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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. FEBRUARY 6TH, 1920.

McKERNAN v. KERBY.

Partnership—Failure to Establish—Lease of Building—Claim for Injury to Fixtures—Stated Account—Counterclaim—Costs.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 16 O.W.N. 368.

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

E. S. Wigle, K.C., for the appellant.

R. L. Brackin, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. FEBRUARY 12TH, 1910.

SELICK v. NEW YORK LIFE INSURANCE CO.

Trial—Jury—Findings Opposed to Evidence—Irrelevant and Inflammatory Remarks by Trial Judge—New Trial—Costs—Life Insurance—Untrue Statements in Application for Insurance Acted upon by Company—Materiality.

Appeal by the defendant company from the judgment of ROSE, J., in favour of the plaintiff, upon the findings of a jury at the trial.

The plaintiff, the widow of Joseph Selick and sole beneficiary under a policy of life insurance issued by the defendant company

on the 19th April, 1917, brought this action to recover $3,000, the amount of the insurance, her husband having died on the 19th March, 1918.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, SUTHERLAND, and MASTEN, JJ.

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

T. H. Lennox, K.C., for the plaintiff, respondent.

MULOCK, C.J. Ex., delivering the judgment of the Court at the conclusion of the hearing, said that the questions submitted to the jury with their answers were as follows:—

1. Did Joseph Selick, in connection with his application for insurance, answer "no" to the following question, "Have you consulted a physician for any ailments or diseases not included in your above answers?" A. Yes.

2. If so, (a) was such answer untrue? A. Yes, but not deliberate. (b) Was it acted upon by the defendants? A. Yes. (c) Was it material? A. Yes.

3. Did Joseph Selick, in connection with his application for insurance, answer "none" to the following question: "What physician or physicians, if any, not named above, have you consulted or been treated by within the last 5 years, and for what illness or ailment?" A. Yes. If so, (a) was such answer untrue? A. Yes, but not deliberate. (b) Was it acted upon by the defendants? A. Yes. (c) Was it material? A. No.

About the end of February, 1917, Selick had been seriously ill, and attended by a physician; and on the 19th April thereafter made his application for the insurance now in question. In September, 1917, he was again ill, treated by the same physician, and underwent an operation; he died on the 30th March, 1918.

There was evidence to support the finding of the jury that the untrue answers were acted upon by the defendant company.

The members of the Court were unable to understand how the jury, if guided by the evidence, were able to say that the misrepresentation was immaterial. The trial Judge said that that finding was utterly opposed to the weight of evidence and to common sense.

It seemed obvious to the Court that, in reaching their conclusion, the jury must have been influenced by something other than the evidence; and counsel for the defendant company contended that the jury must have been influenced improperly by the following observations addressed to them by the plaintiff's counsel:—

"I have had some experience at the Bar; and, talk about soulless corporations, I don't think I have ever known a case in

which a company has shewn itself more soulless. This rich, wealthy, corporation, doing business all over the world, comes here and says: 'Don't take from us what we agreed to pay in the case of the death of the assured, and deprive Mrs. Selick and her family of what we agreed to pay her should her husband die.' Gentlemen, I am perfectly satisfied to leave the result of this in your hands, and I ask—and I am not asking for sympathy—I ask you, upon the evidence I ask you, to answer every question, "no," making any explanation you think you should. I certainly ask you, gentlemen, as far as the materiality is concerned, so far as acting upon the policy by reason of the non-disclosure, I ask you to answer these questions, 'no.'"

Counsel for the defendant company took exception to these remarks; and the learned trial Judge, in charging the jury, said with reference to the observations complained of:—

"His remarks, perhaps I might characterise them as inflammatory statements, about this soulless corporation which hustles for insurance all over the world and take's people's money and then refuses to pay them, are remarks which I think entirely irrelevant to the issue which you and I are trying to dispose of, and are remarks which I hope you will put entirely out of your consideration when you come to deal with what I think, and what I have no doubt you will think, is the real matter in dispute between these parties."

Notwithstanding this caution, some consideration other than the evidence appeared to have influenced the jury to reach a conclusion wholly at variance with the evidence. If, upon the evidence, the Court could assume that 12 reasonable men could have reached the conclusion arrived at in this case, then the remarks of counsel to the jury of the nature here complained of might not warrant the Court in setting aside the jury's finding; but, the finding appearing, beyond reasonable doubt, to be unwarranted by the evidence, the Court must assume, in the absence of any other explanation, that it was arrived at because of the irrelevant and inflammatory observations complained of.

In the interest of justice, the verdict should not be allowed to stand. The findings and judgment should be set aside and a new trial ordered; the costs of the trial already had and of the appeal to be costs in the cause.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 16TH, 1920.

YOUNG v. FORT FRANCES PULP AND PAPER CO.

Nuisance—Injury to Hotel Property by Operation of Neighbouring Pulp Mill—Noise and Vapours—Deposit of Soot and Carbon—Trespass—Damages—Dismissal of Action except as to one Branch—Appeal—Judgment for Plaintiff for Small Sum—Payment of, by Defendants—Motion to Quash Appeal.

Appeal by the plaintiff from the judgment of MASTEN, J., ante 6.

The judgment was in favour of the plaintiff for the recovery of $50 damages in respect of the deposit of carbon on the plaintiff's property. In other respects the action was dismissed by the trial Judge, and no costs were awarded to either party.

The defendants moved to quash the appeal, on the ground that the amount of the judgment against them had been paid to the plaintiff.

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

R. T. Harding, for the plaintiff.

W. N. Tilley, K.C., for the defendants.

THE COURT dismissed the plaintiff's appeal with costs, and dismissed the defendants' motion with costs (fixed at $20).

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

SPEARMAN v. RENFREW MOLYBDENUM MINES LIMITED.

Contract—Ownership of Invention and Patents therefor—Finding of Joint Ownership—Appeal from—Evidence—Counterclaim—Adding Party at Trial—Prejudice.

Appeal by the defendant by counterclaim (the plaintiff in the action) from the judgment of LATCHFORD, J., 15 O.W.N. 343.

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

R. McKay, K.C., and J. Y. Murdoch, for the appellant.

A. G. Slaght, for the plaintiffs by counterclaim, respondents.

MEREDITH, C.J.O., read a judgment in which he said that the controversy between the parties was as to the ownership of an invention for improvements in the process of treating molybdenite ores and the patents obtained for the invention in the name of the appellant.

The respondents claimed a half interest in the invention and patents, upon the grounds: (1) that the discovery of the process was made by the appellant, in so far as he was an inventor of it, while he was employed by the respondent company as manager of its mine and charged with the duty of endeavouring to find means for increasing the percentage of the ore produced from it; (2) that the discovery was the result of the joint efforts of the respondent company's officers, and particularly of A. E. Goyette, the then president of the company, and of the appellant; (3) that it was agreed between the appellant and Goyette, acting on behalf of the respondent company, that the appellant and Goyette, acting for the company, should be joint owners of the invention and patents, each being entitled to a half interest in them.

The trial Judge found in favour of the respondents on the second and third grounds, and did not deal with the first.

There was evidence which warranted the conclusions of the Judge, although it was contradicted by the appellant, and he was to some extent corroborated by another witness. The appellant and this witness were discredited by the Judge. There was no ground for reversing the judgment on the second branch of the case.

Upon the third ground the Judge accepted the testimony of Goyette, which was that it was all along agreed that he, acting for the company, was to be jointly interested with the appellant in the invention and patents; there was much in the testimony of the appellant himself to support the finding on this branch of the case; and the Judge rightly accepted Goyette's testimony in preference to that of the appellant. It could not be said that the learned Judge's finding that the agreement was that Goyette and the appellant should share equally, was wrong.

