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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 27TH, 1917.

ELLIOTT v. BYERS.

Mortgage—Foreclosure—Subsequent Incumbrancer Added as Party in Master's Office—Motion to Set aside Præcipe Judgment—Practice—Irregularity in Judgment—Form 101.

Appeal by the defendant Cleland, added as a party in the Master's office, from the order of FALCONBRIDGE, C.J.K.B., 12 O.W.N. 383, dismissing the appellant's motion to set aside the judgment in the action, entered upon præcipe, and the report of the Master in Ordinary made pursuant to the judgment, and to strike out the name of the appellant as a party.

The judgment was as follows:—

(1) It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure, and that, for these purposes, this cause be referred to the Master in Ordinary at Toronto, *with power to make such special findings as the nature of the case may require.*

(2) And it is further ordered and adjudged that the defendants Jessie I. Byers and William Joseph Martyn do, forthwith after the making of the Master's report, pay to the plaintiff what shall respectively be found due by them for principal money, interest, and costs at the date of the said report, *subject always to the special findings contained therein, and, upon the compliance of them or either of them with the findings and requirements of the said report, the plaintiff shall,* subject to the provisions of section 3 of the Mortgages Act, *do, perform, and execute all or any acts, matters, or things in conformity with the findings of the said report.*

(3) And it is further ordered and adjudged that the defendants do forthwith deliver to the plaintiff, or to whom he may appoint,

possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendants.

The judgment, especially in the parts italicised, did not follow Form 101, in the Forms appended to the Consolidated Rules of 1913.

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

T. Hislop, for the appellant.

A. M. Dewar, for the plaintiff, respondent.

THE COURT allowed the appeal, holding that the judgment was not warranted by the practice of the Court; and directed that the judgment and all subsequent proceedings had and taken to set aside, but without prejudice to the plaintiff taking such proceedings to recover judgment as he might be advised.

No costs.

SECOND DIVISIONAL COURT. OCTOBER 22ND, 1917.

*SHAW v. HOSSACK.

Interest—Promissory Notes—Money Lent—Excessive Rate—Reduction by Court—Harsh and Unconscionable Transactions—Ontario Money-Lenders Act, R.S.O. 1914 ch. 175, sec. 4—Dominion Money-Lenders Act, R.S.C. 1906 ch. 122, secs. 6, 7—Findings of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of CLUTE, J., 39 O.L.R. 440, 12 O.W.N. 183.

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

A. A. Macdonald and W. J. McCallum, for the appellants.

J. M. Ferguson, for the defendant D. C. Hossack, respondent.

D. J. Coffey, for the defendant L. E. Hossack, respondent.

THE COURT allowed the appeal with costs, and directed judgment to be entered for the plaintiffs with costs.

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

SECOND DIVISIONAL COURT. OCTOBER 26TH, 1917.

NEWCOMBE v. EVANS.

Will—Testamentary Capacity—Undue Influence—Conspiracy—Evidence—Execution of Will—Onus—Testimony of Attesting Witnesses—Appeal—Further Evidence for Appellate Court.

Appeal by the defendant from the judgment of CLUTE, J., 12 O.W.N. 266.

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

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

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

MEREDITH, C.J.C.P., in a written memorandum, said that the age, and mental and physical conditions, of the alleged testator; the manner in which, and the circumstances under which, his marriage to the plaintiff was brought about; and the time when, and circumstances under which, the alleged will was said to have been made, put upon them who propounded and supported the will the onus of proof of "the righteousness of the transaction," under which it was said that all of the alleged testator's property passed to the plaintiff; that is, proof of the due execution of the will by a competent testator, not unduly influenced in making it.

And, under all the circumstances of the case, that onus could not be said to have been satisfied without the testimony of the second attesting witness to the alleged will, having regard to the fact that the other attesting witness was the plaintiff's brother, and the person who seemed to have been a moving spirit in the strange occurrences relating to the testator's marriage and the execution of the will.

The other attesting witness should be examined as a witness in this action, before this Court now; and the final disposition of this appeal should be deferred until his testimony has been given.

Any question as to the time when, and the manner in which, such testimony may be given, may be disposed of on an application to any member of this Court at Chambers.

LENNOX, J., agreed with the Chief Justice.

RIDDELL and ROSE, JJ., agreed in the result.

Direction for adducing further testimony.

SECOND DIVISIONAL COURT. OCTOBER 26TH, 1917.

*BRADSHAW v. CONLIN.

Motor Vehicles Act—Motor Vehicle on Highway—Loss or Damage Sustained by Person Driving Horses on Highway—Evidence—General Verdict of Jury—Judge's Charge—Carefulness of Motorist—Objections at Trial—Negligence—Contributory Negligence—Effect of sec. 23 of R.S.O. 1914 ch. 207—Construction of sec. 16 (1)—Speed of Motor Vehicle when Approaching Horse on Highway—Reasonable Belief—Mens Rea—Misdirection—New Trial.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, upon a general verdict of the jury at the trial, in favour of the defendant, in an action in that Court, brought to recover damages for injury and loss sustained by the plaintiff by reason of his horses being frightened by the defendant's motor-car, which, as alleged, was being driven at an excessive rate of speed and was not stopped when the plaintiff signalled. The plaintiff was thrown from his waggon. He charged negligence and failure to observe the requirements of the Motor Vehicles Act, R.S.O. 1914 ch. 207. The plaintiff complained of misdirection and asked for a new trial.

