competing priorities upon the whole property, both land and improvements, by virtue either of liens or mortgage advances, there was nothing left outside the charge secured by one or the other upon which to found increased selling value: Cook v. Koldoffsky (1916), 35 O.L.R. 555. As the $50,000 mortgage gained priority under the statute upon both the land and the improvements for the advances, as against the liens, it was impossible to take that priority away under the guise of increased selling value. The foundation for that is gone when once the improvements are themselves, to their full value, subject to the prior charge created by sec. 14.

The appeal of the mortgagees should be allowed, with one set of costs to be paid by the lien-holders in proportion to their several amounts. The judgment of the Referee should be set aside, and a judgment declaring that the mortgage for $50,000 has priority over the liens should be substituted.

MEREDITH, C.J.O., MACLAREN and FERGUSON, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal allowed.

FIRST DIVISIONAL COURT. MARCH 6TH, 1917.

NORTH-WESTERN NATIONAL BANK OF PORTLAND v. FERGUSON.

Guaranty—Time for Payment of Debt Guaranteed Extended for Definite Period by Arrangement between Creditor and Principal Debtor—Release of Guarantor.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 11 O.W.N. 178, in so far as it dismissed the action as against the defendant John Ferguson.

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

A. R. Clute, for the appellants.

R. McKay, K.C., for the defendant John Ferguson, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION

MIDDLETON, J. MARCH 1ST, 1917.

RE KEAN.

Will—Construction—Residuary Legatees—Vested Estates—Discretion of Executors—Period of Distribution—Immediate Payment—Shares of Infants—Costs.

Motion by Gerald Kean, one of the executors and a beneficiary under the will of Hugh Kean, deceased, for an order determining questions arising as to the proper construction of the will.

The motion was heard in the Weekly Court at Toronto.

J. R. Howitt, for the applicant.

J. H. Rodd, for Robert Meade and Hugh Meade, also executors and beneficiaries.

H. Guthrie, K.C., for adult residuary legatees.

F. W. Harcourt, K.C., for infant residuary legatees.

MIDDLETON, J., in a written judgment, said that the testator left an estate of over $180,000. He had never married. The objects of his bounty were: a niece to whom he gave $1,000; a niece to whom he gave $1,000 and an annuity of $325; his nephews Robert Meade and Hugh Meade, to whom he gave $1,000 each; his housekeeper, to whom he gave an annuity of $500 per annum. All the residue of his estate he gave to the children of his brother Alexander Kean—Gerald Kean being one of these.

Having regard to the magnitude of the estate, the children of Alexander were to receive much more than the other nephews and nieces.

The executors were Gerald Kean and the two Meades.

The will directed the executors to invest and pay the annuities out of the income, and upon the death of the two annuitants to divide the residue of the estate in equal shares among the children of Alexander.

Then followed this clause: "(*e*) My executors and trustees may in their discretion upon the death of either of (the annuitants) or at any other time divide among the residuary legatees . . . such portion of the ultimate residue of my estate as they may think proper," always reserving enough to secure the annuitants.

The Meades thought that the testator did not use them fairly in giving them only $1,000 each; they intended to reimburse themselves by their earnings as executors, so far as practicable; and so turned a deaf ear to the desire of their co-executor and the beneficiaries that there should be a part distribution. The attitude taken was, that there was no obligation to divide any part of the fund till the death of the last surviving annuitant. They said that the power to divide rested in their absolute and uncontrollable discretion.

The Meades were, however,wrong as to their powers under the will. The interest in the residuary estate given to the children of Alexander was vested; and, subject to sufficient being retained to protect the annuitants and to meet any outstanding claims, they were entitled to immediate payment; and, further, they were entitled to demand that the executors should refrain from conversion if they (the children of Alexander) elected to take over existing assets in specie: Re Hamilton (1912-13), 27 O.L.R. 445, 447, 28 O.L.R. 534.

With this declaration, there should be no difficulty in working the matter out; but beyond this nothing should be ordered; and leave to all parties to apply should be reserved.

It was not to be inferred from this that ample had not been

disclosed to warrant interference by the Court; if the declaration made is followed further expense may be avoided.

