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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 21st, 1917.

*EASTVIEW PUBLIC SCHOOL BOARD v. TOWNSHIP OF GLOUCESTER.

Schools—Public Schools—Union School Section—Requisition of Board for Sum of Money for School Purposes—Apportionment between two Municipalities out of which Section Formed—Proportions Fixed by Assessors—Powers of Assessors—Irregularities—Method of Apportionment—Public Schools Act, R.S.O. 1914 ch. 266, secs. 29, 47—Enforcement of Apportionment—Remedy—Mandamus—Declaratory Judgment.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 12 O.W.N. 372.

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

A. H. Armstrong, for the appellants.

C. J. Holman, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that, the defendants having refused to levy and collect for the defendants more than a part of the sum required by the plaintiffs from the defendants for school purposes, this action was brought to compel them to levy and collect or otherwise make good the deficiency.

The plaintiffs were a union school board; the supporters of the school in part resided in the town of Eastview and in part in the township of Gloucester; and the substantial question was, whether

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

those who resided in the township had been called upon to pay more, and those who resided in the town less, than was lawful and right.

The provisions of sec. 29 of the Public Schools Act require that, at the times and in the circumstances set out in that section, "the assessors of the municipalities in which a union section is situate shall . . . meet and determine what proportion of the annual requisition made by the board for school purposes shall be levied upon and collected from the taxable property of the public school supporters of the union section situate in each of the municipalities in which such section lies." It was admitted that this legislation was applicable to the situation here; that, in 1916, it became the duty of such assessors to meet and determine such proportions, and that they did meet regularly for that purpose, and did in fact make such an apportionment.

But the defendants contended that such determination was not binding upon them, because the clerk of the town municipality was present at the meeting and advised the method of apportionment which was adopted by the assessors in reaching their conclusion.

Irregularities in such proceedings are, however, no excuse for the defendants' failure to levy and collect such sums as may be required by the board for school purposes, as they are imperatively required to do by sec. 47 of the Act.

The determination of the assessors is not a nullity, whether it could or could not be set aside at the instance of a ratepayer.

The adoption of an imprudent method of procedure did not make the determination of the assessors void.

The defendants also contended that the assessors proceeded upon a wrong principle in determining the proportion of the annual requisition which each municipality should pay. The trial Judge ruled that the assessors had not done that which the Act required them to do, and, therefore, that which they did was ineffectual. They found that the lands liable for these school taxes were in one municipality assessed at very much less than their actual value, and in the other at very much nearer their actual value; and, bringing the one up to the other in this respect, they apportioned the amount each should pay accordingly; and that was just what it was their duty to do.

The proper principle was adopted; and whether it worked out accurately or not was not a question with which this Court was concerned. The Act provides methods for the correction of errors. But there was no reason for suspecting any serious inaccuracy.

The appeal should be allowed; and, as the defendants evidently had in hand the means to pay, having at one time sent a cheque for the full amount to the plaintiffs, there was no reason why judgment should not go for the full amount—less the money paid into Court, which should be paid out to the plaintiffs—if not paid within one month. The plaintiffs should have their costs throughout against the defendants.

RIDDELL, J., also read a judgment. He was of opinion that the defendants were wrong, and the plaintiffs were entitled to succeed. He differed from the Chief Justice as to the remedy, saying that the evidence shewed that the defendants did not collect the full amount required $2,650, but only $1,500. Sending a cheque for $2,650 was an inadvertence. The defendants should be ordered to raise the amount and pay it over. But a prerogative writ of mandamus should not, without the consent of the defendants, be ordered to issue by the judgment in an action. If the defendants do not consent, there should be a judgment declaring that the plaintiffs are entitled to the writ, with costs of the action and appeal. If they consent, the appeal should be allowed with costs here and below, and a writ of mandamus should issue, the plaintiffs being allowed to amend their statement of claim accordingly.

ROSE, J., agreed with RIDDELL, J.

LENNOX, J., was of opinion that the appeal should be dismissed. He was not satisfied that the steps contemplated by the statute were taken, or that the judgment in appeal was wrong.

Appeal allowed; LENNOX, J., *dissenting.*

SECOND DIVISIONAL COURT. DECEMBER 21ST, 1917.

*SPARKS v. CLEMENT.

Vendor and Purchaser—Agreement for Sale of Land—Memorandum Signed by Purchaser but not by Vendor—Action by Vendor for Specific Performance—Description of Land—Sufficiency for Identification—Statute of Frauds—Defence that Transaction not Real—Inadmissibility—Pretended Sale—Evidence—Probabilities—Immorality of Defence—Rules of Civil Law.

Appeal by the plaintiff from the judgment of CLUTE, J., ante 122.

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

O. A. Sauvé, for the appellant.

J. A. Macintosh, for the defendant, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that there were just two questions involved in the case: (1) whether the description of the parcel said to have been sold was sufficient; and (2) whether the transaction was a real or only a pretended sale.

The description was, "the 50 acres across the road from" the purchaser.

When once it was known, as the parties knew, and as any one seeking to identify the 50 acres could find, that the buyer owned a farm on one side of a road and that the seller owned another farm on the other side of the same road directly opposite the buyer's farm, and that the seller's farm comprised two lots of 50 acres each, the one directly opposite the buyer's land, and the other the west 50 acres beyond that opposite the buyer's land, there can be no doubt about the identity of the land sold.

If the description had been "the seller's 50 acres," it would have been uncertain, because, as buyer and seller knew, the seller owned not only the two 50-acre parcels already mentioned but also a third 50 acres across another road opposite his 50 acres which were in the rear of the 50 acres opposite the buyer's farm.

The agreement was written and signed in the buyer's farm-house, which is upon his land near the road between his farm and the seller's opposite 50 acres. The "lay of the land" made it plain that the description was accurate and ample.

On the other branch of the case, the defendant's tale was improbable; the writing was altogether against it, and so were the circumstances and the probabilities. The plaintiff was anxious to sell; the defendant was a likely purchaser of the 50 acres directly opposite his own farm. In support of the tale there was only the interested testimony of the defendant and his wife; and against it was the testimony of the plaintiff and also that of the defendant's witness Sequin as to statements made by the defendant to him. Much was made of the fact that the plaintiff's wife, who was present when the writing was drawn up and signed, and was a witness at the trial, was not recalled to deny the defendant's tale, told at the trial after she had given her testimony; but, as attempts made to adduce evidence from her, when in the witness-box, as to what was said on that occasion, were promptly stopped, on the ground that such evidence was inadmissible, perhaps the

failure to recall her was not surprising; at all events it was not enough to induce the Chief Justice to give credence to the defendant's improbable tale.