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

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

F. E. O'Flynn, for the defendant, respondent.

RIDDELL, J., read a judgment in which he said that the first ground of complaint was, that the learned County Court Judge told the jury that the evidence shewed that the defendant was a very careful driver, and added, "That evidence, it seems to me, ought to have some weight as to the carefulness of this driver." But the evidence itself was given without objection, and there was no specific objection to that part of the charge, counsel contenting himself with raising two specific objections, and concluding, "And I object to the whole charge;" and, moreover, the trial Judge added at once, "But that won't excuse him if he drove wrong in this case." This ground was not tenable.

Second, it was contended that the doctrine of contributory negligence was not applicable to a case such as this. Section 23 of the Motor Vehicles Act provides: "When loss or damage is

sustained by any person by reason of a motor vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver." But this simply shifts the onus. In the absence of such a provision, when a plaintiff came into Court alleging damage sustained by reason of a motor vehicle on a highway, he must prove negligence or improper conduct on the part of the owner or driver; this provision removes the necessity, and makes it sufficient for the plaintiff to prove damage sustained by reason of a motor vehicle on a highway. Whatever would before have been matter of substantial defence remains to the defendant. This ground should not prevail.

The third ground of objection was, that the learned County Court Judge told the jury that sec. 16 (1) of the Act requires the motor vehicle to be at no greater speed that 7 miles an hour etc., only if the operator has reason to believe that he is approaching a horse—that the restriction does not apply if he has no reason to believe that he is approaching a horse. Section 16 (1) says: "Every person having the control or charge of a motor vehicle . . . outside the limits of any city or town, shall not approach such horse" (i.e., a horse drawing a vehicle or upon which any person is riding) "within 100 yards, or pass the same going in an opposite direction at a greater rate of speed than 7 miles an hour . . . ." This is a specific and definite prohibition. Where the Legislature leaves anything to reasonable ground of belief, it says so, as in sec. 11 (2). Where the prohibition is clear, a mens rea is not necessary, even in criminal matters: Regina v. Prince (1875), L.R. 2 C.C.R. 154. Moreover, a consideration of the purpose and object of the legislation makes it clear that there could have been no intention on the part of the Legislature to rest the duty of going at not more than 7 miles per hour upon the knowledge or reasonable belief of the operator of the motor vehicle. Section 16 contains a special protection for horses on the highway in use for riding or driving. It is more reasonable to protect such horses by saying to the operator of the motor vehicle, "You must not run at a greater rate than 7 miles an hour at points in the road where you cannot see clearly 100 yards ahead," than to make the horseman take all the risk of the operator running at 20 miles an hour till he sees the horse, perhaps a few yards away. The operator of the motor vehicle can protect himself and avoid danger; the horseman cannot. The charge in this respect was erroneous.

As the verdict was general, it was impossible to say that the error might not have affected the verdict; and, consequently,

there should be a new trial. The defendant should pay the costs of the appeal and of the former trial.

ROSE, J., agreed with RIDDELL,J.

LENNOX, J., for reasons given in writing, agreed that there should be a new trial.

MEREDITH, C.J.C.P., read a dissenting judgment.

New trial ordered; MEREDITH, C.J.C.P., *dissenting*.

SECOND DIVISIONAL COURT. OCTOBER 26TH, 1917.

*DEVINE v. CALLERY.

Fixtures—Wooden Building Erected by Tenant on Demised Premises—Removal at Expiration of Term—Agreement in Writing—Estoppel—License—Termination—Privilege—Option to Buy—Reasonable Time for Removing Building—Damages—Nominal Damages—Trespass.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, dismissing an action brought in that Court to recover damages for the alleged wrongful removal by the defendants of a building from the premises of the plaintiff to those of one of the defendants.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LRNNOX, and ROSE, JJ.

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

G. W. Morley, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that one Deremo built and owned a wooden house upon land leased to him by the plaintiff for 10 years. In Deremo's time, the plaintiff had, according to her testimony, no interest in the house, but she "expected to have" the first chance to buy it. Deremo sold the house to Doyle Brothers, with the knowledge and consent of the plaintiff, plainly expressed in a writing drawn up by her with her own hand as a lease by her of the same land to them for a term of 8 years, beginning when Deremo's term ended; and she

expressly provided in this writing that "Doyle Brothers are to have the privilege to move the house Deremo built at the end of 8 years," but that "Doyle Brothers are to give Mrs. Devine the first chance to buy the house at the end of the 8 years." There was no provision against assigning the lease or against subletting the land; and several sales of the house and assignments of the term were made, the last to the defendant Callery. At the end of the 8 years, the defendant Callery, accompanied by one of the Doyles, went to the plaintiff and gave her "the first chance to buy the house;" but she asked for the rest of the day to give her answer. No answer was given. Subsequently she claimed to be entitled to it without buying it or paying anything for it.

The house was removed by the defendant Callery, assisted by the defendant Wright, to the land of the defendants the Deloro Smelting and Refining Company Limited; and thereupon this action was brought to recover from all three defendants $500 for damages for the removal of the building.

In these circumstances, the plaintiff asked the Court, first, to find that the wooden building was not a chattel, but was part of her land, notwithstanding that there was no evidence that the building was affixed to the land; that wooden buildings are often chattels; that she, for probably 18 years, treated it as a chattel in which she had no interest but the first chance to buy as a chattel; that she had in writing declared that the house was not hers but her tenant's; and that standing by and consenting to a sale of the house precluded her from denying the vendor's right to sell, even if he really had none.

Secondly, the plaintiff asked the Court, after finding that the house was part of her land, to rule that all the privileges to remove the house which she gave were revocable licenses which she revoked, or else because, though in writing, the lease was not granted over her seal, though it was over her signature. But the lease was not a mere license; the "privilege" expressed in it was not mere leave, but an essential part of the lease, a part quite common in leases; it was part of the consideration for which the rent provided for in the lease was paid, throughout the term created by it.