Costs of all parties of this application to be paid out of the estate. Any further costs that may be incurred by a renewal of the motion may have to be borne by the party who shall be found to be in fault.

The shares of the infants should be allotted in cash or such securities as may be approved by the Official Guardian, and should be lodged in Court.

MIDDLETON, J., IN CHAMBERS. MARCH 5TH, 1917.

YOUNG v. HARTY.

Mortgage—Mortgagors and Purchasers Relief Act, 1915—Right to Bring Action to Enforce Mortgage—Interest and Taxes in Arrear—Extension of Time for Payment of Principal and Interest—Expiry of Time—Stay of Proceedings—Precarious Security.

Appeal by the plaintiff from an order of the Local Judge at Fort Frances, upon summary application of the defendant Harty, dismissing without costs an action to enforce a mortgage.

R. T. Harding, for the plaintiff.
F. Denton, K.C., for the defendant Harty.

MIDDLETON, J., in a written judgment, said that the appeal was late, but, as it was meritorious, he extended the time.

Harty and Smith owned one parcel of land, Smith another—both mortgaged both parcels by one instrument to secure $10,000. The mortgage was made in 1905.

In 1913, there was due $10,000 principal and $1,500 interest, and an extension agreement was signed on the 1st February, 1913. An informal extension was also endorsed on the mortgage. This provided that the $11,500 should not be paid till the 1st March, 1915, and that interest should be paid on this sum half-yearly.

No sum was paid on account of the $11,500, but interest had been paid on it up to date. Taxes had been paid on the land owned by Harty and Smith, but were in arrear on the other parcel.

The action was summarily dismissed in its entirety by the Local Judge, because, in his view, the plaintiff could not sue without leave, under the Mortgagors and Purchasers Relief Act, 1915. That was wrong. When the two-year extension expired, the rights under the original mortgage revived, and the $1,500 interest became again due.

The mortgagors were both liable, under the covenant, for all taxes, on both properties, and, taxes being in arrear, the mortgagee had the right to proceed.

The property was an hotel in Fort Frances; in view of the war and the temperance legislation, the security was precarious; and, unless some substantial payment were made, it was most unlikely that a stay would be granted; but that question did not yet arise.

Appeal allowed; costs here and below to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS. MARCH 5TH, 1917.

COOMBE v. MURPHY.

Security for Costs—Order for, on Ground of Former Action for Same Cause—Substantial Identity not Established—Order Set aside.

An appeal by the plaintiff from an order of the Master in Chambers requiring the plaintiff to give security for the defendant's costs of the action, on the ground that it was a second action for the same cause.

T. Hislop, for the plaintiff.
A. E. Knox, for the defendant.

MIDDLETON, J., in a written judgment, said that the appeal should succeed. The former action was by a contractor to recover the amount due him. In that action, Coombe, the present plaintiff, asserted that he did not owe the money, and claimed indemnity against one Ponton, as a third party, on the ground that he was Ponton's agent. The finding was that he was not Ponton's agent, and bought the land on his own behalf, and made the contract to build as owner, and was liable.

Now he sued the vendor of the land for specific performance.

The agreement was probably at an end owing to his default, but the vendor was ready to take his money. The plaintiff did not see fit to accept this, and seemed to want a needless law-suit.

One might sympathise with the defendant, but it was plain that this was not a second suit for the same purpose.

Later on, there may be a remedy open; but in the meantime the action must go on.

Order vacated; costs here and below to the plaintiff in the cause

---

KELLY, J. MARCH 5TH, 1917.

STRUTHERS v. BURROW.

Negligence—Unsafe Premises—Injury to Person Going there on Lawful Business—Invitation—Findings of Jury—Evidence.

Action for damages for negligence whereby the plaintiff was injured upon the defendants' factory premises.

The action was tried with a jury at Hamilton.

S. F. Washington, K.C., for the plaintiff.

G. Lynch-Staunton, K.C., and E. F. Lazier, for the defendants.

KELLY, J., in a written judgment, said that, in answer to questions submitted to them, the jury had found that there was negligence on the part of the defendants "for not having proper steps or no steps at all;" that the cause of the plaintiff's injuries was the fall which he received on the defendants' property; that there was an invitation by the defendants to the plaintiff to use the steps or blocks referred to, "being as there was no other means to get upon the platform;" and that the purpose for which the invitation was given was "to receive goods which was ordered." They also found against contributory negligence, and declared that the plaintiff "was justified in doing as he did do."