It was not contended by the plaintiff that the defendant should not be permitted to rely upon his defence that the transaction was not a real one; but the point was suggested in the argument. The learned Chief Justice could see nothing in it. Though the rule of the civil law, "No one alleging his own baseness is to be heard" at one time obtained a foothold in the Courts of England (Walton v. Shelley (1786), 1 T.R. 296), it was, more than 100 years ago, renounced, and has ever since been rejected (Jordaine v. Lashbrooke (1798), 7 T.R. 601, and Doe ex dem. Springsted v. Hopkins (1836), 5 U.C.R. (O.S.) 579). The defence is not that the contract alleged was unlawful, but that it never was made—that the writing was not intended to be a contract. Giving evidence of the reason why it was written and signed—i.e., to induce another to purchase—was merely giving evidence for the purpose of shewing why such a defence was not improbable.

The appeal should be allowed, and the usual judgment for specific performance of the agreement should be granted.

RIDDELL, J., was of the same opinion, for reasons stated in writing.

LENNOX, J., agreed that the appeal should be allowed and judgment entered for specific performance in the usual terms.

ROSE, J., also concurred.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 21ST, 1917.

GENEREUX v. KITCHEN.

Trespass—Sale of House—Agreement of Purchaser to Remove from Land—Similar Agreement between Purchaser and Occupant of House—Forfeiture on Default—Non-enforcement of —Ownership of House—Evidence—Appeal—New Trial.

Appeal by the plaintiff from the judgment of Denton, Jun. Co. C.J., dismissing with costs an action for trespass brought in the County Court of the County of York. The trespass was

entering upon and tearing off half the roof of the plaintiff's house.

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

D. O. Cameron, for the appellant.

A. J. Anderson, for the defendant, respondent.

RIDDELL, J., read a judgment in which he said that Mrs. Crawford was the owner of an old house occupied by the plaintiff. In May, 1916, the defendant bought the house from Mrs. Crawford for $50, agreeing to tear it down and remove it from the land on which it stood on or before the 23rd June, 1916—"otherwise I forfeit my $50 and have no claim for damages or costs." On the same day in May, the defendant sold the house to the plaintiff, on precisely the same terms. The plaintiff began to tear down the house, but stopped, and it was not removed by the 23rd June. The result was that the plaintiff forfeited the house to the defendant, and the defendant to Mrs. Crawford—if the forfeiture were insisted upon. Mrs. Crawford's solicitor, on the 7th September, 1916, wrote to the defendant saying that he must remove the house by the 11th September. The defendant gave the plaintiff a copy of the letter; the plaintiff pulled down a little more of the building, and stopped again. Nothing more was done until the 12th April, 1917, when the solicitor for Mrs. Crawford wrote the plaintiff that he must vacate the property and must not remove any portion of the house or do any damage to it. He did not vacate, and he did no more pulling down. On the 9th July, 1917, the defendant notified the plaintiff to tear down and remove the building within 5 days; this not being done, the defendant on the 26th July went on the premises and removed part of the roof of the house.

The plaintiff sued for damages for the wrongs which he alleged were done him.

Mrs. Crawford by the letter of the 7th September recognised the defendant's right to the house; and his conduct was a recognition by him of the plaintiff's right. But Mrs. Crawford's letter of the 12th April to the plaintiff put an end to any right he might have against Mrs. Crawford.

Where any one is in peaceable possession of land, another who enters upon him cannot justify under the rights of a third person, unless he is acting for and under that third person. The defendant did not act and did not affect to act for Mrs. Crawford; and, therefore, he could not set up her right.

The only other justification he could have would be that the house was his own property. He claimed it as his own. Whether or not his claim was valid might depend upon the effect of a letter which was not produced. In April, 1917, the defendant received a letter, dated the 21st April, from the agent for Mrs. Crawford, on receipt of which he saw the plaintiff and had a colloquy with him, which could apparently have taken place only if the defendant had or believed he had the ownership of the building. This letter was not produced. It should have been produced by the defendant; but, equally, the plaintiff should have contradicted the evidence of the defendant that he (the defendant) owned the building. The agent for Mrs. Crawford was called as a witness: he was asked specifically whether the plaintiff had any rights in this property, but was not asked anything about the rights of the defendant; and, when he was asked whether he still looked to the defendant to remove the house, he was not pressed to answer, and did not answer. It appeared, too, that at least as late as July or August, 1917, the defendant was dickering with another agent of Mrs. Crawford.

The case had not been satisfactorily tried, and the learned County Court Judge had not passed upon the real points in issue, so far as the record disclosed.

There should be a new trial.

MEREDITH, C.J.C.P., also read a judgment. He said (after a discussion of the facts and evidence) that the Court had reached the conclusion that there should be a new trial—the evidence taken at the former trial to stand and to be added to as the parties might be advised. The evidence at the former trial was not well-aimed at the vital points of the case.

The plaintiff being in possession, the defendant could justify the acts complained of in one of two or in both of two ways only: (1) as owner of the house under his purchase of it from the landowner; or (2) acting under or with the authority of the landowner.

There should be no costs of this appeal; the costs in the County Court should be costs in the action, and so in the discretion of the trial Judge in the trial to be had.

LENNOX and ROSE, JJ., concurred.

New trial directed.

SECOND DIVISIONAL COURT. DECEMBER 21ST, 1917.

*RE CITY OF TORONTO AND GROSVENOR STREET PRESBYTERIAN CHURCH TRUSTEES.

Municipal Corporations—Expropriation of Land—By-law—Declaration that Land Forms Part of Highway—Authorisation of Use of Land before Award of Compensation—Municipal Act, sec. 347—Application of—Repeal of Expropriating By-law after Award—Right to Repeal—Right of Land-owner to Enforce Award—Municipal Arbitrations Act—Remitting Award to Arbitrator—Arbitration Act, secs. 10, 11, 12—Reasons for Award—Authorisation not Acted upon—Right of Public User as Highway of Land Expropriated.