The appeal should be dismissed.

RIDDELL, J., read a judgment in which he said, after stating the facts, that there was no evidence that the house was attached to the freehold. In any case, the house was, as the plaintiff herself swore, the property of Deremo; by the sale to the Doyles it became theirs, and by the sales to the intermediate purchasers

and to the defendant Callery the property of each in succession. The agreement bound the Doyles and their successors in title to give the option to buy on the termination of the lease; this was offered, and the offer refused; the house was on the plaintiff's land; in the circumstances, even without the plaintiff's agreement, a right to remove within a reasonable time must be implied. At the most, the plaintiff's only right would be for a technical trespass, and no more than nominal damages would be given. The appellate Court should not grant a new trial for nominal damages, or itself award nominal damages. Reference to authorities.

The appeal should be dismissed.

LENNOX, J., agreed with RIDDELL, J.

ROSE, J., read a judgment in which he said that it was not clearly proved that the house was ever affixed to the land; assuming in the plaintiff's favour that it was so affixed, it became part of the land; but, as between the plaintiff and Deremo, it remained subject to the right of Deremo to bring it back to the state of a chattel again by severing it from the land; Deremo's right was one that could be assigned, and for assignment no deed or writing was necessary. The right was transferred to the defendant Callery, and the plaintiff could not have damages against Callery for exercising it unless Callery lost it before the end of the term. The plaintiff had the right to purchase the house from Callery at the end of the term; and Callery had a reasonable time, after the expiration of the term and after the plaintiff's refusal to purchase, within which to exercise his right of removal; and, there having been no unreasonable delay on his part, the action failed. Reference to authorities.

The appeal should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIOANL COURT. OCTOBER 26TH, 1917.

*MAPLE LEAF LUMBER CO. v. CALDBICK AND PIERCE.

Sheriff—Sale of Logs under Execution—Seizure—Property Passing—Neglect of Sheriff to Ascertain Quantity of Logs—Breach of Duty—Advertisement of Sale of Smaller Quantity than actually Existed—Innocent Purchaser for Value without Notice—Liability—Bona Fide Sale at Fair Value—Estoppel.

Appeals by the defendants Caldbick and Pierce and cross-appeal by the plaintiffs from the judgment of CLUTE, J., 39 O.L.R. 201, 12 O.W.N. 81.

The appeals and cross-appeal were heard by MEREDITH, C.J.C.P., HODGINS, J.A., RIDDELL, LENNOX, and ROSE, JJ.

H. M. Mowat, K.C., for the defendant Caldbick.

J. Y. Murdoch, for the defendant Pierce.

McGregor Young, K.C., for the added plaintiffs.

Gideon Grant and P. E. F. Smily, for the original plaintiffs.

MEREDITH, C.J.C.P., in a written judgment, said that for the plaintiffs the execution creditors, the single contention was, that Rule 557 required public notice of a sheriff's sale under a fi. fa.; that there was no such notice given of the sale in question; and that, consequently, it was invalid. But notice of the sale was given in the manner required by the Rule; the most that could be said against it was, that the goods in question, one item only out of seven set out in the notice were not accurately described—they were described as "about 300 logs in the woods," whereas there were really about 4,000; and failure to give the notice required did not, in itself, invalidate a sale.

Reference to Jarvis v. Brooke (1854), 11 U.C.R. 299; Osborne v. Kerr (1859), 17 U.C.R. 134; Lee v. Howes (1870), 30 U.C.R. 292; McDonald v. Cameron (1867), 13 Gr. 84; McGee v. Kane (1887), 14 O.R. 226; McNichol v. McPherson (1907), 15 O.L.R. 393; Am. & Eng. Encyc. of Law, 2nd ed., vol. 25, p. 762.

That the defendant Pierce was an innocent purchaser, within the meaning of the word "innocent," as applied to such a case as this, was really not questioned in any of the testimony adduced at the trial.

Setting aside the sale, at the instance of either the execution debtors or the execution creditors, was out of the question, and so the trial Judge rightly considered.

The learned Chief Justice was, however, unable to agree in the trial Judge's finding that the defendant Pierce, knowing the capacity in which the defendant Caldbick, the sheriff, was acting, and that to sell, as "about 300 logs," some 4,000, would be a breach of duty, and would operate as a fraud on other creditors, was liable with the sheriff for damages. In fact, the sheriff did not sell about 300 logs; he advertised "about 300 logs in the woods;" he sold all the logs of the execution debtors in the woods, expressly stating that, if less than 300, the purchaser must pay full price—if more, the purchaser took them. It was impossible to say that the property was sacrificed, or even that the sale was was not a fair one. A fair price was paid for the logs at the sale, the purchaser buying at the most unfavourable time of the year and taking the great risk of loss by forest fires.

But, if that were not so, it did not lie in the mouths of either execution debtors or execution creditors to complain of any of the things with which they now found fault.

The appeal of the defendant Pierce should be allowed, and the action against him dismissed, both with costs; the appeal of the defendant Caldbick should also be allowed with costs, and the action against him dismissed without costs—without costs because of the loose method in which his duties were performed; and the cross-appeal should be dismissed with costs, if any.

HODGINS, J.A., for reasons given in writing, agreed in the result stated by the Chief Justice.

LENNOX, J., agreed with the Chief Justice.

RIDDELL, J., for reasons stated in writing, was in favour of allowing the appeal of the defendant Pierce, and of dismissing the appeal of the defendant Caldbick, with a variation of the judgment at the trial against him.

ROSE, J., agreed with RIDDELL, J.

Order as stated by MEREDITH, C.J.C.P.; RIDDELL *and* ROSE, JJ., *dissenting in part.*

HIGH COURT DIVISION.