It was contended for the appellant that Goyette was improperly added as a plaintiff by counterclaim and that the appellant was prejudiced by the addition of Goyette during the trial. This objection was not well-founded. Goyette testified that in what he did and in making his arrangements with the appellant he was acting for the company; and, that being the case, and the claim of the company being based not only on the rights that Goyette had obtained for it but upon its own right, it was proper to add Goyette as a counterclaiming plaintiff. The appellant was not prejudiced by Goyette being added at the stage at which he was added. Both he and the appellant were present, and both or

either of them could have been recalled if there was anything that the appellant desired to bring out that had not been brought out. The appellant's counsel, though he said that he did not consent to Goyette being added, did not suggest that the appellant was or would be prejudiced, or suggest or ask for a postponement of the trial, if he was not ready to meet the case as presented owing to the change made in the plaintiffs to the counterclaim.

The appeal should be dismissed with costs.

MACLAREN, HODGINS, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

*DIXON v. GRAND TRUNK R.W. CO.

Negligence—Collision of Motor-car with Backing Train upon Highway Crossing of Railway—Action by Person in Motor-car—Findings of Jury—Negligence of Railway Company—Contributory Negligence of "those in Charge of Auto"—Motor-car Hired by Five Occupants—Driving Entrusted to One—Agency—All Five in Control of Car.

Appeal by the defendant company from the judgment of the County Court of the County of Brant, upon the findings of a jury at the trial, in favour of the plaintiff for the recovery of $381.20 and costs in an action for damages for personal injuries sustained by the plaintiff in a collision between a motor-car in which he was and a train of the defendant company, which was backing across a highway in the city of Brantford.

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

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

J. Harley, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the respondent and four other young men, being desirous of

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

taking a drive in a motor-car, arranged that one of them, Scott, should procure the car, which he did by hiring it from a garage. Scott appeared to have been the only one of the party who knew how to drive the car, and he drove it. The members of the party entered the car at the garage and proceeded to drive around the town. When driving down Market street, the car collided with a car of the backing train, causing the injuries to the respondent of which he complained.

His case was that the collision was caused by the failure of those in charge of the train to obey the statutory requirements as to the ringing of the engine-bell, the sounding of the whistle, and the stationing of a man on the rear of the car that was in front of the backing train. This was denied by the appellant company, and it was contended that the accident was caused by the failure of those in the motor-car to take proper precautions before crossing the railway track, and driving at an immoderate rate of speed down Market street, where the street slopes towards the track, to the track.

Questions were put to the jury and answered as follows:—

1. Was the whistle sounded within 80 yards of the Market street crossing and was the bell being sounded continuously? A. We believe the whistle was sounded. We do not believe the bell was being sounded continuously.

2. Was a person stationed on the foremost part of the train? A. No.

3. Could the accident have been avoided by proper care by those in charge of the auto? A. Yes.

4. What, in your opinion, was the primary cause of the accident? A. Negligence in not ringing the bell.

It was contended for the appellant company that, upon these answers, it was entitled to judgment. For the respondent it was argued that Scott was the person in charge of the motor-car, and that the respondent's claim to recover was not affected by Scott's negligence.

The County Court Judge, applying Mills v. Armstrong, The Bernina (1888), 13 App. Cas. 1, was of opinion that the appellant company was liable, because the respondent never had control of the motor-car, was not capable of taking control, and trusted to Scott alone to do the driving.

The learned Chief Justice's view was, that the five men had the control of the motor-car: it was hired by them, although Scott was the one who acted for his companions as well as himself in hiring it; they entrusted the driving to Scott.

The Bernina case had no application if Scott in driving the motor-car was acting as the agent or servant of his companions. That he was acting as their agent was clear, because it was also

clear that he was entrusted by them with the duty of driving the car. The five men in the motor-car were the persons having the control of it; and probably that was what the jury thought: see their answer to question 3, which is inconsistent with their view being that Scott alone was in charge of it.

The appeal should be allowed with costs and the action be dismissed with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

*DOMINION SUGAR CO. v. NORTHERN PIPE LINE CO.

Contract—Supply of Natural Gas—Order of Ontario Railway and Municipal Board—Powers of Board—Control of Supply and Distribution—Natural Gas Act, 1918, 8 Geo. V. ch. 12—Construction and Operation—Interference with Contract of Parties—Rate of Payment for Gas Supplied—Order of Board Made without Hearing Plaintiffs as to their Contract—Right to Shut off Gas in Default of Payment of Demands—Injunction—Interim Order—Costs.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 16 O.W.N. 249.

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

W. N. Tilley, K.C., and J. G. Kerr, for the appellants.

Wallace Nesbitt, K.C., and J. M. Pike, K.C., for the plaintiffs, respondents.

HODGINS, J.A., reading the judgment of the Court, said that the respondents were consumers of natural gas, and brought this action against the appellants, who were producers and transmitters of it. Under various agreements, of which the principal one bore date the 8th October, 1909, the respondents were entitled to a supply from the appellants of natural gas to the full extent of their requirements, at 12 cents per 1,000 cubic feet. This privilege was to last so long as gas was or could be produced and supplied from certain territory therein designated; and, subject to the requirements of the respondents, the appellants could supply gas for domestic use and for operating gas-engines in the town of Wallaceburg.

The respondents obtained an interim order enjoining the ap-

pellants from cutting off their supply of natural gas, a threat so to do having been made on account of the non-payment of the appellants' claim for gas supplied during July and August, 1918, at the rate of 35 cents per 1,000 cubic feet.

The contest was now practically reduced to a question whether the amount to be charged for those two months should be at the rate of 12 cents per 1,000 cubic feet, according to the contract, or at the rate of 35 cents, as the appellants contended, or, under an order of the Ontario Railway and Municipal Board of the 28th November, 1918, at the rate of 25 cents, and whether the orders made by the Board were not contrary to natural justice and should be disregarded so far as they purported to interfere with the contract.

The question whether the respondents were justified in moving for the interim injunction was also raised. Upon the order being obtained, the respondents submitted to pay at the rate of 12 cents and to deposit in Court a sum equal to 23 cents per 1,000 cubic feet, all without prejudice to their contentions.

Reference to the Natural Gas Act, 1918, 8 Geo. V. ch. 12 (Ont.), and resumé of its provisions.

That Act (sec. 3) puts the Board in full control of the "production, transmission, distribution, sale and disposal and consumption of all natural gas produced in Ontario," and enables it to exercise its powers "notwithstanding the provisions of any agreement, franchise, bargain, or arrangement." Its orders, where followed, are declared to afford a good defence to any one obeying them, if sued; and (sec. 7) a heavy penalty is imposed, payment of which may be enforced by imprisonment, for any refusal or neglect to obey the Board's orders or directions. This made the performance of the contract in question, and any other similar agreement, illegal.

Reference to Brightman & Co. Limited v. Tate, [1919] 1 K.B. 463.

If it became illegal to supply gas pursuant to the contract, it also became illegal to pay for it, or to exact or sue for payment pursuant to its terms. If then the performance of the contract became, by Act of the Legislature, illegal, there was no foundation for saying that, before granting a permit for sale to the appellants, the Board should have notified the respondents so that they might set up the provisions of a void agreement in an endeavour to get some of its provisions reinstated or regard had to the bargain it embodied. The agreement was, for the time being at least, dead, and the rights of the parties were gone for that time also by a legislative act; and no right survived which would require to be regarded before action could be taken by the Board. The orders of the Board could not, therefore, be disregarded.

The main questions left to be disposed of were: (1) whether the Act of 1918 empowered the Board not only to control the supply and distribution of natural gas, but to fix the price at which it should be sold; and (2) whether the Board did in this case exercise these powers. These questions should be answered in the affirmative.

The learned Judge said that he agreed with the view of the Judicial Committee in Cook v. Ricketson, [1901] A.C. 588, and of Sargant, J., in Metropolitan Electric Supply Co. v. London County Council, [1919] 1 Ch. 357, that suspension means an annulment of the rights and obligations accruing during the suspension, and that the parties for the time being are in the same position as if the contract did not exist.

The order of the 28th November, 1918, reduced the rate from 35 cents to 25 cents—and that was the governing rate from and after the 27th June, 1918.

The Public Utilities Act was in no sense applicable.