Going to the defendants' premises on business in which both he and the defendants were concerned—to take delivery of a scales which he had purchased from them—he entered the defendants' office, and was there directed by a person in charge where to drive into the premises, and was told to go to the platform at the door of the shipping-room, where the scales would be brought out. Having gone to the platform and there waited

for about ten minutes—no one appearing with the scales—he attempted to get upon the platform, with the object of entering the shipping-room: he went up what he called the "steps" of the platform, they gave way, he fell, and was injured.

There was, it seemed to the learned Judge, sufficient in the evidence to warrant the inference by the jury that the plaintiff was within his rights in going upon the platform by way of the steps or blocks. There was evidence on which the jury could find that he was there on the defendants' invitation, and that invitation was not limited so as to exclude his going on the platform, but extended to his using the steps or blocks as a means of access to the platform. There was evidence also on which the jury might find that the defendants failed in their duty to keep this means of access in proper condition—they must have been aware of the existence of the blocks and their condition.

The duty of the occupier of premises on which the invitee enters is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware—in other words, to have the premises reasonably safe for the use that is to be made of them: Halsbury's Laws of England, vol. 21, para. 656; Indermaur v. Dames (1866), L.R. 1 C.P. 274.

Judgment for the plaintiff for the sum assessed by the jury as damages with costs.

MIDDLETON, J. MARCH 5TH, 1917.

RE MASSEY TREBLE ESTATE.

Will—Construction—Gift to Children of Named Person—Sum to be Set apart and Invested—Sum with Accumulations to be Divided at Majorities of Children respectively—Only one Child in Being—Vested Estate—Unborn Children.

Motion on behalf of the infant son of Walter A. Watts for an order determining a question arising upon a will.

F. W. Harcourt, K.C., for the applicant
Grayson Smith, for the executors.
J. R. L. Starr, K.C., for the residuary legatees.

MIDDLETON, J., in a written judgment, said that the question arose under a clause in the will which directed the executors to set apart the sum of $5,000 and to accumulate the income "and to divide the principal and accumulated income of the said $5,000 equally share and share alike between and among the surviving children of Walter A. Watts when and as said children shall respectively reach their majorities." There was at present one child only, a boy 10 years old. The question was whether this was a vested legacy.

There was no gift save in the direction to divide, and no gift over.

The principle stated by Buckley, L.J., in In re Lord Nunburnholme, [1912] 1 Ch. 489, 496: applied. "If . . . the gift is to be immediately separated from the rest of the property, and the income is at once given to the beneficiary or the income is to be accumulated for the benefit of the beneficiary, and when and so soon as he attains the named age the corpus is given him, and the accumulations are given him, then the Court ceases to regard the gift as a contingent gift and holds it to be a vested gift."

The question as to the right of any child who may hereafter be born should not now be dealt with. It might well be that the gift now vested might be divested so as to admit any after-born child to share.

Costs out of the estate.

LATCHFORD, J. MARCH 7TH, 1917.

RUSHBROOK v. ORDER OF CANADIAN HOME CIRCLES.

Insurance—Life Insurance—Friendly Society—Undertaking to Distribute Fund among Class of Members—Period of Distribution—Amendment to Constitution of Society—Effect of—Immediate Payment—Class Action—Declaration—Costs.

Action by the plaintiff, on behalf of herself and all other members of the defendant society who contributed to the beneficiary fund of the society between September, 1892, and March, 1905, and who were in good standing in the society on the 1st May, 1914, for a declaration that the defendants were not entitled to postpone the distribution of a certain fund among the plaintiff

and the other members of her class, and for an account and immediate payment.

The action was tried without a jury at Toronto.

R. G. Agnew, for the plaintiff.

N. Somerville, for the defendants.

LATCHFORD, J., in a written judgment, said that the defendants had given a formal undertaking to set aside a certain sum of $200,000 out of their reserve fund, and, after the payment of certain claims, to distribute the balance (admitted to be about $149,000) among the class represented by the plaintiff.