LATCHFORD, J. OCTOBER 22ND, 1917.

*ELECTRICAL DEVELOPMENT CO. OF ONTARIO LIMITED v. COMMISSIONERS FOR QUEEN VICTORIA NIAGARA FALLS PARK.

Pleading—Statement of Claim—Motion to Strike out as Disclosing no Reasonable Cause of Action—Rule 124—Prayer for Declaratory Judgment—Judicature Act, sec. 16 (b)—Question of General Importance—Defective Pleading—Direction to Deliver Better Pleading—Rule 138.

Application by the defendants, under Rule 124, for an order striking out the statement of claim and dismissing the action, on the ground that the statement of claim disclosed no reasonable cause of action, and that the action was frivolous and vexatious.

The motion was heard in the Weekly Court at Toronto.

G. H. Kilmer, K.C., for the defendants.

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

LATCHFORD, J., in a written judgment, said that the statement of claim set forth that the plaintiffs and defendants were the parties referred to by the same names in the Ontario statute 5 Edw. VII. ch. 12 (an Act passed to confirm an agreement between the defendants and certain persons who assigned to the plaintiffs); that the plaintiffs had constructed certain works, and had for years generated electricity under the provisions of the agreement in accordance with plans approved by the defendants; that doubts had arisen with respect to the quantity of water the plaintiffs might use, the amount of electricity they might develope, and the type of machinery they might install; and that the approval of the defendants rendered the plaintiffs' works proper works to develope the power which they were entitled to generate. By para. 6, the defendants then said that they desired the Court to declare, having regard to the words contained in the agreement, "license irrevocable to take from the waters of the Niagara river within the park a sufficient quantity of water to develope 125,000 electrical or pneumatic or other horse power for commercial use:" (a) the present legal effect of the agreement and statute, and more particularly the amount of water which the plaintiffs were entitled

to take from the Niagara river; (b) the type of machinery which the plaintiffs were entitled to use in developing electric power from the water so taken; and (c) the amount of electrical power which the plaintiffs were entitled to develope.

The action, the learned Judge said, was not open to objection on the ground that a merely declaratory judgment was sought: Judicature Act, sec. 16 (*b*).

In England it was recently held that Order XXV., r. 4, which is identical with the Ontario Rule 124, was never intended to apply to any pleading which raised a question of general importance or a serious question of law: Dyson v. Attorney-General, [1911] 1 K.B. 410; Dyson v. Attorney-General, [1912] 1 Ch. 158. The summary procedure under Order XXV., r. 4, can be adopted only when it can be clearly seen that the claim is, on the face of it, absolutely unsustainable: Lindley, L.J., in Attorney-General of the Duchy of Lancaster v. London and North Western R.W. Co., [1892] 3 Ch. 274, at p. 277; Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited, [1899] 1 Q.B. 86.

It could not be said that the pleading now attacked disclosed no ground for the declaration sought. It lacked the definiteness characteristic of the statements of claim in the Dyson case and in Gingell Son & Foskett Limited v. Stepney Borough Council, [1906] 2 K.B. 468, at p. 471. Rule 145 requires that a statement of claim shall state specifically the relief—in this case, the declaration—claimed. Such a pleading should also state what action or contention on the part of the defendants has made it necessary to ask for a specific declaration. That "doubts have arisen" is not a sufficient reason for the appeal made to the Court. The defendants, according to counsel for the plaintiffs, had advanced beyond the state of doubt.

The issue was of much importance to the plaintiffs and to the Province as represented by the defendants.

While the pleading was defective, it should not for that reason be struck out. Rule 138 warrants an order that a further and better statement of claim be filed. The pleading in the Dyson case might well be followed as a model.

Order accordingly. Costs in the cause.

LATCHFORD, J. OCTOBER 24TH, 1917.

*UPPER CANADA COLLEGE v. CITY OF TORONTO.

Injunction—Interim Order Obtained by Plaintiff—Undertaking as to Damages—Dismissal of Action without Costs—Application by Defendant for Inquiry as to Damages—Refusal—Discretion—Special Circumstances.

Application by the defendants for an order directing a reference to ascertain what damages, if any, the defendants had sustained by reason of an interim injunction granted in this action on the 30th September, 1915, and directing that the plaintiffs should pay, forthwith after such inquiry, such damages as the defendants might be found to have suffered by reason of the injunction.

The present application came before MASTEN, J., on the 3rd October, 1917, and he (ante 92) directed that it should be adjourned before FALCONBRIDGE, C.J.K.B., who had tried the action and dismissed it without costs; his judgment was affirmed by the Appellate Division (37 O.L.R. 665) and by the Supreme Court of Canada in a decision not yet reported.

Since the trial of the action, the Chief Justice of the King's Bench had, as President of the High Court Division of the Supreme Court of Ontario, became ex officio one of the Governors of Upper Canada College; and he requested LATCHFORD, J., to hear the motion.

The motion was heard in the Weekly Court at Toronto.

Irving S. Fairty, for the defendants.

Frank Arnoldi, K.C., for the plaintiffs.

LATCHFORD, J., in a written judgment, after setting out the facts, said that the interim injunction order contained the usual undertaking by the plaintiffs as to damages, and the injunction was continued to the trial. The dismissal of the action put an end to it. The question was, whether the defendants, by reason of the interim injunction, had "sustained any damage *which the plaintiffs ought to pay.*" The learned Judge said that the matter obviously imported a discretion; and he was free to form any conclusion warranted by the evidence.