The judgment appealed from should be reversed, and there should be judgment upon the counterclaim for the appellants for the amount which, calculating the gas supplied at 25 cents per 1,000 feet, would be due to them, less the amount already paid.

As to the right of the appellants to cut off the gas for non-payment: at the time the threat was made, the orders of the Board were operative, and the supply was being given pursuant thereto. Under the statute, any person who refuses or neglects to obey any order of the Board is subject to a heavy penalty; and the act of turning off the gas, when it was being supplied pursuant to a permit which had been obtained for the supply, would have been an offence against the Act, and consequently illegal. For that reason alone, the respondents were justified in obtaining the injunction order, and should have the costs thereof.

Appeal allowed.

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

*BALLARD v. MONEY.

Husband and Wife—Action by Husband against Seducer of Wife—Alienation of Affection Causing Loss of Consortium—Cause of Action apart from Claim Based on Adultery—Jurisdiction of County Court—Absence of Evidence to Support Claim—Husband and Wife Living together at Commencement of Action—Dismissal of Action—Appeal—Costs.

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing the action, which was brought

to recover damages for the alleged alienation by the defendant of the affections of the plaintiff's wife while the plaintiff was overseas on active service.

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

A. C. Heighington, for the appellant.

J. M. Godfrey, for the defendant, respondent.

The judgment of the Court was read by HODGINS, J.A., who said that His Honour Judge Widdifield had withdrawn the action from the jury and dismissed it, on the ground that the County Court had no jurisdiction. The cause of action was limited to alienation of affection, causing loss of consortium.

The appellant and his wife were married in October, 1911, and resided together until he went overseas on the 23rd March, 1916; he returned on the 8th June, 1919, and lived with his wife until the 6th October, 1919, when he turned her out. This action had been begun on the 20th August, 1919.

The evidence indicated adultery on several occasions between the wife and the respondent while the plaintiff was in France.

Shortly after the husband's return, namely, on the 28th June, 1919, the wife confessed her misconduct—notwithstanding which the husband and wife remained together in their own house until October, 1919, and were so living when this action was begun.

It was contended for the respondent that this was in truth an action for criminal conversation, and the County Court had no jurisdiction. For the appellant it was urged that an action lay for the alienation of the wife's affections as alleged in the statement of claim, whereby he had been deprived of her society and affection, quite apart from any cause of action resting on adultery, and notwithstanding that they were living together when the action was begun.

The neat point was settled for this Court in Bannister v. Thompson (1913-14), 29 O.L.R. 562, 32 O.L.R. 34. The decision in that case, that alienation resulting in consortium gives a cause of action, irrespective of separation or enticement followed by harbouring, is contrary to what was said by Osler, J.A., in Lellis v. Lambert (1897), 24 A.R. 653, and to the decisions in a number of American cases; but it is in line with the view expressed in Bishop on Marriage and Divorce, para. 1361.

But, notwithstanding that such an action will lie where, as here, the wife was living with the husband when the action was begun, and continued to live with him until a couple of months before the trial, the plaintiff's case failed on the facts.

There was no evidence that the husband in effect lost the affection of his wife or that he was deprived of her love, services, and society. The only wrong which he suffered was caused by the adultery, and, when he finally turned her out, it was because he feared a recurrence of the wrong. While an action for the alienation of affections is competent though the parties are living together, no damages for the loss of consortium, which is really the gist of the action, can properly be awarded upon the evidence adduced, and consequently the action was rightly withdrawn from the jury, though not upon the ground of want of jurisdiction. The evidence suggesting adultery was properly disregarded, as the Court was not competent to entertain an action founded upon it.

The appeal should be dismissed, but the conduct of the defendant warrants the Court in depriving him of the costs of appeal.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

*DELORY v. GUYETT.

Agent—Payment of Mortgage-moneys by Mortgagor to Solicitor Acting for Mortgagee—Misappropriation by Solicitor—Payment by Cheque—Authority of Agent to Receive Money—Cheque Paid to Agent before Authority Revoked—Evidence—Banking Transactions—Payment to Principal.

Appeal by the defendant from the judgment of LENNOX, J., 16 O.W.N. 57.

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

T. R. Ferguson, for the appellant.

A. J. Thomson, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the Court had to determine on which of two innocent persons, neither of whom was well able to bear it, the loss sustained by the dishonesty of a solicitor must fall.

The appellant held a mortgage made by the respondent on property in Hamilton which she owned, and she lived in that city. The mortgage had been prepared by the solicitor, L. Being desirous of paying it off, the respondent came to Toronto and

went to the office of L., where she expected to meet the appellant. Communication was had with the appellant, but he was unable to come to the office, and, being asked what the respondent was to do with the money she desired to pay to him, he directed her to pay it to L., which she did. L. had possession of the mortgage, and the respondent signed a cheque on her banker in Hamilton for the amount owing on the mortgage and the costs of the discharge. The cheque was drawn by L., and was made payable to him, and was given to him. L.'s bank-account at this time had a small sum at his credit, but not sufficient to pay a cheque for $1,060, which he drew on the day on which he deposited the respondent's cheque to the credit of his own account. There was no doubt that L. intended to use the proceeds of the respondent's cheque, or part of it, for his own purposes. It was deposited with his banker on the 29th May, 1918, and placed to his credit. The banker, however, did not treat the amount as available to be drawn against until it was learned that there were funds in the bank on which it was drawn to meet it. This was learned on the day following the making of the deposit, and then the amount credited to L.'s account became available to be drawn on by him; and the cheque that he drew, having been again presented, was paid. In this way part of the proceeds of the respondent's cheque was applied to pay this cheque, and the remainder of it was afterwards applied by L. to his own use.

The result of the appeal depended entirely upon a question of fact. The law to be applied was clear. An agent authorised to receive money for his principal may not receive anything but money; but, if he receives a cheque on a bank, and the cheque is paid to the agent before his authority is revoked, that is a good payment to his principal.

Reference to Williams v. Evans (1866), L.R. 1 Q.B. 352; Bridges v. Garrett (1870), L.R. 5 C.P. 451, 454; Papè v. Westacott, [1894] 1 Q.B. 272; Walker v. Barker (1900), 16 Times L.R. 393.

On the facts, the proper conclusion was, that the respondent's cheque was paid; and, when it was paid, her debt to the appellant was discharged.

What L. did in depositing the cheque did not transfer it for value to the banker and so convert it to his own use. What he did was to deposit it as so much cash to the credit of his account, and what the bank did was so to credit it subject to the cheque being honoured when it should be presented for payment. It was an ordinary, everyday transaction; and, in the circumstances, the bank received the cheque as agent of L. to collect it. It might have been different if L. had drawn cheques on his banker,

and the banker had honoured them on the faith of the respondent's cheque being good.

The appeal should be dismissed with costs.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., for reasons stated in writing, agreed that the appeal should be dismissed.

FERGUSON, J.A., read a dissenting judgment.

Appeal dismissed (FERGUSON, J.A., *dissenting*).

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

*RE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND CITY OF HAMILTON.

Assessment and Taxes—Business Assessment—Liability of Hydro-Electric Power Commission of Ontario—Exemption—Assessment Act, secs. 5 (7), 10—Assessment Amendment Act, 1918, sec. 39—"Property"—"Person"—Place where Business Carried on—Office Premises.

Case stated by the Senior Judge of the County Court of the County of Wentworth, under sec. 81 of the Assessment Act, as enacted by the Assessment Amendment Act, 1916.

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

C. S. MacInnes, K.C., for the Power Commission.

F. R. Waddell, K.C., for the city corporation.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the question raised was as to the liability of the Commission to be assessed for the building occupied by it in the city of Hamilton, in addition to the land on which it stood, and for business assessment under sec. 10 of the Assessment Act.

The Commission is "a public commission" within the meaning of para. 7 of sec. 5 of the Assessment Act, and, except as provided by sec. 39 of the Assessment Amendment Act, 1918, its property is, therefore, exempt from municipal taxation.