The share of the balance to which the plaintiff, as one of the class, was entitled, according to the undertaking, was on the 1st May, 1916, $13.67. The defendants said that they had the right to postpone payment until the claimant should reach the age of 70. If she desired immediate payment of her share, she must be content to accept its present value, $11.50.

The amount in question, so far as the plaintiff was personally concerned, was trivial, but, as several thousand persons were in like case, the sum of the amounts involved was very large.

The defendants sought to justify their position on the ground that on the 9th and 10th May, 1915, prior to the giving of the undertaking, an amendment was made to their constitution which, after empowering the managing committee to set aside the sum of $200,000 on hand in the reserve fund, on the 1st May, 1914, for certain specified purposes, provided that, until "such fund" was set aside or apportioned or paid out, the managing committee might use as much of the interest accrued since the 1st May, 1914, or from time to time accruing, on the balance of the said sum remaining, as they might deem necessary for the general and organising expenses of the society, after first using for that purpose the per capita tax contributed by the members.

It was argued on behalf of the defendants that, as the parts of this amendment referred to were approved by the Registrar of Friendly Societies, they were binding and obligatory upon the plaintiff and all other members of the society under sec. 184 of the Ontario Insurance Act, R.S.O. 1914 ch. 183.

Assuming that the amendment to the defendants' constitution was to be read as qualifying the defendants' subsequent undertaking, and that it was binding upon the plaintiff and others of the same class, it still failed to justify the contention of the defendants.

The amendment ought, if possible, to be construed as not

contravening the undertaking, and should be read with whatever light the undertaking could throw upon it.

By para. 3 of the undertaking, the $149,000 was to be equitably and ratably apportioned among the class; the time of distribution was not stated; but there were no words postponing it. The balance was to be apportioned and paid as soon as ascertained. That date was certainly not later than the date of the certificate issued to the plaintiff—the 1st May, 1916.

In the amendment to the constitution, "such fund" plainly meant the $200,000. That sum was set aside at a date not established, but clearly prior to the 1st May, 1916. It was only "until such sum" was set aside that the defendants were authorised to use the interest accruing upon it.

The plaintiff was entitled to share in the balance of the $200,000 as of the date when that balance was ascertained—that might be taken as the date of her certificate. The defendants were not, after the 1st May, 1916, entitled to use the interest of such balance for any purposes other than the benefit of the plaintiff and members of the society who were in the same class with her.

Judgment for the plaintiff for $13.67, with interest from the 1st May, 1916, and costs on the Supreme Court scale, with a declaration that all members of the defendant society in the same class as the plaintiff had the same rights against the defendants that were here declared to be possessed by her.

MIDDLETON, J., IN CHAMBERS. MARCH 10TH, 1917.

*RE HARMSTON v. WOODS.

Division Courts—Jurisdiction—Action for Trespass to Land—Title not in Question—"Personal Actions"—Division Courts Act, R.S.O. 1914 ch. 63, sec. 62.

Motion by the plaintiff for a mandamus to compel one of the Junior Judges of the County Court of the County of York, presiding in the First Division Court of the County of York, to hear and determine a plaint in that Court for trespass to land—the title not being shewn to be in question.

J. E. Lawson, for the plaintiff.
A. E. Knox, for the defendant.

MIDDLETON, J., in a written judgment, said that the Judge in the Division Court followed the view of Anglin, J., in Neely v. Parry Sound River Improvement Co. (1904), 8 O.L.R. 128, that an action for damages for trespass to land is not a "personal action," within the meaning of R.S.O. 1897 ch. 109, sec. 64.

The Division Courts Act, R.S.O. 1914 ch. 63, sec. 62, confers jurisdiction in contract to $100; in "personal actions" to $60; and no mention is made of any jurisdiction in actions for trespass to land.

"Personal actions" is a flexible term, and is here used in a narrow sense, not including either actions on contracts, in which jurisdiction is specially conferred, or trespass to land, in which a limited jurisdiction is conferred upon the County Courts (see the County Courts Act, R.S.O. 1914 ch. 59, sec. 22 (1) (*c*)), but not upon the Division Courts.

The decision of Anglin, J., should be followed; it was not a mere dictum; and the affirmance of the decision by a Divisional Court gives it greater weight.