Appeal by the Corporation of the City of Toronto from the order of MASTEN, J., ante 142.

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

Irving S. Fairty and C. M. Colquhoun, for the appellants.

J. A. Paterson, K C., and I. F. Hellmuth, K.C., for the trustees, respondents.

MEREDITH, C.J.C.P., read a judgment, in which he stated that he was in favour of allowing the appeal upon four grounds:—

(1) That the respondents had failed to point to anything or to give any good reason for depriving the appellants of their right to repeal the by-laws in question. They had such a right; and, the right having been exercised, there was an end of the matter, except that leave might be given to enforce the award as to costs only; but that was unnecessary, as the appellants had always been ready and willing to pay the costs.

(2) That the appellants were within the provisions of sec. 347 of the Municipal Act, and by virtue of it the by-laws in question were repealed. It was contended that one of the by-laws authorised or professed to authorise an entry on or use of the respondents' lands, before the award. The words relied on were, that the lands are "hereby expropriated and taken," and that "the same are hereby declared to form part of the highway." Probably, the enactment related only to an expressed authorisation. But, if an authority might be implied from other words and from surrounding circumstances, there was nothing from which it could be implied in this case. The public were not

authorised and had no right to travel upon a highway before it was thrown open to them; and the only authorisation that could be given would be to use the highway for the purposes of highway traffic.

(3) That the appellants had such powers only as had been conferred upon them by legislation. Anything in excess of such powers had no force or effect. Therefore, unless they had power to create a highway by a mere declaration, such as that contained in the by-law, the declaration could have no such effect as that contended for by the respondents; it could only be treated as declaring that in due course—that is, when everything had been done which the law required to be done before they could make it a highway—it should be a highway; and that was the purpose and effect of the by-law and of all that was said in it.

(4) That, if it were necessary, the award might be sent back to the arbitrator so that he might set out in his award the unquestionable and admitted fact that no right of entry or use of the property of the respondents was ever acted upon; or the award might be made right under the 10th, 11th, or 12th section of the Arbitration Act.

The appeal should be allowed and the application for leave to enforce the award dismissed.

RIDDELL, J., agreed that the appeal should be allowed, giving reasons in writing. He based his decision on sec. 347 of the Municipal Act, holding that it might be invoked by the appellants and was not inconsistent with the Municipal Arbitrations Act. But it was applicable only "if the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award . . . or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon." With some doubt, the learned Judge considered that the by-law, by professing to make the land at once a public highway, professed to authorise its use as such forthwith. It was immaterial whether the by-law was effective for the purpose—it was enough to see what it purported to do. The arbitrator did not in his formal award find that the authority was not acted upon; but he did so find in his reasons, which might be read as part of the award: Parsons v. Township of Eastnor (1915), 34 O.L.R. 110. Had the non-exercise of the use professed to be authorised by the by-law not appeared in the award (including the reasons), the question whether the Court would enforce an award in which there was a defect, in not setting out an undisputed fact material to the award, would still be open.

There should be no costs of the appeal or of the motion below.

LENNOX, J., agreed that the appeal should be allowed and that there should be no costs.

ROSE, J., agreed with what had been said by RIDDELL, J., except in one particular, which did not affect the result. He suggested that a by-law which "did not authorise or profess to authorise any entry on or use to be made of the land before the award "meant a by-law which did not *expressly* authorise or profess to authorise such entry. Otherwise, the words quoted would be almost meaningless: see sec. 324 of the Municipal Act. If the expression "authorise an entry" meant "so affect the land that the law will authorise an entry," there was no valid expropriating by-law that did not authorise an entry. The reasons of the arbitrator might be looked at, but it was unnecessary to look at them: the by-law did not authorise any entry on or use of the land, and could be repealed.

Appeal allowed; no costs.

SECOND DIVISIONAL COURT. DECEMBER 21ST, 1917.

CLOISONNE AND ART GLASS LIMITED v. ORPEN.

Contract—Assumption or Adoption—Holding out—Agency—Breach—Damages—Findings of Trial Judge—Appeal.

Appeals by the defendants A. M. Orpen the elder and the Hessco Company from the judgment of FALCONBRIDGE, C.J.K.B., ante 147.

The appeals were heard by RIDDELL, SUTHERLAND, KELLY, and ROSE, JJ.

Harcourt Ferguson, for the appellant Orpen.

J. R. Roaf, for the appellant company.

John Jennings, for the plaintiffs, respondents.

THE COURT dismissed the appeals with costs.

HIGH COURT DIVISION.

MASTEN, J., IN CHAMBERS. DECEMBER 4TH, 1917.

REX v. SCALES AND ROBERTS LIMITED.

Municipal Corporations—By-law Regulating Transient Traders—Conviction for Infraction of—Persons Going from Place to Place in Vehicle and Selling Goods—Hawkers or Pedlars, not Transient Traders—Sale to Retail-dealers only—Exception—Pedlar's License not Required—Amendment—Municipal Act, secs. 416, 420.

Motion to quash the conviction of the defendants, by the Police Magistrate for the Town of Picton, for an offence against a transient traders' by-law of the town.

John Jennings, for the defendants.
P. C. Macnee, for the town corporation.

MASTEN, J., after hearing counsel, said that the sole point to be determined was, whether the defendants were transient traders or pedlars; and, upon the undisputed facts, they must be found to be pedlars. The provisions of sub-sec. 1 (*d*) of sec. 416 of the Municipal Act come into play only when a pedlar is transmogrified into a transient trader. If he localises himself or otherwise comports himself and carries on his trade in such a way that he becomes a transient trader, the fact that he has previously taken out a pedlar's license under sec. 416, does not interfere with the right of the municipality to apply to him a by-law passed under sec. 420 and to require him to take out a license in his new capacity as a transient trader. It must be a question of fact in each individual instance whether a man is or is not a transient trader. If he is not a transient trader, a by-law relating to transient traders cannot be applied to him. A transient trader is one who is carrying on business in some fixed place; in his case, if he remains long enough, he will come upon the assessment roll, and will become liable to pay taxes as an occupant or lessee.

In Rex v. Geddes (1915), 35 O.L.R. 177, the question was, whether a farmer was a trader.