The exemption was partly taken away by sec. 39 of the Act of 1918, which makes the land owned by or vested in the Com-

mission liable to "assessment and taxation for municipal and school purposes in the municipality in which it is situate at its actual value according to the value of land in the locality;" and sub-sec. 2 provides that buildings, machinery, and works on the land "shall continue to be exempt from assessment and taxation as heretofore."

The learned Chief Justice assumed for the purposes of his judgment that these provisions were applicable to the Power Commission.

Section 5 of the principal Act makes "all real property in Ontario and all income derived either within or out of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same," subject to certain exemptions, liable to taxation; and the exempting paragraph (7) says nothing about income, but exempts the property vested in or controlled by any public commission.

"Property" there means real property, because personal property is not liable to taxation.

The business assessment is imposed by sec. 10, and is a personal tax, and not a tax on real or personal property. The assessment on land is used only for the purpose of determining the amount of the business assessment, which is a percentage on the assessed value of the land occupied or used for the purpose of the business.

The Commission must be considered a "person" within the meaning of sec. 10. "Person" has the extended meaning given to it by the Interpretation Act. There is nothing in the context to exclude that meaning. Every tax which a man must pay has to be paid in a sense out of his property—unless he borrows the money with which to pay it. The business assessment is a personal tax, and by no process of reasoning can it be said to be a tax upon property.

Reference to Curtis v. Old Monkland Conservative Association, [1906] A.C. 86; Pharmaceutical Society v. London and Provincial Supply Association (1880), 5 App. Cas. 857.

It was contended by counsel for the Commission that, even if it is a "person" within the meaning of sec. 10, it does not carry on its business in Hamilton—the premises in that city in respect of which the assessment was made being used only as office premises for the purposes of its business.

It is not essential in order that the Commission shall be liable to the business assessment that it shall carry on its business in Hamilton. If it carries on one of the businesses mentioned in sec. 10—and the Commission does carry on one of the businesses mentioned in sub-sec. 1 (*h*)—and occupies or uses land for the purpose of its business, it is to be assessed "for a sum to be called

'business assessment' to be computed by reference to the assessed value of the land so occupied or used."

In this view of the meaning of sec. 10, a more fair mode of assessment is prescribed than is applicable in the case of income, which is assessable practically where the head office of a corporation is situate.

The first question in the stated case, whether the Commission was a person carrying on the business of the transmission of electricity for the purposes of light, heat, and power, within the meaning of sec. 10, so as to be liable to a business assessment thereunder, should be answered: "Yes."

The second question should be answered: "The Commission is liable to be assessed for business assessment in respect of the value of the land only."

The third question, whether the property was assessable against the Commission in respect of the value of the land and building, or of the land only, should be answered: "In respect of the land only."

No costs to either party.

FIRST DIVISIONAL COURT. FEBRUARY 20TH, 1920.

*GEDDES BROTHERS v. AMERICAN NATIONAL RED CROSS.

Sale of Goods—Contract—Cancellation—Repudiation—Correspondence—Rejection—Damages—Property Passing—Recovery of Price of Goods.

Appeal by the defendants from the judgment of ROSE, J., ante 43.

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

A. J. Thomson, for the appellants.

D. L. McCarthy, K.C., and A. W. Langmuir, for the plaintiffs, respondents.

HODGINS, J.A., reading the judgment of the Court, said that the two points raised were: (1) whether the non-performance of the contract by the respondents at the time when it should have been performed according to its terms, preceded by an earlier refusal to perform it, put an end to the contract without any action on the part of the respondents; and (2) whether, in the

circumstances detailed in the evidence, the property had passed to the appellants so as to make them liable for the price instead of for damages for non-acceptance.

The order received by the respondents, No. 1788, dated the 14th August, 1918, was in these words: "Geddes Brothers, Sarnia, Ont. Shipping instructions to be given later. Freight, collect, f.o.b. Sarnia—Net, 10 days. Purchased in bond, 20,000 lbs. Oxford woollen yarn, sweater, scoured, $1.80. Deliver 4,000 lbs. at once and 2,000 lbs. a month. Edward T. Reed."

The shipping instructions were not given until the 2nd October, when the 20,000 lbs. were divided into three lots, each of which was directed to be sent to a different place. The shipping instructions dealt with the total, as if all was to be delivered at the same time.

On the same day, the 2nd October, 1918, the respondents wrote to the appellants, in reference to this order, that it would be impossible for them to deliver the yarn, as the mills were not able to make it, their whole attention being taken up with Government orders. At the time of writing that letter, the respondents had not received the shipping instructions—the two crossed in the mails. That being the case, and the appellants having previously pressed for the fulfilment of this contract, it might have been expected that a reply would have been received from them, making it clear whether or not they had accepted or rejected the proffered cancellation. They did not write at all; and the respondents, after waiting for a time, and becoming uneasy lest silence meant that they would be held to their contract, proceeded to buy yarn to fill the order, and succeeded in shipping it on the 27th November and early in December, 1918, to the appellants, who declined to receive it.

The letter of the 2nd October enabled the appellants to treat the repudiation as a definite breach, and thereupon to treat the contract as rescinded, except for the purpose of bringing an action for the breach, or they might have treated the notice that the contract would not be performed as inoperative, and awaited the time when the contract was to have been executed, and then held the respondents responsible for all the consequences of non-performance. If, however, the notice is treated as inoperative, the contract is kept alive for the benefit of both parties. Each remains subject to all his own obligations and liabilities under it, and the party who gave the notice is at liberty, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it: per Cockburn, L.C.J., in Frost v. Knight (1872), L.R. 7 Ex. 111.

Reference also to Michael v. Hart & Co., [1902] 1 K.B. 482, 490; Johnstone v. Milling (1886), 16 Q.B.D. 460.

For the appellants it was urged that, even admitting that down to the time for performance it was incumbent upon them to have assented to rescission, yet, not having done so, the actual non-performance by the respondents of the contract on the day named put an end to the contract or supplied in some way the want of acceptance of the prior renunciation. The learned Justice of Appeal was unable to accept that view. The case chiefly relied upon by the appellants, Ripley v. McClure (1849), 4 Ex. 345, does not seem to go far enough to support their point. See Tufts v. Poness (1900), 32 O.R. 51.

As to damages, the original order contained the words, "freight, collect, f.o.b. Sarnia," and payment was to be "net, 10 days," i.e., after shipping instructions had been given and complied with by placing the goods on the cars at Sarnia properly billed. The goods were afterwards delivered "f.o.b. Sarnia," and went forward. This, being done in pursuance of the contract, was a good delivery of the goods to the buyer: Benjamin on Sale, 7th ed., p. 701; Halsbury's Laws of England, vol. 25, p. 189. Inspection could not well be made at Sarnia, as both the contract and the shipping instructions provided for the collection of the freight on arrival at the foreign destination; but this would not seem to prevent recovery of the sale-price, pursuant to the terms of the contract. The goods might have been rejected on their arrival at the places designated as their destination, if not in accordance with the contract. It had not been contended that these goods did not conform to the order, and it was affirmed by the chief witness for the respondents that the yarn he bought and shipped conformed to the contract.

The respondents should not be confined to damages for non-acceptance.

Appeal dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J. FEBRUARY 14TH, 1920.

ATTORNEY-GENERAL EX REL. TOWNSHIP OF PELEE v. HOMEGARDNER.

Land—Removal of Sand and Gravel from Shore of Island—Protection from Erosion—Actionable Wrong—Injury not Caused by Acts of Defendants—Findings of Fact of Trial Judge.

Action for an injunction restraining the defendants from taking sand and gravel from lot 70 in Pelee Island and so impairing the

natural protection from erosion afforded by the banks, and for damages.

The action was tried without a jury at Sandwich and Toronto.

H. S. White, for the Attorney-General.

R. McKay, K.C., and J. G. Kerr, for the relators.

Wallace Nesbitt, K.C., O. E. Fleming, K.C., and A. J. Thomson, for the defendants.