Reference to Termes de la Ley, tit. "Actions Personal;" Whidden v. Jackson (1891), 18 A.R. 439; Re McGugan v. McGugan (1890), 21 O.R. 289; Attorney-General v. Lord Churchill (1841), 8 M. & W. 171.

Cases appearing to be in conflict with this view are not so when looked at closely—in none of them was the actual question here raised discussed: Seabrook v. Young (1887), 14 A.R. 97; Hawkes v. Richards (1852), 9 U.C.R. 229; Ball v. Grand Trunk R.W. Co. (1866), 16 U.C.C.P. 252; Stewart v. Jarvis (1868), 27 U.C.R. 467.

In the alternative, it was sought to have the plaint transferred from the Division Court to the Supreme Court of Ontario; but there was no reason why the plaintiff should not seek his remedy in a County Court.

Motion dismissed with costs (fixed at $15.)

MASTEN, J., IN CHAMBERS. MARCH 10TH, 1917.

*REX v. THOMPSON.

Ontario Temperance Act—Conviction for Receiving Order for Liquor for Beverage Purposes—Evidence—Findings of Magistrate—6 Geo. V. ch. 50, sec. 42—Interpretation of—Application to Non-commercial Transaction—Jurisdiction of Magistrate—Right to Examine Evidence upon Motion to Quash Conviction—Costs.

Motion to quash a conviction of the defendant by the Police Magistrate for the District of Temiskaming for unlawfully receiving an order for intoxicating liquor for beverage purposes, contrary to sec. 42 of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50: "Every person, whether licensed or unlicensed, who, by himself, his servant, or agent, canvasses for, or receives, or solicits orders for liquor for beverage purposes within this Province, shall be guilty of an offence against this Act."

J. Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Police Magistrate.

MASTEN, J., in a written judgment, set out the findings of the magistrate: "This man ordered some whisky for Talki at Talki's request. Talki gave him $6.25 to send for the liquor for him, which he did, bringing the liquor in, in his own name. Liquor, unless shewn to be for special purposes. Well known that liquor as liquor is 'beverage.' I find the defendant guilty and convict him and fine him $50 and costs $4 or two months in North Bay gaol."

The learned Judge said that, if it were not impertinent to the discussion of a motion to quash a conviction, he would say that the testimony before the magistrate afforded a truthful representation of the real occurrence, and was not a sham; that the defendant did not receive an order from Talki; that there was no order for liquor until the defendant posted his letter ordering it from a place outside the Province; that the transaction was really the appointment by Talki of the defendant as his agent; that the transaction was in truth fortuitous, friendly, and non-commercial, as distinguished from a transaction which could be characterised as commercial or to which the terms "canvass for," "receive,"

and "solicit" could be properly applied; and that sec. 42 did not apply to such a transaction. But this was a motion to quash a conviction—not an appeal—and the findings of fact of the magistrate were not open to review. It must be held that the magistrate had necessarily by implication found as a fact that the defendant did receive an order, and that the magistrate did not credit the evidence of the defendant that the transaction was fortuitous, friendly, and non-commercial; and that, consequently, the receipt of the order came plainly within the statute.

Reference to Rex v. Toyne (1916), 38 O.L.R. 224, 226.

The two findings of fact which, as a result of the conviction, must have been made by the magistrate, precluded the defendant from arriving on this motion at a point where he could effectively raise his contention as to the true interpretation of the statute, viz., that it included only business transactions and related exclusively to the receiving of orders of a commercial nature.

The cases of Rex v. Berry (1916), 38 O.L.R. 177, Rex v. Cantin and Rex v. Weber (1917), 11 O.W.N. 435, differed from the present case because the Ontario Temperance Act does not itself contain any provision corresponding to sec. 148 of the Canada Temperance Act, by which the right to certiorari is taken away. Section 72 of the former Act imports into that Act the provisions of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90; but sec. 10 of that Act seems to be excluded by sec. 92 (1) of the Ontario Temperance Act. There is in the present case, therefore, no statutory prohibition against certiorari; and the principle to be acted upon is found in Regina v. Coulson (1896), 27 O.R. 59, and Rex v. Borin (1913), 29 O.L.R. 584.