Reference to Newby v. Harrison (1861), 3 De G. F. & J. 287, 290; Bingley v. Marshall (1863), 9 L.T.R. 144; Smith v. Day (1882), 21 Ch. D. 421, 430; Griffith v. Blake (1884), 27 Ch. D. 474, 477.

The good faith of the plaintiffs; their duty as trustees to assert what they conceived to be their rights; the importance of the issue as to assessment (involving, as it did, the right of the defendants to pass the by-law under which they acted); the arbitrary, though legal, conduct of the defendants in laying out the work to the manifest disadvantage of the plaintiffs and the equally manifest benefit of interested property-owners on the opposite side of the street; the fact that the dismissal of the action was without costs—all these were circumstances which warranted the learned Judge in reaching the conclusion that, if the defendants had suffered damages by reason of the injunction, they were not such damages as the plaintiffs ought to pay.

Motion dismissed with costs.

KELLY, J. OCTOBER 24TH, 1917.

HAMILTON MOTOR WORKS LIMITED v. BROWNE.

Patent for Land—Water-lot Granted by Crown—Boundaries—Surveys—Plans—Determination of True Boundary-line—Amendment of Patent—Title by Possession to Shore-lots—Conflicting Evidence—Application for Leave to Adduce Further Evidence—Counterclaim—Damages—Costs.

Action by the company and the Attorney-General for Canada (the latter having been added as a plaintiff after the institution of the action) to repeal and avoid letters patent of a water-lot, issued to the defendant on the 24th April, 1907, for a declaration that the plaintiff company were entitled to the ownership and possession of certain land, and for an order requiring the defendant to replace part of a boundary-fence. The defendant counterclaimed damages.

The action was tried without a jury at Hamilton.
G. S. Kerr, K.C., and T. B. McQuesten, for the plaintiffs.
J. L. Counsell, for the defendant.

KELLY, J., in a written judgment, said that the plaintiff company and the defendant were the owners of adjoining lands on the north side of Brock street, in the city of Hamilton, the defendant's land being to the west of the company's. Conveyances of both

parcels had been made with reference to a plan on deposit in the registry office, made by one Burwell in 1834. The water-lot granted to the defendant was said to be to the north of these Brock street lands owned by him; and in the application for the patent the position was taken that the defendant was in possession of the water-lot in front of his lands.

The plaintiff company claimed to be entitled to the ownership not only of lots 5, 6, and 7 in block 40 according to the plan of 1834, of which lots they had a conveyance, but also of lands to the east thereof (part of lot 4 on the plan) lying to the west of a fence which once existed and the prolongation thereof northerly into the waters of Burlington bay, the line of which they asserted to be the true boundary-line. The evidence as to the location of the fence, and of the length of time it existed in any one position, was conflicting.

The description furnished to the Department of Marine and Fisheries when the patent was applied for was prepared by one McKay, a surveyor employed by the defendant at that time. In preparing the description, he did not regard the lines of the lots on the plan of 1834, but simply extended to and into the water the visible lateral boundaries of the defendant's lots as they appeared on the ground at the time.

While McKay's evidence did not assist in locating, with reference to any existing object or mark, the true boundary-line between the lands conveyed to the defendant and those conveyed to the plaintiff company, the uncontradicted evidence of another surveyor, Lee, established that line with reference to a dwelling-house which had since 1871 been and at the time of the trial was upon, and at or near the south-easterly corner of, the lands in possession of the plaintiff company. As the result of a survey, made with great care, he defined on a plan which he produced at the trial the boundary-line between lots 4 and 5 on the plan of 1834, and committed himself to its correctness; and there was no reason to doubt that it was the true boundary-line.

As to the question of possession along the boundary between the two properties, there was, except as to the existence of the dwelling-house and the length of time it had occupied its present situation, the greatest possible contradiction in the evidence. The evidence did not establish, on the one hand, the possession which the plaintiffs contended for up to a line some feet to the east of the dwelling-house, nor, on the other hand, a possession by the defendant of any of the land to the west of the line which Lee laid down as the westerly limit of lot 4 on the plan of 1834.

It was sufficiently established that the plaintiff company and their

predecessors in title had been so in possession of the house referred to as to give them title to any part of lot 4 on which the house stands and which has been used therewith; and therefore that the boundary-line between the lands owned respectively by the plaintiff company and the defendant should now be defined by the line of the stone monuments (shewn on Lee's plan) from the northerly limit of Brock street northerly to the intersection of that line with the line forming the northerly boundary of lots 4 and 5 on the plan of 1834.

It was not established that the defendant had acquired by possession any lands lying west of the production northerly of the dividing line between lots 4 and 5 as laid down by Lee; and the patent should not have included any lands lying to the west of the line between the stone monuments to its intersection with the dividing line between lots 4 and 5 on Lee's plan, or west of the production of that line into the water. The letters patent of the 24th April, 1907, should be amended accordingly; and it should also be declared that the defendant's property was subject to the right of the owner of the property adjoining it to the west to maintain the projecting eave on the easterly side of the house referred to as it now extends over the defendant's lands.

An application, made after the trial, on the defendant's behalf, for leave to adduce further evidence to establish the location of the boundaries on the old plan, should be dismissed with costs, the proposed evidence not differing from or adding to what had already been put in at the close of the trial.

There was no sufficient evidence of damage to the defendant, and his counterclaim for damages should be dismissed.

There should be no costs of the action, success being divided, and there being other circumstances which warranted a denial of costs to either party.

CLUTE, J. OCTOBER 25TH, 1917.

*SPARKS v. CLEMENT.

Vendor and Purchaser—Agreement for Sale of Land Signed by Purchaser but not by Vendor—Action by Vendor for Specific Performance—Description of Land—Uncertainty—Statute of Frauds—Parol Evidence to Identify Land—Inadmissibility.