LENNOX, J., in a written judgment, said that the township of Pelee was composed of Pelee Island, in Lake Erie, an area of about 10,000 acres. Of this 6,000 acres had to be reclaimed by dyking, drainage works, and pumping stations, under the provisions of the Ontario Drainage Act, at a cost of $200,000 or more.

The township corporation had opened up and improved highways on the island, including highways or roads at various places along and in the neighbourhood of the lake shore. Until recently the beach along the east and south sides of the island afforded exceptional advantages and facilities for driving and other road purposes and as a place of resort and recreation.

Until quite recently a long, narrow point of land, known as "Fishing Point," extended southerly from the south shore. In 1897, one McCormick, who was then the owner of "Fishing Point," obtained a grant from the Crown of the lands covered by water adjoining "Fishing Point" on the east, west, and south, in all 222 acres, upon the representation that it was necessary that he should have it to protect his property by preventing sand-dredging operations within the area covered by the grant. This, upon the evidence of William Hendrickson, was a false and fraudulent representation, for the grant was in fact applied for to enable McCormick to carry out an arrangement for granting dredging rights when the patent should be obtained, and they were granted accordingly.

The defendants were successors in title of McCormick of both "Fishing Point" and the adjoining 222 acres covered by water.

The point and the water-covered land adjoining it were composed of sand and gravel of very great commercial value. Some sand and gravel were dredged and carried away before 1896, but it was not suggested that this caused injury to the island or its inhabitants. Dredging work was more extensively carried on after McCormick obtained the patent. In 1909, the quantity of material excavated greatly increased in volume, and again in 1911; and vast quantities had since been annually carried away, including a considerable part of the southerly end of "Fishing Point."

The relators contended: (1) that the sand-banks and bars, while they remained, afforded a measure of protection to the

shores of the island; (2) that the operations of the defendants had caused the removal or destruction of these banks and bars; (3) that the restoration of the banks and bars could not begin until the basin should be filled in; and (4) that restoration was made impossible because the defendants not only continued to enlarge the basin, but also gathered up and carried away the sand and gravel deposited in the basin from time to time as it collected.

The defendants' acts would constitute an actionable wrong if they were the cause of the damage or injury of which the relators complained.

After an examination of the evidence, the learned Judge said that it was shewn that the erosion of the shore, the cutting away of the banks, the destruction of the highways, and the consequent re-establishment of them further back, were things of frequent occurrence long before the date of the operations complained of. The relators had distinctly fallen short of proving that the works or operations of the defendants caused the injuries or damage complained of, or that they were likely or calculated to cause injury.

Whilst the relators had failed for want of proof, their belief was not irrational, and their attempt, in the circumstances, not unreasonable: it was not a case for awarding costs to the defendants.

Action dismissed without costs.

MEREDITH, C.J.C.P., IN CHAMBERS. FEBRUARY 17TH, 1920.

*DOVERCOURT LAND BUILDING AND SAVINGS CO. v. DUNVEGAN HEIGHTS LAND CO.

Mortgage—Foreclosure—Motion to Open up—Final Order—Sale to Third Person—Prompt Application—Weighing of Equities—Terms—Payment of Mortgage-debt and Costs—Costs of Applications.

Appeal by the defendants the Dunvegan Heights Land Company from an order of the Master in Chambers dismissing their application to vacate a final order of foreclosure, and substantive motion to open the foreclosure.

I. F. Hellmuth, K.C., and G. S. Hodgson, for the appellants.

F. H. Barlow, for the plaintiffs.

E. P. Brown, for the defendants the Toronto Investments Limited.

H. R. Frost, for the Eglington Avenue Syndicate and Forest Park Syndicate.

MEREDITH, C.J.C.P., in a written judgment, said, after stating the facts, that, assuming that the proceedings in this action ending in the final order of foreclosure were regular, and that nothing in the negotiations for settlement should have prevented the taking out of that order, there was no good reason why the mortgagors should not yet be permitted to redeem. The action was not defended, and the final order was obtained on the 18th October, 1919.

A Court of Equity is always ready to hear a meritorious application for relief against a foreclosure, and will open it whenever good and substantial reasons for such a course are shewn to it, provided the application is seasonably made. The mere fact that the land has been sold to a third person in good faith is not alone an insuperable obstacle: see Campbell v. Holyland (1877), 7 Ch.D. 166. The true equitable principle has always been that the mortgagor may be permitted to redeem whenever the equities in favour of redemption undoubtedly outweigh all that are against it.

Here those who really ought to have paid off the mortgage-debt, and those associated with them, were the purchasers from the mortgagees; and, freed from their debt to the mortgagors, were clothed with the mortgaged property, leaving the mortgagors naked and exposed to attack by the other purchasers from them.

Then, whether or not the negotiations for settlement made it unfair of the sellers to make the sale which was made, at least no one could blame them if, before selling, they had given the mortgagors the opportunity to redeem with a knowledge that, if they did not, that sale would be made.

Whether the other purchasers from the mortgagors had a right to redeem could not be considered on this application, as they were not parties to it; but the consequences, whatever they might be, of the final order and the subsequent sale upon their interests and rights might properly be taken into consideration upon this motion.

As to countervailing equities, it was a matter of no substantial concern to the mortgagees by what hand the money due to them might be paid. And as for the Toronto Investments Limited there was nothing inequitable or unfair in a reversion to their former state, if for no other reason because of their expressed agreement to revert if the mortgagors should be let in to redeem—an agreement made with a knowledge of the negotiations and of most of the other circumstances. Other reasons were made plain by a mere statement of the facts.

The mortgagors should be let in upon the following terms: a substantial payment, $10,000, should be made upon the mortgage within 10 days after the issue of the order now made, any party to be at liberty to take out the order if the mortgagors should delay; the balance of the mortgage-debt and interest should be paid

within one month after the first payment; and the amount of all proper expenses incurred by the plaintiffs in this action, except of the applications to open the foreclosure, and in the sale of the lands, should be paid forthwith after it is agreed upon or settled by the proper officer. No order is made as to any of the costs of the applications to open the foreclosure. But, if the terms imposed are not complied with, these motions are to be dismissed with costs.

MEREDITH, C.J.C.P., IN CHAMBERS FEBRUARY 17TH, 1920.

*REX v. KAPLAN.

Ontario Temperance Act—Magistrates' Conviction for Offence against sec. 41—Having or Giving Intoxicating Liquor—Jurisdiction of Police Magistrate—Ex Officio Justice of the Peace—Conviction by two Justices—Time for Laying Information—Section 61 (2) of Act—Amendment by 9 Geo. V. ch. 60, sec. 19—Within 3 Months after Commission of Offence—Information Amended by Adding Alternative Charge of "Having" after Expiry of 3 Months—Sec. 78—Power to Substitute New Charge—Conviction in Alternative—"Having or Giving"—Uncertainty—Evidence—Outside Information obtained by Magistrate—Impropriety—Quashing Conviction.

Motion to quash a conviction of the defendant by two magistrates for an offence against the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50.

P. Kerwin, for the defendant.
Edward Bayly, K.C., for the magistrates.

MEREDITH, C.J.C.P., in a written judgment, said that the first objection was, that the convicting Police Magistrate had no jurisdiction. This objection, the learned Chief Justice said, had no force because the Police Magistrate was ex officio a Justice of the Peace, and acted in that capacity only, with another Justice of the Peace, the two together having jurisdiction.

The second objection was, that the prosecution was not begun within 3 months after the commission of the offence.

The information was laid on the 18th November, 1919, and the charge made in it was that the accused, on or about the 15th September, 1919, did unlawfully give liquor to two persons named, and to others, in a place other than the dwelling house in which

he resides, contrary to the provisions of sec. 41 of the Ontario Temperance Act.

At the trial, on the 30th December, 1919, the information was amended so as to charge that the accused did, on the 15th September, 1919, have or give liquor in a place other than in the private dwelling house in which he resides, without having first obtained a license under the Ontario Temperance Act, contrary to sec. 41 of the said Act. The conviction was in the same words.