The question here was, whether these defendants, who operated a motor-car from Belleville, carrying cigars, cigarettes, and tobacco, and selling them in the towns and villages *en route*, were transient traders within the meaning of sec. 420 (6) and (7) of the Act.

A man carrying goods in a car and selling them at places *en route* is a hawker or pedlar.

It was admitted that the sales made by the defendants were only to retail-dealers in tobacco, and so the defendants came within the exception in clause 1 (*a*) of sec. 416, and were not required to have a pedlar's license. There was, therefore, no ground for amending the conviction.

The conviction should be quashed with costs, and the defendants should be paid back the money paid by them for fine and costs.

FALCONBRIDGE, C.J.K.B. DECEMBER 19TH, 1917.

LAWSON v. MARTIN.

Sale of Goods—Written Memorandum—No Express Condition of Prepayment—Statement of Terms of Payment—"Half-cash"—Cheque Given for Half of Price of Goods—Dishonour of Cheque—Subsequent Acceptance of Security—Property Passing—Goods Retaken by Vendors—Wrongful Taking—Assignment by Purchaser for Benefit of Creditors—Action by Assignee for Value of Goods.

Action by the assignee for the benefit of creditors of the Toronto Lumber Company Limited to recover the money-value of certain lumber which, as the plaintiff alleged, the defendants wrongfully took away from the yards of the lumber company.

The action was tried without a jury at Toronto.
Alexander MacGregor, for the plaintiff.
W. J. Elliott, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defence was, that the lumber removed by the defendants was their own and was removed with the consent of the lumber company.

Lumber had been sold by the defendants to the company. The only written memorandum of the sale set out the specifications of the lumber sold by the defendants to the company, and contained, at the foot, the words, "Half-cash on delivery, balance 60 days." It was not signed, but was shewn to be in the handwriting of C. Bishopric, vice-president of the company—not dated, but probably written early in July, 1915. On the 7th July, 1915, the defendants shipped a car-load to the company, invoiced at $419.09. The company sent a cheque to the de-

fendants for $210, dated the 15th July, 1915. This was presented for payment and dishonoured on the 23rd July. Meanwhile, the defendants, relying on the supposed half-cash payment, had shipped another car-load of lumber to the company.

In the early part of August, the president and vice-president of the lumber company suggested to W. J. Martin, one of the defendants' firm, that he had better take the lumber away. W. J. Martin came to the lumber-yard, and then Norris, the president of the company, said, "Perhaps we can raise the money in a day or two;" and on the 18th August the company gave the defendants an assignment of a lien on property of one Benner to the amount of $245.84. This was supposed by Norris and Bishopric to be a good security, but it turned out to be worthless.

On the 25th and 26th August, Martin loaded the lumber on cars which stood on the lumber company's siding.

The assignment to the plaintiff was executed on the morning of the 27th August. The assignee at once went down to the yards and delivered to W. J. Martin a letter demanding the return of the lumber. On the 25th August, Martin had been notified by a solicitor's letter not to remove the lumber.

The learned Chief Justice accepted the statement of Norris, that what the alleged consent of the company amounted to was, that, when Martin said he was going to take away the lumber, he (Norris) said he had no objection but it would go hard with the creditors, otherwise he would help to load it himself, but it was not for him (Norris) to say.

The question was, whether the property in the lumber ever passed to the lumber company.

The authorities cited for the defendants were: Loeschman v. Williams (1815), 4 Camp. 181; Rogers v. Devitt (1894), 25 O.R. 84; Smith v. Hobson (1858), 16 U.C.R. 368; Benjamin on Sale, 5th ed., pp. 325, 326; Blackburn on Sales, Can. ed., p. 181; Re Canadian Camera and Optical Co., A. R. Williams Co.'s Claim (1901), 2 O.L.R. 677; Banks v. Robinson (1888), 15 O.R. 618; Barron on Conditional Sales, 2nd ed., p. 54.

The present case presented the following points distinguishing it from all or any of these authorities: (1) there was no express condition of prepayment either in the memorandum or orally—there was merely a statement of the terms of payment; (2) the acceptance by the defendants of the Benner assignment, they thereby exercising any option which they might have had up to that point; (3) the defendants' letter to Benner of the 19th August, 1915, and their solicitor's letter to the lumber company of the 24th August, were not consistent with the position which the defendants now took.

Judgment for the plaintiff for $534.02 and costs.

MIDDLETON, J. DECEMBER 19TH, 1917.

RE CHARLTON.

Will—Construction—Printed Form—Meaningless Provisions—Duty of Court to Ignore—Gifts Free from Trust—Residuary Estate—Intestacy.

Motion by the executors for an order determining questions arising as to the true construction of the will of Elizabeth Charlton, deceased.

The motion was heard in the Weekly Court at Toronto.

M. W. McEwen, for the executors.

R. H. Parmenter, for the Hospital for Sick Children.

J. H. Fraser, for four beneficiaries.

M. C. McLean, for three beneficiaries.

J. Douglas, for one of a class who would be entitled upon an intestacy and appointed to represent the whole class.

MIDDLETON, J., in a written judgment, said that the testatrix had caused much trouble and expense to her estate by the use of a printed form of will. The form itself, if filled out accurately would result in a valid will, but was one that lent itself to the making of many errors, and contained many phrases adopted from the law of Scotland, not understood by either lawyers or laymen in Ontario, which led to confusion by reason of their unfamiliar appearance. Instead of being a simple document in language easily understood, there seemed to have been a deliberate attempt to use as many high-sounding and unnecessary phrases as possible. So far as these were meaningless, no great harm was done; but the great vice of this absurd form was, that it began with a declaration of trust so concealed and lost in bombastic and idle verbiage that the unskilled would not apprehend its existence, and gifts that were intended to be beneficially enjoyed were defeated.

The intention of the testatrix could be gathered from what she had written, and the greater part of the printed and noxious rubbish might be ignored. It is the duty of the Court to give effect to the wishes of a testator, but the wishes must be gathered from the will itself. In construing this will, the principle laid down by the House of Lords in Glynn v. Margetson & Co., [1893] A.C. 351, a commercial case, where there was a contract partly written and partly printed, and it was determined that a

printed clause should be ignored, when to give effect to it would be to defeat the main object and intent of the contract, might well be applied.