Action by the vendor for specific performance of an alleged agreement for the sale and purchase of land.

The action was tried without a jury at Ottawa.
O.A. Sauvé, for the plaintiff.
D. Danis, for the defendant.

CLUTE, J., in a written judgment, said that the document relied on by the plaintiff was as follows: "Vars, March 30th, 1917. A. E. Sparks sells and J. Clement buys the 50 acres of land across the road from him for the sum of $4,000 cash. Joseph Clement." The plaintiff did not sign the document. The defendant was the owner of 100 acres in the 6th concession of the township of Russell. There was a road-allowance between the 5th and 6th concessions, and the plaintiff owned the 100 acres across the road-allowance and directly east of the defendant's land.

The plaintiff alleged in his statement of claim that he sold to the defendant the east half of his 100 acres, and offered in evidence the above agreement and oral evidence to identify *which* 50 acres was intended. The defendant's house, it was said, was about the middle of his 100 acres, and the land mentioned in the agreement was described as the 50 acres of land across the road from him, that is, from the defendant. Any one of three parcels of 50 acres, of the 100 acres owned by the plaintiff, might answer the description, that is to say, the east half of his 100, or the north half, or the south half, or possibly the centre 50.

The question was, first, did the agreement sufficiently identify the 50 acres sold? If not, was oral evidence admissible to shew which was intended?

It did not appear to the learned Judge that the words "across the road from him" necessarily meant all the land of the plaintiff opposite all the land of the defendant to a depth of 50 acres. If the plaintiff's land were divided from north to south, the words were as well-satisfied by either the north or the south 50. Nor did a fence which is said to be somewhere near the boundary-line between the north and south halves of the plaintiff's land, lend aid to decision. It was not mentioned or referred to in the agreement, so that the case turned upon the question whether or not oral evidence was admissible, as against the Statute of Frauds, which was pleaded.

Reference to Ogilvie v. Foljambe (1817), 3 Mer. 53; North v. Percival, [1898] 2 Ch. 128; Shardlow v. Cotterell (1881), 20 Ch .D. 90; Plant v. Bourne, [1897] 2 Ch. 281; Bleakley v. Smith (1840), 11 Sim. 150; Cowley v. Watts (1853), 22 L.J.N.S. Ch. 591; Owen v. Thomas (1834), 3 My. & K. 353; Waldron v. Jacob and Millie (1870), 5 Ir. R. Eq. 131; Caisley v. Stewart (1911), 21 Man.

R. 341; McMurray v. Spicer (1868), L.R. 5 Eq. 527; Fry on Specific Performance, 5th ed., pp. 168, 256, 257; E.W. Savory Limited v. The World of Golf Limited, [1914] 2 Ch. 566; McClung v. McCracken (1882-3), 2 O.R. 609, 3 O.R. 596; Rossiter v. Miller (1878), 3 App. Cas. 1124, 1140, 1141.

In the present case, according to the plaintiff himself, the parties did not go upon the farm, nor was the particular 50 acres pointed out. The contract was drawn in the evening by the plaintiff, who did not sign it.

The plaintiff did not satisfy the learned Judge that he accepted the paper evidencing the bargain as a binding contract at the time it was made.

The document in itself is not a sufficient note or memorandum as required by the Statute of Frauds; and parol evidence as to *which* 50 acres was intended is inadmissible. While it was not necessary, under the statute, that both parties should sign the memorandum required by sec. 5 of the Act, R.S.O. 1914 ch. 102, the fact that one party does not so sign may be very significant of what was intended at the time as to whether the bargain should be considered as binding when signed by one of the parties only. See Clergue v. Plummer (1916), 38 O.L.R. 54, at p. 57.

It was not a case where specific performance should be enforced, and the action should be dismissed with costs.

MIDDLETON, J. OCTOBER 26TH, 1917.

DOMINION RADIATOR CO. LIMITED v. STEEL CO OF CANADA.

Contract—Breach—Failure to Deliver Goods Contracted for—Specifications — Waiver — Acquiescence — Time — Damages — Measure of.

Action by purchasers against vendors for damages for failure to deliver pig-iron under two separate written contracts.

The action was tried without a jury at Toronto.

R. S. Robertson, for the plaintiffs.

George Lynch-Staunton, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the defendants manufactured pig-iron, and the plaintiffs used large quan-

tities of it in manufacturing radiators. Numerous successive contracts were entered into for the delivery of a given quantity of iron at a specified price within a named time. The first contract in respect of which a breach was charged was that of the 23rd December, 1915, which called for 1,000 tons at $22.88 per ton, "to be delivered between date of completion of current contract and June 30, 1916, in equal monthly instalments." The "current contract" was a contract of January, 1914, under which about 150 tons remained to be delivered, and which was not completed until the 12th January, 1916. The other contract in respect of which a breach was charged was made on the 25th September, 1916, and called for the delivery of 1,200 tons between the 1st January, 1917, and the 30th June, 1917, at $23.88 per ton. Between the making of this contract and the end of the year 1916 the price of pig-iron advanced with great rapidity, and the demand exceeded the supply—the defendants' iron sold at $39 a ton and upwards. The situation was, that, under two contracts, similar in their terms, save as to price, the defendants were bound to deliver and the plaintiffs to accept 2,200 tons between the completion of the January, 1914, contract, in January, 1916, and the 30th June, 1916—a period of less than 6 months.

The learned Judge, after stating the facts, made the following findings:—

(1) That the parties by their conduct acquiesced in the postponement of deliveries under the two contracts of December, 1915, until the defendants had completed delivery under a former contract of October, 1915.