Section 61 of the Act provides, in sub-sec. 2, as amended by (1919) 9 Geo. V. ch. 60, sec. 19, that "all informations or complaints for the prosecution of any offence against any of the provisions of this Act, shall be laid or made in writing, within 3 months after the commission of the offence . . ."

The charge of having liquor was not thus laid or made, though that of giving liquor was. Section 78 of the Act gave power to the magistrates to make the amendment, to permit the substitution of another offence for the offence charged in the information; but did the power to make a new charge in effect repeal the provisions of the Act limiting the time within which such prosecutions shall be begun?

Rex v. Ayer (1908), 17 O.L.R. 509, referred to.

A new charge may be made, but it must be made within the 3 months: see Rex v. O'Connor (1912), 3 O.W.N. 840.

The conviction, therefore, for having liquor was bad; and, as there was no certain conviction for giving liquor, it was altogether bad. It was not for having and giving, but for having or giving; so that, if the one fell, the other was without support.

So, too, the conviction in the alternative form was bad—convictions must be certain.

The last objection was, that the accused was not convicted or punished upon the evidence adduced at his trial, but upon statements made to the Police Magistrate not under oath and not at the trial. It seemed to the learned Chief Justice quite plain, from the words of the Police Magistrate in giving reasons for the conviction and punishment of the accused, that the penalty (a fine of $500), if not the conviction, was based very much upon statements made or information obtained to or by the Police Magistrate out of court.

The conviction should be quashed on this ground also: see secs. 101 and 102 of the principal enactment: it could not be amended, for this Court had no power to try the case and impose a proper fine or other punishment, the minimum fine being $200 and the maximum $1,000.

Conviction quashed.

MEREDITH, C.J.C.P., IN CHAMBERS. FEBRUARY 17TH, 1920.

RE TORONTO GENERAL TRUSTS CORPORATION v. SULLIVAN.

Mortgage—Foreclosure—Proposed Action for—Application for Appointment of Administrator ad Litem of Estate of Deceased Mortgagor—Rules of Court of 1913—Rule 90—Powers of Court under—Grounds for Exercise of—Evidence—Devolution of Estates Act, sec. 10 (1).

The trusts corporation, proposing to bring an action for foreclosure upon a mortgage made by Jennie Theresa Sullivan and Michael Sullivan, moved *ex parte* for an order appointing an administrator ad litem of the estate of Jennie Theresa Sullivan, who was said to have died intestate.

E. G. Long, for the applicants.

MEREDITH, C.J.C.P., in a written judgment, said that for several reasons, no such order should, in his opinion, be made.

In the first place, the Rule of Court which formerly expressly conferred power to make such an order—Con. Rule 195 (Rules of 1897)—no longer exists: it was not brought into the Rules now in force (Rules of 1913).

Under earlier Rules—of legislative origin and effect—the power of this Court to appoint administrators was very wide: but, by the Rules of which Con. Rule 195 was one, that power was very much curtailed; and now it has vanished altogether. So there is no power to make the particular order applied for.

But in Rule 90 of the current Rules of Court (1913), power is brought down from earlier Rules under which the Court may, in certain cases, proceed in the absence of a person representing the estate of a deceased person who has no personal representative, or appoint some person to represent the estate; which is quite a different thing: and is a power which also ought not to be exercised in this matter, for several reasons.

The property in question is valuable. The arrears of taxes against it alone amount to about $2,500. The mortgage was for $6,000. So that the interests of creditors, if any, and of the heirs at law may be considerable.

Then there is now no need, in such a case, to make a personal representative of the deceased mortgagor a party to the proposed action: "Where there is no legal personal representative of a deceased mortgagor of freehold property it shall be sufficient, for the purposes of an action for the foreclosure of the equity of

redemption in, or for the sale of, such property that the person beneficially entitled under the last will and testament, if any, of the deceased mortgagor, or under the provisions of this Act, to such property or the proceeds thereof, be made defendants to such action, and it shall not be necessary that a legal personal representative of the deceased mortgagor be appointed or be made a defendant thereto unless it shall be otherwise ordered by the Court in which the action is brought or by a Judge thereof; but if, during the pendency of such action, the equity of redemption devolves upon and becomes vested in a legal personal representative of the mortgagor he shall be made a party to the action:" Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 10 (1).

And, for other reasons: there is really no evidence that the woman died intestate, or that letters probate or letters of administration have not been granted; and not even her surviving husband, who was also a mortgagor, or the person proposed as representative of the estate, has had any notice of this application or given any consent to the order being made; nor is there any evidence as to creditors or heirs at law; and in the mortgage there is a power of sale which apparently may be exercised without notice.

No order can be made as the matter now stands.

KELLY, J. FEBRUARY 19TH, 1920.

PAGE v. CAMPBELL.

Covenant—Building Scheme—Residential Property—Restrictive Negative Covenant—Erection of Church Building, in Breach of—Notice and Knowledge—Continuance after Protest—Judgment Restraining Defendants from Using Building and Directing Removal.

Action for an injunction restraining the defendants, the wardens and trustees of All Saints Church, Windsor, from proceeding with the construction of a building upon lots 138 and 139 on the west side of Moy avenue, in the city of Windsor, according to registered plan M. 579, and from using that building for the purposes of a parish-hall or boys' club-room or for other church purposes, and in the alternative for damages.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiff.

E. S. Wigle, K.C., for the defendants.

KELLY, J., in a written judgment, said that on the 20th April, 1911, one Morton and others granted to the plaintiff, as trustee, a large block of land in Windsor. The land had been subdivided into building lots according to registered plans. The plaintiff, on the 5th August, 1913, conveyed in fee simple to Arthur Turner, Edith Turner, and Bessie Turner, the lots 138 and 139 according to plan M. 579 (one of the said plans), to hold to the grantees, their heirs and assigns, "subject nevertheless to the reservations, limitations, and conditions and also to the restrictive covenant, hereinafter contained;" and the grantees therein covenanted for themselves, their heirs and assigns, with the plaintiff, his heirs and assigns, "that no buildings shall be erected upon said lands except for residences and their necessary outhouses, such residences to be erected as single residences or double tenements only," with further restrictions as to the cost of buildings to be erected and distance from the street-line. This conveyance was executed by the grantees as well as by the grantor.

The plaintiff, following this building scheme, sold many of the lots laid out upon this plan to other purchasers, many of whom had erected upon the lots so purchased dwelling-houses complying with the requirements of the covenant.

The defendants acquired lots 138 and 139 from the Turners, and towards the end of the year 1918 proceeded to erect thereon a wooden building which was intended to be used for the time being as a church, and later as a school-room and parish-hall. The defendants had notice and admitted knowledge of the building restrictions imposed upon these two lots; and about the time they commenced their building operations obtained the approval of their building proposition from a large number of purchasers of other lots upon the same plan; but many others similarly interested and affected as purchasers of lots declined to approve of the defendants' proposed building, and protested against it being proceeded with. The plaintiff also protested, telling the defendants that, as trustee, it was his duty to protect the interests of others as well as his own.

The defendants, with this knowledge of the situation, and in defiance of the protests, proceeded with and completed the building. At the trial they contended that using the property for church purposes was not a violation of the covenant, and also that the character of the locality had changed and was no longer "residential."

The latter contention, the learned Judge said, was not sustained by the evidence.

Reference to Sobey v. Sainsbury, [1913] 2 Ch. 513; Tulk v. Moxhay (1848), 2 Ph. 774; Haywood v. Brunswick Permanent Benefit Building Society (1881), 8 Q.B.D. 403; London and South Western R.W. Co. v. Gomm (1882), 20 Ch. D. 562.

The covenant here was clearly restrictive; it was not an affirmative covenant compelling the purchasers to do a specific act or acts, but a negative covenant compelling them to refrain from doing certain acts, namely, erecting buildings of the class excluded by the covenant. Not only that, but the conveyance itself was made subject to that restriction, thus in effect reserving to the grantor an interest to that extent in the lands, and qualifying the title which passed to the grantees and their successors in title.