Applying this principle, it should be declared that the gifts to the nieces, the brother, the church, and the hospital, were absolute and free from any trust.

The second question arose from what the testatrix had written when dealing with the proceeds of her house. Mrs. McDonald should receive the $300, as she is living; and the balance should be equally divided between the four named nieces (after providing for the $25 legacy, if that is payable).

In coming to this conclusion, the learned Judge was conscious that he was supplying something in aid of what was said; but this was done that effect may be given to what was said, rather than that a lapse should be caused by reason of the infirmity of expression of the testatrix.

Costs out of the residuary estate—which passed as on an intestacy.

The order should declare that those served adequately represented all those entitled to share in the estate as to which there was an intestacy.

FALCONBRIDGE, C.J.K.B. DECEMBER 20TH, 1917.

McINTYRE v. GENTAL.

Marriage—Infant under 18—Action for Declaration of Invalidity—Marriage Act, R.S.O. 1914 ch. 148, sec. 36—Effect of sub-sec. 2—Sexual Intercourse after Ceremony—Finding of Fact of Trial Judge.

Action by Annie McIntyre, an infant, by her next friend, for a declaration, under the Marriage Act, R.S.O. 1914 ch. 148, sec. 36, that a valid marriage was not effected or entered into between the plaintiff and the defendant.

Section 36 is in part as follows:—

(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by section 15 . . . the Supreme Court, notwithstanding that a license or certificate was granted or . . . proclamation was made and that the ceremony was performed by a person authorised by law to solemnise marriage,

shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into;

Provided that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.

(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.

The action was tried without a jury at Haileybury.

W. A. Gordon, for the plaintiff.

H. L. Slaght, for the defendant.

G. L. T. Bull, for the Attorney-General, intervening.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the ceremony was performed on the 14th March, 1917; the plaintiff was 16 on the 7th November last, or perhaps only 15; she went home immediately after the ceremony.

The learned Chief Justice stated the evidence as to sexual intercourse having taken place between the parties after the ceremony and said that he was obliged to find as a fact that, after the ceremony, there occurred that which, if a valid marriage had taken place, would have been a consummation thereof (sub-sec. 2, above).

The question as to the constitutional validity of sec. 36 could not be settled in this case.

Action dismissed without costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 20TH, 1917.

*REX v. McEWAN.

Ontario Temperance Act—Magistrate's Conviction for Delivering Intoxicating Liquor to Person not Entitled to Sell who Sells or Buys to Resell—6 Geo. V. ch. 50, sec. 49—Application to Carriers—Proof that Person to whom Liquor Delivered such a Person as Described—Absence of Direct Proof—Inference from Facts Proved—Question for Magistrate.

Motion to quash the conviction of the defendant, by the Police Magistrate for the Town of Perth, under sec. 49 of the

Ontario Temperance Act, for that the defendant did, on the 29th October, 1917, deliver intoxicating liquor "to a person not entitled to sell liquor, who sells such liquor."

James Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that it was contended, first, that sec. 49 did not apply to a carrier. It was true that the statute contained provisions which prevented it being unlawful for a carrier to deliver liquor; but sec. 49 was in aid of the general policy of the statute, prohibiting the selling of liquor within the Province by any except the authorised Government agent. The first sub-section of sec. 49 rendered it unlawful either to sell or to deliver liquor to a person not entitled to sell, and who sells, or buys for the purpose of reselling. This sub-section creates an offence quite apart from any knowledge of the unlawful purpose. Sub-section 2 casts the onus upon the accused, and provides that he shall not be convicted if he satisfies the magistrate that he had reason to believe and did believe that the person to whom the liquor was sold or delivered did not sell liquor unlawfully or did not buy to resell, and that he was entitled to purchase liquor. The third sub-section shewed that the section was intended to apply to carriers as well as vendors. The first contention was not well-founded.

The second contention was, that it was not shewn that the person to whom the liquor in question was delivered was one "who sells" such liquor or who buys for the purpose of reselling. The question thus raised was one depending entirely upon the facts. There was no direct evidence that the person to whom the liquor was delivered was one who bought for the purpose of reselling; but it was open to the magistrate to draw an inference to that effect from the facts proved; and it could not be said that he erred in drawing the inference he did. The clandestine nature of the transaction, combined with the quantity of liquor delivered (8 gallons of whisky) and the use of a false name in shipping, left it open to the magistrate to draw the conclusion which he did.

The motion should be dismissed, with costs fixed at $25.

MULOCK, C.J. Ex. DECEMBER 21ST, 1917.

*REX v. HARRIS.

Ontario Temperance Act—Magistrate's Conviction for Having Intoxicating Liquor in Place other than Dwelling-house—Sec. 41 of Act—Evidence of Offence of Selling Liquor Given after Plea of "Guilty" on First Charge—Sentence—Penalty Increased on Account of Evidence Improperly Received—Amendment of Conviction—Reduction of Amount of Penalty—Criminal Code, secs. 1124, 754.

Motion to quash a conviction of the defendant, by a magistrate, for violation of the provisions of sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, which prohibits a person having or keeping intoxicating liquor in any place other than the private dwelling-house in which he resides.

W. K. Murphy, for the defendant.
Edward Bayly, K.C., for the Crown.

MULOCK, C.J. Ex., in a written judgment, said that the defendant pleaded "guilty," and then evidence was adduced before the magistrate to the effect that the prisoner had admitted having sold liquor and realised $1,500 from the sale. The magistrate then imposed the maximum fine of $1,000, or, in the alternative, imprisonment for three months. See sec. 58.

The magistrate, in a memorandum furnished at the request of the Chief Justice, stated that it had been his intention, up to the point of hearing the evidence as to sale, to impose the minimum fine of $200 and costs. The maximum fine was imposed in consequence of the evidence as to sale.

This meant that the magistrate increased the penalty because of his belief that the defendant had committed a breach of sec. 40 (illegal selling).

The magistrate should have excluded from consideration the evidence as to illegal selling. He was in effect convicting the defendant of an offence with which he was not charged. The magistrate had, under sec. 58, a discretion as to the amount of the fine, and had not exercised it correctly.

In sentencing a person found guilty of an offence, the Judge should not increase the severity of the sentence because he considers the defendant guilty of some other offence not charged (Rex v. Bright, [1916] 2 K.B. 441); and the defendant was entitled to be relieved from the injustice done by the disregard of this rule.