(2) That the parties waived the delivery of any specifications, and agreed that the iron should be according to the standard specifications established between them save where varied by special instructions given from time to time by the plaintiffs.

(3) That the defendants repudiated, and so rendered themselves liable to an action for refusal to deliver before the time for the delivery of specifications had arrived, having regard to the first finding.

(4) That time was not originally of the essence of the contract; and, even if it was, the parties by their conduct waived this.

Whatever the rights of the parties were as to the contract of December, 1915, there was no room for question as to the position under the contract of September, 1916. A dispute as to earlier agreements could not justify a breach of the later one. The defendants took an altogether unjustifiable position when they refused to carry out the September, 1916, contract, unless the plaintiffs would abandon their position with reference to the December, 1915, contract.

The measure of damages is the difference between the contract-price and the market-price at the date of the breach: Jamal v. Moolla Dawood Sons & Co., [1916] 1 A.C. 175.

It was contended that, became the plaintiffs could buy other iron which might answer the purpose well enough, the price of such iron would give the measure. There was no justification for this. Why should the defendants retain their product which they had contracted to sell to the plaintiffs and realise $39 per ton and limit the recovery against them to $34 on any such theory? There was no question as to the market-price of the very thing sold, and the price of some other things suggested as an equivalent was nihil ad rem. On the evidence, it could not be found that the iron selling upon the market at $34 was equivalent in all respects to the defendants' pig-iron at $39.

Judgment for the plaintiffs for $27,795.06 with costs.

BRITTON, J., IN CHAMBERS. OCTOBER 26TH, 1917.

REX v. AUER.

Criminal Law — Magistrate's Conviction — Jurisdiction — Offence against "Defence of Canada" Order in Council, 1917—Provision for Preliminary Investigation—Failure to Hold—Conviction Quashed.

Motion to quash a magistrate's conviction of the defendant for an offence against an order in council of the Governor-General of Canada, made on the 10th April, 1917, under and by virtue of the powers conferred by the War Measures Act, 1914.

The conviction was for that the defendant "by word of mouth did spread reports and make statements intended and likely to cause disaffection to His Majesty's forces and to interfere with the success of His Majesty's forces and of the forces of His Majesty's allies by land and sea and to prejudice His Majesty's relations with foreign powers, contrary to the 'Defence of Canada' order, 1917."

Gideon Grant and H. G. Smith, for the defendant.
Edward Bayly, K.C., for the Crown.

BRITTON, J., in a written judgment, after setting forth the facts, quoted clause 2 of sec. 50 of the order in council: "Where a

person is alleged to be guilty of an offence against this order, the case shall be referred to the competent naval or military authority, who shall forthwith investigate the case and determine whether or not the case is to be proceeded with." Clause 3: "If it be determined that the case is not to be proceeded with, the alleged offender, if in custody, shall (unless he is detained on some other charge) forthwith be released."

This procedure was not followed.

The learned Judge said that the defendant was a person alleged to be guilty of an offence against the order in council, and so was of right entitled to have the judgment of the competent naval or military authority to investigate the case and determine whether or not it should be proceeded with.

The magistrate had no jurisdiction, and the conviction must be quashed. No costs.

LATCHFORD, J., IN CHAMBERS. OCTOBER 26TH, 1917.

RE G., A SOLICITOR.

Solicitor—Sum Due by Solicitor to Client—Agreement—Equitable Assignment—Validity—Solicitor's Lien.

Application on behalf of D. Matheson & Sons for an order discharging the order of a Local Judge staying and setting aside a writ of execution directed against G., a solicitor, on the ground that the Judge erred in holding that an assignment which the applicants had made to one T., also a solicitor, of a sum due by the solicitor G. to the applicants, had been validly made, and on the further ground that the Judge should have held that the lien for costs of the present solicitor for Matheson & Sons was a first charge upon a certain fund.

A. A. Macdonald, for the applicants.
C. M. Garvey, for G.

LATCHFORD, J., in a written judgment, said that in May, 1916, an order was made at the instance of the present applicants for the delivery of a bill of G.'s costs against them. The order was complied with; and, upon taxation, it was declared that G. was indebted to Matheson & Sons in $159.20. It was afterwards

discovered and admitted that G. was entitled to a further credit of $89.38, thus reducing the balance due by him to $69.82.

G. was ordered to pay and did pay the costs of the application and taxation. However, instead of paying the $69.82 to the solicitor then and now acting for Matheson & Sons, he paid the money to T., a former solicitor for the firm, who claimed it under the assignment now in question. This was made in 1914, upon an adjustment of accounts between Matheson & Sons and T. Two members of the applicants' firm were present and were represented by Mr. A. G. Murray, who with T. signed (by initials) the following memorandum: "Bal. due settled at $150, to be paid out of first moneys realised from Mr. G. on further accounting by him."

There was undisputed evidence that the agreement was approved by the Mathesons when it was made and signed on their behalf. It must be regarded as a valid equitable assignment. See Brown Shipley & Co. v. Kough (1884), 29 Ch.D. 848, at p. 854.

It was clear that Matheson & Sons, from the delivery of the assignment to T., had, to the extent of the $150 assigned, no claim against G. Could their solicitor stand in any higher position than his clients? However reprehensible the action of G. may have been, the answer to this question must be in the negative.

In Taylor v. Popham (1808), 15 Ves. 72, it was held that in equity the costs are arranged according to the equities of the parties; and the solicitor's lien is upon the balance only.

See also Re Union Cement and Brick Co. (1872), 26 L.T.R. 240, and Gwynn v. Krous (1845), 7 Ir. Eq. R. 274; at p. 280, the Master of the Rolls says: "On the question of the solicitor's lien for costs, nothing is better settled than that it is in this Court subordinate, and to be postponed, to the equities between the parties."