Following these cases, the evidence may be examined in order to ascertain whether the magistrate had jurisdiction. It being found that he had jurisdiction, and had by implication found the facts which would support the conviction, the result was the same as though the principle established by Regina v. Wallace (1883), 4 O.R. 127, Rex v. Berry, and Rex v. Cantin and Rex v. Weber, applied.

Motion refused, but, because of the difficulty of the question and the case being near the border-line, without costs.

CLUTE, J. MARCH 10TH, 1917.

IMRIE v. EDDY ADVERTISING SERVICE LIMITED AND E. B. EDDY.

Contract—Advertising—Liability for Price of—Advertising Agent—Incorporated Company—Action against both—Judgment by Default Recovered against Company—Personal Liability of Agent—Debt not Merged in Judgment—Liability upon Guaranty.

Action by the assignee of a number of claims for sums due for advertising, to recover payment of the aggregate amount.

The action was tried without a jury at Toronto.
R. McKay, K.C., and Gideon Grant, for the plaintiff.
M. G. Hunt, for the defendant E. B. Eddy.

The defendant company suffered judgment by default, and was not represented.

CLUTE, J., in a written judgment, said that the defendant company was incorporated in 1912. Prior to that, the defendant E. B. Eddy carried on and managed an advertising service business under the name of the Eddy Advertising Service.

The plaintiff contended that the defendant E. B. Eddy was directly liable, and also that he guaranteed the various amounts forming the claim sued for

After a full statement of the facts, the learned Judge said that, in the view he took of the case, it was not necessary to decide whether the guaranty was valid or not; he considered the defendant E. B. Eddy personally liable; neither of the part es expected that the new company would be looked upon as the debtor until it had recognition, which it never had.

It was urged, however, on behalf of the def ndant Eddy, that, judgment having been entered against th defendant company, the debt was merged in the judgment, and the defendant Eddy discharged from any liability therefor, if he ever were liable. In support of this view it was said that he was jointly liable with the defendant company, as in the case of partners, and judgment against one was a bar to recovery by the other. But this was not that case. There never was, in any sense, a joint liability of the two defendants. They never were partners or in any other sense joint debtors. The fact that the defendant company was sued

and put in no defence did not relieve the defendant Eddy from his liability. For all that appeared, the company might have agreed with Eddy to pay all his liabilities in this business; but there was no evidence which justified a finding that the plaintiff ever agreed to look to the company and not to Eddy, or to discharge him from liability.

Reference to Kendall v. Hamilton (1879), 4 App. Cas. 504; Hough Lithographing Co. v. Morley (1910), 20 O.L.R. 484; and other cases.

In this case the debt was incurred by the defendant Eddy, and had not been discharged.

Although the learned Judge rested his judgment on the direct personal liability of Eddy, he thought that there was good consideration for the subsequent promise by Eddy to guarantee payment. The word "guarantee" was used, but what was really meant was a renewal of Eddy's obligation to pay the accounts, the contract being a continuing one, and without payment publication might be discontinued. See Brown v. Coleman Development Co. (1915), 35 O.L.R. 219, and S. C., sub nom. Gillies v. Brown (1916), 53 S.C.R. 557.

Judgment for the plaintiff for $1,701.67, with costs.

RE JEANES—MASTEN, J., IN CHAMBERS—MARCH 5.

Infant—Custody of Foster-parents—Right of Access of Mother.] —Application by Lena Grace Jeanes for an order, supplementary to that made on the 3rd February, 1917 (11 O.W.N. 365), permitting the applicant to have access to her infant child, remaining in the custody of persons by whom the child had been adopted. MASTEN, J., in a written judgment, said that, having considered the application, he was of opinion that the mother should have a right of access to and be allowed to visit or be visited by the infant once a year—on terms to be arranged so as to minimise any inconvenience or prejudice that might arise in consequence. The parties should agree on the best and most convenient way of carrying this into effect; if they could not agree, the learned Judge said, he would settle the details and terms. J. G. Gauld, K.C., for the applicant. W. M. McClemont, for the respondents.

RE JONES—MIDDLETON, J.—MARCH 5.