Applying secs. 1124 and 754 of the Criminal Code, the conviction should be amended by reducing the fine to $200.

There should be an order accordingly, with a clause protecting the magistrate.

RIDDELL, J., IN CHAMBERS. DECEMBER 21ST, 1917.

*MAY v. WHEATON.

Parties—Action to Set aside Bequests in Will—Next of Kin Entitled if Bequests Set aside—Joinder as Parties of all Persons who would Benefit by Success of Action—Order for Representation—Consent—Practice—Amendment—Costs—Rules 5 (1), 75—Persons "Having the same Interest."

Motion by the plaintiff to vary the minutes of an order made at a sittings for the trial of actions.

J. J. Gray, for the plaintiff.

E. C. Cattanach, for the defendants.

RIDDELL, J., in a written judgment, said that, upon opening the pleadings when the action came on for trial, it appeared that the action was brought, under the provisions of sec. 38 of the Judicature Act, R.S.O. 1897 ch. 38, by one of the next of kin of Samuel May, deceased, and had for its object the setting aside of two bequests in the will of the deceased to the defendants and their removal from the office of executor. In case the action were successful, the bequests to the defendants would not be disposed of by the will, but would necessarily be distributed amongst the next of kin of the deceased. It further appeared that there were at least three persons in the same relationship to the deceased as the plaintiff, and it was suggested that there were others.

It was pointed out that the practice was to make all those who would be benefited by the success of the action parties: Cornell v. Smith (1890), 14 P.R. 275, and other cases; and it was suggested that the present plaintiff might represent all those in the same interest. Counsel for the plaintiff asked that that should be done, and, counsel for the defendants not objecting, an order was pronounced to the effect that the plaintiff should be regarded as suing not only in his own behalf, but also for all other next of kin of the deceased.

The order, as settled (in the absence of counsel for the plain-

tiff), recited the consent of counsel for all parties, and was that the record and proceedings be amended by striking out the name of the plaintiff and substituting, "Albert D. May, suing on behalf of himself and all other the next of kin of the late Samuel May, and of all those who would be benefited by the action succeeding;" that the said Albert D. May should in this action represent the said next of kin and persons who would be so benefited; and that the costs of the order be costs in the cause.

Upon the motion to vary the minutes, counsel for the plaintiff objected that he did not consent to the order as drawn. It was true that he did not consent to costs being allowed; so the recital should read: "And plaintiff by his counsel applying for an order of representation and counsel for the defendants consenting thereto"—thus limiting the consent to the representation.

It was contended also that the words "and of all those who would be benefited by the action succeeding" should be struck out. But the representation contemplated by Rule 75 is a representation of a class "having the same interest;" it has reference not to relationship, but solely to interest in the result of the action: In re Lart, [1896] 2 Ch. 788, and other cases.

The object of requiring all parties interested to be joined in the action is to prevent another action where the same issues will be raised. The intention is, that all having identically the same interest shall be bound in one action and by one judgment: Commissioners of Sewers of City of London v. Gellatly (1876), 3 Ch.D. 610; Burt v. British Nation Life Assurance Association (1859), 4 DeG. & J. 158.

There could be no honest objection to the representation of these who would be benefited by the action succeeding.

The question of costs was in the learned Judge's discretion and he directed that the costs of the order should be costs in the cause payable by the plaintiff. In these costs should be included the costs of the present and former application, and also the costs of amending the writ of summons: Rule 5 (1); Hynes v. Fisher (1883), 4 O.R. 78; amending the style of cause: In re Tottenham, [1896] 1 Ch. 628, and other cases; and setting out the amendment in the pleadings: Marshall v. South Staffordshire Tramways Co., [1895] 2 Ch. 36.

MIDDLETON, J. IN CHAMBERS. DECEMBER 21ST, 1917.

REX v. MOORE.

Ontario Temperance Act—Magistrate's Conviction for Having Liquor in Place other than Private Dwelling-house—6 Geo. V. ch. 50., secs. 41, 88—Evidence—Onus—Finding of Magistrate—Credibility of Witnesses.

Motion to quash a conviction of the defendant, by a magistrate, for having intoxicating liquor in a place other than a private dwelling-house in which the defendant resided, between the 26th October and the 10th November, 1917, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

J. C. Moore, for the defendant.
J. R. Cartwright, K.C., for the magistrate.

MIDDLETON, J., in a written judgment, said that it was proved that liquor was delivered to the accused on the 30th October at an express office, and this must be taken to be the "liquor concerning which he is being prosecuted," and so he may be convicted unless he "prove that he did not commit the offence with which he is so charged" (sec. 88).

In the evidence given by the accused he did not in any way attempt to shew what was done with this liquor. The accused also got two dozen bottles of whisky on the 24th August and two dozen more on the 7th September. He told the constable who searched his premises that he had drunk this. At the hearing he said this was untrue, "a joke," and only told "for curiosity;" but he does not explain what was done with this liquor. His wife was called, and she said that there were ten bottles in the house, but the constable found none. She did not say that they were any part of the liquor received on the 10th October—they might well be part of the earlier shipments.

Counsel put the case forcibly when he said that the magistrate convicted the accused of having liquor elsewhere than in his house, upon proof that he had liquor in his house—but that was not the fair interpretation of the evidence nor the result of it. The defendant was convicted because it was shewn that he received liquor from the express company, and the statute then cast upon him the onus of shewing that he was innocent of the offence charged; and neither he nor any of his witnesses attempted to do this. It was not enough to say, as possibly was the case, "I had

ten bottles concealed in my house," when he did not say anything about that which he might have had elsewhere.

The magistrate was not bound to believe all that was said, and he might well have discredited anything the accused did say. The man who lies as "a joke" and "out of curiosity" is in danger of being thought unworthy of credit when in the witness-box attempting to clear his skirts from an accusation of an offence against the Ontario Temperance Act.

Motion dismissed with costs.

MASTEN, J., IN CHAMBERS. DECEMBER 22ND, 1917.

EAST v. EAST.