Bell v. Wright, as decided in the Supreme Court of Canada (1895), 24 S.C.R. 656, does not apply to the facts as established in this case. There the fund was regarded as being "as much in the solicitor's hands as if it had been paid to him directly and personally, instead of into Court:" Strong, C.J.C., at p. 658. Nor should that case be regarded as affecting the authority of Taylor v. Popham, cited in the Court appealed from: Wright v. Bell (1894), 16 P.R. 335.

Application dismissed. No order as to costs.

BRITTON, J. OCTOBER 27TH, 1917.

*MALDOVER v. NORWICH UNION FIRE INSURANCE CO.

Insurance—Fire Insurance—Chattel Property Owned by Different Members of one Family—Insurance in Name of one Member—Right to Recover—"Direct Loss"—Proofs of Loss—Acceptance—Waiver—Insurance Act, R.S.O. 1914 ch. 183, secs. 194 (condition 18), 199.

Action upon a policy of fire insurance.

The action was tried without a jury at Toronto.
Gideon Grant, for the plaintiff.
R. S. Robertson, for the defendants.

BRITTON, J., in a written judgment, said that the plaintiff was a student-at-law, living with his family, consisting of his father, mother, brothers and sisters, in a house in the city of Toronto. The plaintiff alleged that he was the owner of certain of the goods and chattels contained in the house, and that different members of his family were the owners of the remainder. On the 20th June, 1916, the defendants issued to the plaintiff a policy insuring for $2,000 the chattels in the house, described in detail and stated to be "the property of the assured, or of any member of the assured's family." A fire occurred on the 25th November, 1916, by which the property insured was destroyed or damaged. Notice of the fire and of the loss was promptly given by the plaintiff to the defendants. On or about the 8th January, 1917, the defendants caused their adjuster to investigate the cause and result of the fire and to report upon the loss and make an adjustment of the amount owing to the plaintiff, if the defendants were liable. Proofs of loss, in a form which appeared to be satisfactory to the defendants, were furnished to them by the plaintiff, and the adjuster made an adjustment and determined the amount of the loss at $1,535.63. The defendants, however, refused to pay the amount of the loss; and on the 10th March, 1917, this action was commenced, the plaintiff suing for $1,535.63.

The defendants set up that proofs of loss satisfactory to them had not been furnished, and, if furnished at all, that 60 days had not elapsed before the commencement of the action; also that the plaintiff did not personally suffer the loss, as he had not an insurable interest in the great bulk of the property destroyed.

Effect should not be given to the defence of failure to furnish proofs of loss as required by the 18th statutory condition (Insurance Act, R.S.O. 1914 ch. 183, sec. 194). The company sent its adjuster; the plaintiff was led to believe that the only objection was in regard to the amount of the damage or loss; there was no request in writing for anything further from the plaintiff than the proofs furnished; after the proofs were sent in by the plaintiff, no objection was taken by the defendants to them—in fact, the defendants treated them as if they were not objectionable on any ground; and no objection was in fact made until the defendants made one in their statement of defence. The proofs became the property of the defendants as soon as the letter containing them was posted; and, in the absence of any decision to the contrary, that would be a sufficient delivery of proofs of loss within the meaning of condition 18. It was admitted that the proofs were in the hands of the defendants on the 9th January, 1917. Section 199 of the Act would entitle the plaintiff to relief, if there were any default on his part.

There was no written application for the insurance; the application was oral; and, after negotiations, the defendants issued the policy as it appeared. It was clear upon the evidence that both parties thought that the defendants were insuring the whole of the property mentioned in the policy, the same as if actually owned by the plaintiff; and that in the event of loss or damage by fire, the plaintiff would be entitled to recover the amount of the loss up to $2,000.

The words "direct loss" were not intended to apply in a case like the present—these words exclude damages too remote to warrant recovery.

The property was treated as if it all belonged to a class—the family of the plaintiff. See Keefer v. Phœnix Insurance Co. of Hartford (1901), 31 S.C.R. 144.

The plaintiff was entitled to recover—he might be liable to the true owners for such parts of the loss as they had sustained by the fire.

Judgment for the plaintiff for $1,535.63, with interest at 5 per cent. per annum from the date of the commencement of the action, and with costs.

RE BENNETT AND SKOOL—BRITTON, J.—OCT. 23.

Mortgage—Power of Sale—Exercise by Assignee of Mortgage—Notice of Sale—Provisions of Mortgage—Objection to Title Made by Assignee on Agreement for Sale—Application under Vendors and Purchasers Act.]—Motion by Rebecca Bennett, vendor, under the Vendors and Purchasers Act, for an order declaring that an objection raised by Morris Skool, purchaser, to the title to land, the subject of an agreement for sale and purchase, was invalid. The vendor proposed to sell under and by virtue of the power of sale contained in a mortgage; and the objection was, that notice of exercising the power of sale had not been served on all parties interested. The motion was heard in the Weekly Court at Toronto. BRITTON, J., in a written judgment, said that the mortgage expressly provided that the mortgagee might, on default, upon 10 days' notice, sell the land, and, upon continued default for two months, might sell without notice. There having been default for more than two months, the objection could not prevail: Re British Canadian Loan and Investment Co. and Ray (1888), 16 O.R. 15; Barry v. Anderson (1891), 18 A.R. 247. The power of sale in the mortgage was properly and validly exercisable by the assignee of the mortgage. Order declaring the objection invalid. No costs. J. H. Campbell, for the vendor. F. B. Edmunds, for the purchaser.

CORRECTION.

In JARVIS v. CITY OF TORONTO, ante 103, third line from the bottom, "struck out" should be "restored."