Will—Construction—Life Tenant—Possession—Costs.]—Motion by A. L. Jones for an order declaring the rights of the persons interested under the will of Anson Jones, deceased. The motion was heard in the Weekly Court at Toronto. MIDDLETON, J., in a written judgment, said that, for reasons appearing from what was said on the argument, the rights of the parties appeared plain. In view of the documents, the mother was given a life estate, and did not by her possession acquire the fee; so nothing passed by her will. There should be no costs against Winnifred Ramsay, as she might have been misled by the will, but obviously she could not have any costs. The costs of the other person appearing should be paid out of the estate. G. N. Shaver, for A. L. Jones. H. S. White, for W. R. Finkle. F. W. Harcourt, K.C., for Clinton Jones, an infant.

ROSS v. MURRAY—LENNOX, J.—MARCH 9.

Contract—Sale of Business and Chattels—Shortages—Damages—Counterclaim—Promissory Note—Set-off—Costs.]—Action to recover $1,137.50 as damages for breach of a contract for the sale of a business, plant, and equipment by the defendants to the plaintiff. The breach was in shortages in the equipment as it was represented by the defendants to be. The defendants counterclaimed upon a promissory note, and also for a sum of $248.50 for "supplies," which, under the agreement, the plaintiff was to pay for in addition to the lump sum of $4,000. The action and counterclaim were tried without a jury at London. LENNOX, J., in a written judgment, stated the facts and reviewed the evidence, making findings thereon. He gave the plaintiff judgment for $1,078 with costs of the action; the defendants judgment for $193.75 and the balance due on the promissory note, with costs of the counterclaim, fixed at $20; the $1,078 and the costs of the action (if the plaintiff's solicitors desire to set them off) to be credited upon the sum due upon the note, and the plaintiff to pay the balance. W. R. Meredith, for the plaintiff. J. M. McEvoy, for the defendants.

WILLSON v. JAMIESON—LATCHFORD, J.—MARCH 9.

Executors—Action against—Claim upon Estate—Moneys Received by Testator from Wife—Bequest by Wife to Son—Evidence—Corroboration—Evidence Act, sec. 12.]—Action against the execu-

tors of the will of the plaintiff's father, who died on the 27th June, 1916, to recover a sum of $2,000 bequeathed to the plaintiff by his mother, who died on the 1st July, 1913. The bequest was of "the sum of $2,000, being the amount of legacy received by me in the year 1896 from the estate of the late George Willson, which $2,000 was chequed out by me to my . . . husband by way of loan to him . . . The said bequest to my son of $2,000, however, shall not be collected from my said husband during his lifetime, but shall be paid out of the estate immediately after his death, without interest." The action was tried without a jury at Barrie. LATCHFORD, J., in a written judgment, after stating the facts, said that, having regard to the corroboration required by sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76, the plaintiff's claim was established as to the sum of $592, and as to that sum only. There was no sufficient evidence that any other sum was to be repaid. Judgment for the plaintiff for $592, with interest from the date of the death of the plaintiff's father, and with costs. R. T. Harding, for the plaintiff. W. A. J. Bell, K.C., for the defendants.

FIRST DIVISION COURT OF THE COUNTY OF MIDDLESEX.

JUDD, JUN. CO. C.J. FEBRUARY 2ND, 1917.

RE MINISTER OF INLAND REVENUE AND THORNTON.

Revenue—Special War Revenue Act, 1915, 5 Geo. V. ch. 8, secs. 14, 15 (D.)—Sales of Articles Mentioned in sec. 15—"Selling to a Consumer"—Inland Revenue Officer—Act of Clerk or Servant—Act of Fellow-servant—Manager of Store Owned by Incorporated Company—Use by Barber of Part of Contents of Bottle on Customer's Face after Shaving—Order in Council—Departmental Instructions—Agent for Original Vendor—Refusal of Magistrates to Convict—Appeal—Preliminary Objection—Status of Minister—Informant—Prosecutor—Criminal Code, sec. 749.