The plaintiff, not having actively or passively relinquished his rights, or debarred himself from the right to insist upon them, was entitled to enforce compliance with the terms of the restriction and the covenant and to prevent the erection of buildings not thereby contemplated.

In Jackson v. Normanby Brick Co., [1899] 1 Ch. 438, it was said by Lindley, M.R., that "in future it would be better for the Court to say in plain terms what it means, and in direct words to order the buildings to be pulled down and removed."

The plaintiff should have judgment restraining the defendants from using the building objected to and directing that it be pulled down and removed; the operation of the judgment to be suspended until the 1st May, 1920; the defendants to pay the plaintiff's costs of the action.

MIDDLETON, J. FEBRUARY 20TH, 1920.

WITTON v. TUCKETT.

Will—Trusts of—Modification by Act of Legislature (8 Geo. V. ch. 87)—Effect as to Proceeds of Sale of Shares of Stock of English Banking Corporation, Part of Estate in Hands of Trustees.

Motion by the plaintiffs, the trustees under the will of George Elias Tuckett, deceased, for judgment on admissions in the pleadings in an action in which the plaintiffs claimed a declaratory judgment defining the rights, powers, authority, and duty of the plaintiffs in the administration and distribution of the proceeds of the sale of 101 shares of the capital stock of the Bank of British North America, part of the residuary estate of the testator.

The motion was heard in the Weekly Court, Toronto.

E. H. Ambrose, for the plaintiffs.

T. H. Barton, for the defendants George Joseph Tuckett and others.

H. A. Burbidge, for the defendants the Royal Trust Company, administrators of the estate of Richard George Duggan, deceased.

Edward Bayly, K.C., for the Attorney-General for Ontario.

F. W. Harcourt, K.C., Official Guardian, for the infant defendant.

MIDDLETON, J., in a written judgment, said that under the will the executors were to convert the residuary estate, of which they were trustees, and, after certain legacies and annuities were provided for, the proceeds were to be held upon certain trusts for the benefit of the grandchildren. These trusts producing hardship, the Legislature modified the terms of the trusts, by the Act 8 Geo. V. ch. 87.

Among the assets were shares in the Bank of British North America, an English corporation, having no share registry in Ontario. A question was raised as to the effect of the statute on the proceeds of these shares.

Quite apart from the view that, though the shares might have an English situs for the purpose of taxation, they were mobilia for the purpose of administration, it was clear that the proceeds of the shares were in the hands of the trustees subject to the statute.

This was not a case in which the Court must determine what law is applicable in the administration of the estate upon any general principle. The title of the executors and trustees was not in question, but the Legislature of the Province, having jurisdiction over the trustees and the cestuis que trust, had seen fit to modify the terms of the trust. The trust concerned the proceeds of these shares; and, even if the shares themselves were subject to English law, the trustees' title to them had not been interfered with.

It should be declared that the proceeds of the shares in question were subject to the operation of the Act.

Costs of all parties out of the estate.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 21ST, 1920.

*RE SHIELDS, SHIELDS v. LONDON AND WESTERN TRUST CO.

Costs — Taxation — Defendants Severing — Rule 669 — Practice — Award of Costs by Court Binding upon Taxing Officer—Parties Representing the same Estate and Interest not Entitled to Sever—Execution Creditor and Execution Debtor—Receiver of Share —Administration Proceeding.

Appeal by the plaintiff Andrew J. Shields from the taxation by the Senior Taxing Officer at Toronto of the costs of the defendants

under several orders made in this proceeding or matter, which originated by an application for an order for administration of the estate of James Shields, deceased.

W. E. Fitzgerald, for the appellant.
C. St. Clair Leitch, for the administrator.
W. J. Elliott, for the Union Trust Company.
J. D. Shaw, for John J. Shields.
W. Lawr, for Annie Shields and others.

MIDDLETON, J., in a written judgment, said that James Shields died in 1895, leaving him surviving his wife and a number of children. Letters of administration of his estate were not obtained until the 23rd March, 1916.

The application for an administration order was made by Andrew J. Shields and George Shields, two of the children; the administrator was the only person made a defendant. The application was unopposed, and it was not disclosed that certain of the children of the deceased claimed to have acquired during the lifetime of the intestate possessory title to certain of his lands. When those children were added as defendants in the Master's office, this claim was asserted, and the Master ruled that the administration could not proceed until the question of title had been determined. An order was made by a Divisional Court of the Appellate Division on the 2nd February, 1917, referring it to the Master to determine the question of the ownership of the property, on notice to all parties interested. The Master found in favour of those who claimed to have acquired the possessory title. There was an appeal from the Master's report to a Judge, a further appeal to a Divisional Court, and finally an appeal to the Supreme Court of Canada. All these tribunals upheld the Master's finding; and the plaintiff Andrew J. Shields was ordered to pay all the costs of this litigation, and the plaintiff George Shields the costs up to a date when he discontinued his attack upon his mother and brothers.

Before the Master and in the appeals, the brothers and sisters did not unite in a common defence: they were represented by a number of different solicitors, and execution creditors of two of the brothers were represented by other solicitors. Six separate bills of costs were carried in before the Taxing Officer, and taxed and allowed at an aggregate sum of more than $2,500.

Upon this appeal the appellant contended that these parties, all substantially representing the one interest and the one claim, ought to have been represented by one set of solicitors only, and that under the practice the taxation against the appellant of these 6 bills was oppressive and improper.

No steps were taken at any time to secure the representation by one solicitor of those opposed to the appellant. Perhaps, under the practice, this could not have been done; but it would not be proper, at this stage of the proceedings, to enter upon an inquiry as to whether it could have been done. The award of costs by the various orders and judgments pronounced in the cause was binding upon the Taxing Officer, and also upon the Judge sitting in appeal; but the Taxing Officer should have entered into an inquiry, as directed by Rule 669, with the view of ascertaining whether the defendants were or were not entitled to more than one set of costs upon the taxation. The only obligation which is cast upon the defendants to appear by the same solicitor is that resting upon the old practice of the Court of Chancery. See Melbourne v. City of Toronto (1890), 13 P.R. 346. The embarrassing expression "the law of the Court" found in the Rule in force in 1890 is not to be found in the present Rule.

In cases of this kind, each defendant having a separate interest is justified in severing if he sees fit; and, unless the Court, at the hearing and in awarding costs, sees fit, in the exercise of its discretion, to provide that there shall be but one set of costs, each is entitled to his separate bill. The only exception to this general statement, at all relevant to this case, is that those who in truth represent the same estate and interest are not entitled to sever: an execution creditor and his debtor, e.g., are not entitled to separate. See Morgan on Costs, 2nd ed., p. 125; Belcher v. Williams (1890), 45 Ch.D. 510; Catton v. Banks, [1893] 2 Ch. 221.

The rule is that the amount payable by way of costs out of the share should be paid to the first mortgagee; but, if that rule should be arbitrarily applied here, injustice would be done. As against the appellant the amount to be allowed should be that of the largest bill incurred in respect of the particular share. The receiver appointed to receive the share of one of the brothers would then be entitled to a first lien upon the share, including costs, for the amount of the costs payable to the solicitor for the receiver. If there is any difficulty in working this out, the learned Judge may be spoken to.

The administrator of the estate of James Shields was entitled to be represented, as the plaintiff attacked that administrator, and refused to withdraw the charges made.

The appeal should be dismissed save in this respect.

As to the shares concerning which a modification of the taxations is made, there should be no costs of this appeal, the success being in part only. Where there is no change, the appellant should pay costs—the amount to be fixed in the order.

WHITE v. GREER—LENNOX, J.—FEB. 21.