Judgment—Summary Judgment—Husband and Wife—Action by Wife for Recovery of Chattels in House of Husband—Title to Chattels—Wedding-gifts—Joint Property of Husband and Wife—Gifts Made to Wife alone—Specially Endorsed Writ of Summons—Rules 33, 56, 57.

An appeal by the defendant from an order of one of the Registrars, holding Chambers in lieu of the Master in Chambers, directing that the appearance of the defendant be struck out, and that the plaintiff be at liberty to sign judgment, as for default of appearance, for recovery of the articles mentioned in the special endorsement on the writ of summons, save and except certain articles mentioned in the order.

W. A. Henderson, for the appellant.
E. D. Armour, K.C., for the plaintiff.

MASTEN, J., in a written judgment, said that the action was for the recovery by Bessie Reynolds East, the plaintiff, from her husband, the defendant, of the possession of the personal property set out in the endorsement on the writ, as being the separate property of the plaintiff, unlawfully detained by the defendant.

The writ was specially endorsed pursuant to Rule 33. The defendant, with his appearance (Rule 56) filed an affidavit in which, after stating that he had always been willing to hand over to the plaintiff the articles which were excepted in the order appealed from, he went on to say "that all the other goods and chattels as set out in the . . . writ . . . are the joint

property of the plaintiff and defendant . . . and are lawfully upon the premises No. 955 Queen street east, to the use of the plaintiff and defendant." On this affidavit he was cross-examined (Rule 57), and on the cross-examination made certain admissions with respect to some of the articles described in the endorsement. These admissions entitled the plaintiff to judgment for those articles; but the defendant made no general admission or withdrawal of the statement quoted from his affidavit, but stated facts which supported it.

The order appealed from was made under Rule 57, upon the plaintiff's application. The order went too far, in that the Registrar treated the situation as if the plaintiff were entitled to judgment for every article unless the defendant by his affidavit and depositions clearly established his title to such article.

The practice upon a motion under Rule 57 is the same as under the old Con. Rule 603, and the principles upon which the Judge or officer determines whether the plaintiff is entitled to a speedy judgment or must go to trial in the ordinary way are the same as before the change in the Rules.

Wedding-presents given to a newly married couple may be given to the wife or the husband or to both jointly. On his cross-examination the defendant asserted that certain of the articles were given to him and the plaintiff jointly. That is a question of fact which must go to trial.

The family-silver received as a gift from the plaintiff's family must be taken to be the property of the plaintiff, and as to that the order must stand. So also as to articles bought by the plaintiff with moneys given her by her uncle.

The furniture, linen, and silver (new) given by the plaintiff's mother were distinctly claimed by the defendant as gifts to himself and his wife jointly. As to these the defendant was entitled to have the case tried.

The plaintiff was entitled to hold the order as to pictures which were hers before she was married, but not as to such articles given as wedding-presents.

The learned Judge dealt with certain other articles also; and directed that the order below should be varied by limiting the summary judgment to articles specified by him; and allowing the defendant to defend as to the remainder.

Costs of the appeal to be costs to the defendant in the cause; costs of the motion to be costs in the cause.

CLUTE, J. DECEMBER 22ND, 1917.

*MAGILL v. TOWNSHIP OF MOORE.

Negligence—Obstruction or Nuisance in Highway—Telephone Wires Strung too Low—Proximate Cause of Injury Occasioning Death of Person lawfully Passing under Wires—Liability of Township Corporation—Notice of Obstruction—Notice of Action—Absence of Contributory Negligence—Statutory Authority—Rural Telephone Association—Indemnity or Contribution from—Action under Fatal Accidents Act—Damages—Telephone Act, R.S.O. 1914 ch. 188, and Amending Acts.

Action by the father and mother of James Magill against the Municipal Corporation of the Township of Moore, the Municipal Telephone Association, and the Brigden Rural Telephone Company, to recover damages for the death of James, alleged to have been caused by the negligence of the defendants.

The deceased was thrown from a load of hay which he was driving from a field into a highway, by coming in contact with telephone wires under which it was necessary to pass in order to reach the highway.

The plaintiffs alleged that the wires were too low, and that, the deceased being unable to pass under them and at the same time properly manage his team, the load was upset and he was thrown violently to the ground, sustaining injuries from which he died.

The plaintiffs charged the defendants with negligence in erecting and maintaining the wires, and alleged that the wires as placed constituted a nuisance.

The action was tried without a jury at Sarnia.

J. R. Logan, for the plaintiffs.

R. I. Towers, for the defendant township corporation.

A. Weir, for the other defendants.

CLUTE, J., in a written judgment, said that the effect of the evidence was, and he found as a fact, that the wires were so placed on the highway as to form an obstruction and interfere with the driver on the top of an ordinary load of hay in driving from the field out upon the highway—he would have to stoop to go under the wires; that it was necessary to drive with great care in order to prevent upsetting from oscillation owing to the unevenness and curve of the approach to the road from the gateway; that to enable a person so to drive it was necessary for him to stand

up, because sitting down in the hay he could not use the necessary care; that he would have to stoop or crouch when passing under the wires, and that would necessarily interfere with that due care which was necessary in order to drive safely.

It was contended for the defendants that the plaintiffs were not entitled to recover, because, even if the wires offered an obstruction, they were placed there under statutory authority by competent workmen, and so the township corporation was not liable.

The learned Judge then stated with great particularity the facts with regard to the erection of the wires and the statutes and by-laws applying thereto.

He then referred to Roberts v. Bell Telephone Co. and Western Counties Electric Co. (1913), 4 O.W.N. 1099, distinguishing it.

In the present case, he said, the duty arose in reference to a highway. The owners of lands adjoining the highway had a right to reach it from any part of their lands contiguous to the highway, and for any reasonable and necessary purpose had the right to pass over any part of it. There was, therefore, a duty, in constructing a telephone-line upon or along the highway, not to create an obstruction or nuisance that would interfere with such right, unless under special statutory authority. And any want of ordinary care in the construction of the line would amount to such interference and obstruction and would be a breach of duty and negligence as against the owner of adjoining lands. Authorisation by statute would relieve from liability unless negligence was shewn: Eastern and South African Telegraph Co. v. Cape Town Tramways Co., [1902] A.C. 381; National Telephone Co. v. Baker, [1893] 2 Ch. 186.

Reference to numerous additional authorities.