Appeals by the Minister of Inland Revenue for Canada from orders made by two Justices of the Peace in the Police Court for the City of London, discharging William H. Thornton, Frank E. Jones, G. C. Lewis, and Gordon Lamb, after trial on informations charging them with breaches of the Special War Revenue

Act, 1915, 5 Geo. V. ch. 8 (D.), by reason of their not affixing stamps on certain preparations sold by them to one H. J. Dager, an Inland Revenue officer, acting for and at the request of the appellant—the magistrates holding that Dager was not a "consumer" within the meaning of the Act, sec. 15.

The appeals were heard by JUDD, Jun. Co. C.J., Middlesex.
A. H. M. Graydon, for the appellant.
P. H. Bartlett, for the respondent Thornton.
F. F. Harper, for the respondents Jones and Lewis.
W. R. Meredith, for the respondent Lamb.

JUDD, Jun. Co. C.J., in a written judgment, dealt first with a preliminary objection that the appeals were not properly lodged because they were in the name of the Minister, whereas the informations had been laid by Dager. The informations, however, shewed that they were laid in the name of the Minister, though signed and sworn to by Dager. The Minister was the prosecutor, if not the complainant, and as prosecutor might appeal under sec. 749 of the Criminal Code. The appeals were properly lodged; the objection was overruled.

Dealing next with the case of Thornton, the learned Judge said that there was no dispute either as to the sale or the want of a stamp; and he was bound to hold, on the evidence, that the sale to Dager was made by a clerk in Thornton's store, and that Thornton was responsible for the clerk's act: Rex v. Russill (1913), 29 O.L.R. 367; Patenaude v. Thivierge (1916), 26 Can. Crim. Cas. 138; Ethier v. Minister of Inland Revenue (1916), 27 Can. Crim. Cas. 12.

In the Jones case, the dispute was as to whether a stamp was or was not affixed at any time to the package of tooth-paste produced. The learned Judge finds that no stamp was attached at or before sale.

Coming to Lewis's case, it was admitted that the respondent was not the proprietor or even a stockholder in the incorporated company which kept the store in which goods were purchased without stamps being affixed. The respondent was said to be the manager of the company, and was no more than a fellow-employe of the saleswoman who made the sale or sales. Lewis was not a "person selling" under sub-sec. (1) of sec. 15, nor an "importer" under (2), nor a "manufacturer or producer" under (3). The saleswoman herself would be liable as a "person selling," and the company, her employers, because of her acts—but it could not be said that one employee was liable for the illegal

acts of his fellow, even though he were "manager," which he swore he was not, and was not contradicted.

Lamb was a barber, who purchased a bottle of perfumery from a Montreal firm, and kept it in his shop; he did not come within any of the clauses of sec. 15 by reason of his having used a portion of the contents on Dager's face after shaving him. Lamb was the "consumer," and the "person selling" to him was the Montreal firm. There was some evidence that he was an agent of the Montreal firm; but there was nothing to shew a sale of any part of the contents of the bottle to any one but himself. If he was the agent of the Montreal firm in selling the bottle to himself, that firm was liable for not having attached a stamp. Lamb was not liable as an "importer" or "manufacturer" or "producer."

Reference was made to printed "instructions" given by the Department of Inland Revenue to preventive officers, under which it was said a barber was to be liable in such circumstances as were here disclosed. These "instructions" had not the force of an order in council; and, if they went so far as was contended, they were not in accordance with the Act. But, upon a reasonable reading of the "instructions," they applied only to cases where the barber was making a sale of part of the contents of a large bottle.

The magistrates, in deciding that Dager was not a "consumer," evidently followed Patenaude v. Paquet Co. (1916), 26 Can. Crim. Cas. 204; but the learned Judge who decided that case must have overlooked the last words of sec. 14 (i) of the Act. The sale to Dager was a sale by retail, and thus a sale to a "consumer," as was decided by Cross, J., in Ethier v. Minister of Inland Revenue, supra, disapproving of the Paquet case.

The purchases made by Dager in each of the cases came within the Act.

In the Thornton and Jones cases, the appeals should be allowed; in the Lewis and Lamb cases, the appeals should be dismissed.

[See Re Minister of Inland Revenue and Nairn (1917), 11 O.W.N. 422.]

CORRECTION.

In AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED, 11 O.W.N. 425, there is a mistake on p. 426, third line from the bottom: "KELLY, J.," should read "FERGUSON, J.A."