The position of the wires, causing the deceased to stoop or crouch in passing under them, was the proximate cause of the horses getting from under that control which was necessary to secure the safe passage of the load.

The latest statement of the law in respect to highways is in Papworth v. Battersea Corporation, [1916] 1 K.B. 583.

The defendant township corporation had notice of obstruction; the notice of action was proved; and the deceased was not guilty of contributory negligence.

The defendant association had no legal entity separate from the township corporation; and the defendant the Brigden Rural Telephone Company had transferred all its interests to the township corporation. If the township corporation was liable to the plaintiffs, indemnity by the subscribers to the telephone system

could be worked out under the provisions of the Telephone Act, R.S.O. 1914 ch. 188, and amending Acts, 4 Geo. V. ch. 32, 5 Geo. V. ch. 33, 7 Geo. V. ch. 40. It was not necessary to dismiss the action formally against the association or the rural telephone company.

The deceased was unmarried, and was living at home and working on his father's farm without wages, thus contributing by his work to the support of his father and mother. The father was 71 years old, and unable to do much work. The plaintiffs had a pecuniary interest in the continuance of their son's life, and were entitled to damages under the Fatal Accidents Act, R.S.O. 1914 ch. 151.

The damages should be assessed at $1,500—$500 to the father and $1,000 to the mother.

Judgment for the plaintiffs for $1,500 with costs.

RE MCDONNELL—SUTHERLAND, J., IN CHAMBERS—DEC. 20.

Lunatic—Sale of Land—Approval of—Disposition of Purchase-money—Costs—Payments to Committee for Maintenance—Payment of Balance into Court.]—By an order of a Judge in Chambers, dated the 7th April, 1917, John McDonnell and Alexander McDonnell were declared persons of unsound mind, and their sister, Christina McDonnell, was appointed committee of their persons and estates, with full power and authority over their personal estates and authority to use the same in any manner she might consider advisable for their support and maintenance. The order also provided that she should have power to sell and dispose of the personal estate as she should deem reasonable or expedient in their interests. In addition to the personal estates, there was a farm owned by the two brothers and the sister in ascertained proportions. The committee now applied for an order approving of a proposed sale of the farm for $2,500. SUTHERLAND, J., in a written judgment, after setting out the facts, said that $2,500 appeared to be a fair and reasonable rice for the farm, and the proposed sale should be approved. The committee asked that, on the completion of the sale, the shares of her two brothers in the proceeds of sale should be paid to her. This now appeared to be the only fund remaining to assist in the support and maintenance of the two brothers; and the learned Judge did not think it would be proper to make such an order at present. The costs of this application and of the sale should be paid out of the $2,500, when received; and the applicant should be

allowed to deduct $100 out of the share of each brother to aid her further in their support and maintenance, and the remainder of their shares should be paid into Court to abide further order. E. F. Burritt, for the applicant.

RE GRAND TRUNK R.W. CO. AND BROOKER—SUTHERLAND, J., IN CHAMBERS—DEC. 20.

Money in Court—Claimants of—Priorities—Reference.]—Motion by the Toronto General Trusts Corporation for payment out to them of the amount paid into Court by the railway company under an order of the Master in Chambers of the 2nd June, 1917. SUTHERLAND, J., in a brief memorandum, said that a number of other companies and individuals, represented upon the motion, were claiming the fund in whole or in part under alleged assignments, liens, stop-orders, etc. On the material filed, it was impossible to determine the priorities. They could best be ascertained by a reference, and there should be a reference to the Master in Ordinary. The applicants should have the conduct of the reference, and should notify all those represented on the motion, and they might attend at their risk as to costs. Further directions and costs reserved. W. Proudfoot, K.C., for the applicants. G. F. Rooney, for certain claimants. G. Cooper, for another claimant. A. C. Heighington, for J. G. Arnold. J. E. Lawson, for J. S. Fullerton.

SEAGRAM v. KEMISH—SUTHERLAND, J.—DEC. 20.

Fraud and Misrepresentation—Sale of Company-shares—Return of Money Paid with Interest—Principal and Agent—Evidence.]—Action by an unmarried woman to recover money paid by her to the defendants or to one or other of them for certain shares of stock in the Pneuma Tubes Limited, a company organised to exploit an invention of the defendant Burgess. There were three defendants: Albert Kemish, who (as agent) sold the shares to the plaintiff and made the representations of which the plaintiff complained; Burgess, whose shares were sold to the plaintiff; and Gray, the secretary of the company, of whom Kemish was also alleged by the plaintiff to have been the agent. The action was tried without a jury at Toronto. SUTHERLAND, J., in a written judgment, after stating the facts and referring to the

correspondence and other evidence, found that the representations which, the plaintiff alleged, were made to her by Kemish, were so made and were false and misleading; that Kemish was the agent of Burgess in connection with the sale of the shares, and was responsible for the representations made; that the plaintiff was induced by the representations made to purchase; and that Kemish was also liable to the plaintiff on his written undertaking to repay the respective sums mentioned, with interest at 10 per cent. The learned Judge was unable to find that Kemish was agent for Gray in the sale of the shares. Judgment for the plaintiff against the defendants Kemish and Burgess for the sums claimed by the plaintiff, with interest at 10 per cent. from the dates of payment, with costs. As against the defendant Gray, action dismissed without costs. George Bell, K.C., for the plaintiff. The defendant Kemish appeared in person. The defendant Burgess did not appear and was not represented at the trial. W. J. L. McKay, for the defendant Gray.

PARKER v. HOSSACK—SUTHERLAND, J., IN CHAMBERS— DEC. 21.

Mortgage—Final Order of Foreclosure—Application to Vacate Order and to Stay Proceedings upon Payment of Interest and Taxes in Arrear.]—Motion by the defendant Donald C. Hossack and one Charles M. Brown for an order that the latter be added as a defendant in this mortgage action and the proceedings amended accordingly; that the final order of foreclosure obtained against the defendants, other than the defendants by original writ, and dated the 7th August, 1917, be vacated; and that all proceedings in the action be stayed, on payment by the applicants of all arrears of interest and taxes now due upon the mortgage. SUTHERLAND, J., in a written judgment, after stating the facts, said that the case was not one in which the order should be made. Motion dismissed with costs. G. G. McCullough, for the applicants. J. McBride, for the plaintiffs.