Master's Report—Evidence—Excessive Credit—Appeals—Report Set aside—Res Judicata.]—An appeal by the plaintiff and a cross-appeal by the defendant from a report of the local Master at Bracebridge. The appeals were heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that by the judgment of the Appellate Division of the 21st March, 1916—White v. Greer (1916), 36 O.L.R. 306—the plaintiff was declared entitled to recover $2,108.84 in respect of the sale of saw-logs and other timber. Some of the logs which the plaintiff was found entitled to be paid for had sunk in Concession Lake. On appeal to the Supreme Court of Canada, the judgment of the Appellate Division was affirmed, with a variation by which the defendant was declared entitled to a reference to take an account of the logs sunk and their value, and that the amount found by the Master should be deducted from the amount for which the plaintiff had judgment. Upon this reference the Master made a report, which was set aside by LATCHFORD, J., on the 17th January, 1918; the whole matter was referred back to the Master to be dealt with de novo. The report now appealed from was made on the 22nd April, 1919. The learned Judge said that he was satisfied that the defendant had no ground of complaint against the conclusions of the Master. The plaintiff's appeal from the Master's findings must be allowed, both on the evidence and because the matters upon which he had found were concluded by the order of LATCHFORD, J. The Master had gone outside of the scope of the reference and had given the defendant a decidedly excessive credit. There should be no reference back, but counsel should agree upon a fair credit, or a computation should be made by some competent person to be named by the learned Judge. The report should be set aside, with costs of the present appeals and of the last reference to the plaintiff. The learned Judge will make the adjustments directed by the Supreme Court of Canada when informed of the arrangement, if any, made by counsel, reserving also until then the disposal of the question of costs left by the order of LATCHFORD, J. J. M. Ferguson, for the plaintiff. William Laidlaw, K.C., for the defendant.

LENNOX, J. FEBRUARY 21ST, 1920.

DICKIE v. CURTIS.

Marriage—Breach of Promise of—Trial by Judge without Jury—Attempted Justification of Breach—Evidence—Damages.

Action for breach of promise of marriage.

The action was tried without a jury at a Toronto sittings.
J. A. Campbell, for the plaintiff.
J. Haverson, K.C., for the defendant.

LENNOX, J., in a written judgment, said that it was the first breach of promise action he had known to be tried without a jury: the parties desired trial by a Judge alone, and there was no statute or rule of law to prevent it. The defendant did not deny the mutual promise, and admitted that the engagement existed for about 8 years. No specific marriage date was ever fixed, but more than a reasonable time had elapsed. The defendant, without alleging any impropriety or misconduct upon the part of the plaintiff, attempted to establish a justification for his refusal to marry her—in this he entirely failed. Neither party's bearing and attitude towards the other appeared to be quite all that could be wished for, both seemed disposed to magnify very small hills into mountains, both were unduly exacting. When two persons become engaged, and particularly when the engagement is continued for a third or a fourth of the average duration of married life, neither party can be allowed to repudiate the agreement because of slight differences of opinion, frailties of temper, partial disenchantment, or the like. In court, each revealed a singular lack of reasonable consideration for the alleged faults of the other. It was just as well that the engagement was broken off; but the defendant must pay something for indulging in a very tardy change of mind, and obstructing the plaintiff's matrimonial outlook for so long a time. The pecuniary measure of the plaintiff's loss was, of course, to be gauged by the financial standing and aptitude of the defendant. His earning powers, if his evidence was to be accepted, were of an exceptionally low order, and, aside from earnings, he had not a great deal to fall back upon. All this had been taken into consideration.

There should be judgment for the plaintiff for $850 with costs.

SUTHERLAND, J. FEBRUARY 21ST, 1920.

SAYLES v. EVANS.

Dower—Partnership Lands—Seisin of Husband—Mortgages Made by Members of Partnership—Lands Conveyed to Husband (Member of Partnership) upon Dissolution—Dower not Attaching—Lands Conveyed to Husband after Dissolution of Partnership—Mortgages Made by Husband—Wife Joining to Bar Dower—Dower Act, R.S.O. 1914 ch. 70, sec. 10—Preservation of Dower-rights.

Action by the widow of Arthur Sayles for dower out of certain lands, briefly described as lots 3, 4, 5, 7, 8, and 9.

The action was tried without a jury at Brantford.

W. S. Brewster, K.C., for the plaintiff.

M. W. McEwen, for the defendants.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that it was plain upon the evidence, and he found as a fact, that lots 3, 4, and 5 were bought for a partnership of which Arthur Sayles was a member, became the property of the partnership, and continued to belong thereto down to its dissolution in 1911, when the equity then existing therein was transferred to and became the sole property of Arthur Sayles.

The fact that the conveyances did not refer to the partnership, and might appear to be inconsistent with the idea of conveyances to the partnership, was not conclusive: Ex p. Neale, Bank of England Case (1861), 3 DeG. F. & J. 645, at p. 658; In re Music Hall Block, Dumble v. McIntosh (1884), 8 O.R. 225, at p. 234; In re Cushing's Estate (1895), 1 N.B. Eq. R. 102, 111.

Real estate belonging to a partnership is, like other partnership assets, held in the first place liable for the debts of the partnership, and for distribution among the partners, upon a dissolution, in proportion to their shares in the capital thereof. There is no dower in partnership lands: Armour on Real Property, 2nd ed. (1916), p. 105; In re Music Hall Block, Dumble v. McIntosh, supra.

While these lots were partnership property, mortgage incumbrances were placed upon them by the members of the partnership. Each of these mortgages was executed by the plaintiff for the purpose of barring her dower.

When the partnership was dissolved in September, 191 , Sayles became sole owner of lots 3, 4, and 5, subject to the rights of the mortgagees, and the lots became the separate property of Sayles: Ex p. Ruffin (1801) 6 Ves. 119; Ex p. Williams (1805),

11 Ves. 3. The agreement between Sayles and his partner to that effect became an executed one, in so far as the real estate of the partnership was concerned, by the conveyance from the former to the latter.

When Sayles thus acquired lots 3, 4, and 5 from his father, he did so free to convey the equity he thus acquired without regard to any claim to or right of dower therein on the part of his wife, because what he got under the deed to him was not a conveyance of the legal estate then outstanding in the mortgagees. When the partners, dealing with partnership property, made mortgages in fee, the mortgagees obtained a conveyance of the legal estate, and became seised of the property. Seisin on the part of the husband is one of the essentials of dower. The seisin thus passing to the mortgagees and remaining in them, it never became vested in Sayles so that dower could attach. See Copestake v. Hoper, [1908] 2 Ch. 10, 16, 18. In these circumstances, sec. 10 of the Dower Act, R.S.O. 1914 ch. 70, had no application.

But as to lots 7, 8, and 9 the result was different. They were conveyed to Sayles after the partnership had been dissolved. He became seised of these lots upon the conveyance to him in 1917, the partnership being then dissolved. Although immediately after the conveyance to him he executed a mortgage on these lots, in which the plaintiff joined to bar dower, and also subsequent mortgages, the plaintiff was still entitled to dower, sec. 10 of the Dower Act preserving her rights.

Reference to Pratt v. Bunnell (1891), 21 O.R. 1, 6; Gemmill v. Nelligan (1895), 26 O.R. 307; Standard Realty Co. v. Nicholson (1911), 24 O.L.R. 46, 51, 52.

The plaintiff was not entitled to dower in lots 3, 4, and 5, but was so entitled in respects of lots 7, 8, and 9.

Judgment for the plaintiff with costs. Reference to the Master at Brantford to ascertain the value of the dower as at the death of the husband.

JOHNSON v. MEDLAR—KELLY, J.—FEB. 17.

Money—Dispute as to—Sums Handed by Plaintiff to Defendant—Purpose for which Intended—Evidence—Deposit in Bank—Findings of Fact of Trial Judge—Counterclaim.]—Action by Mary Johnson and the executors of the will of her deceased husband, William Johnson, against Martha Medlar, Andrew Medlar, and the Merchants Bank of Canada, for a declaration as to the ownership of certain sums of money deposited by Martha Medlar in the Merchants Bank of Canada to the joint credit of herself and Mary Johnson. There was a counterclaim by the defendants the Medlars. The action and counterclaim were tried without a jury at Chatham. The Merchants Bank of Canada were not represented at the trial; the plaintiffs admitted that the bank had no interest in the result. KELLY, J., in a written judgment, said that the main dispute was as to a sum of $1,450 which Martha Medlar received from Mary Johnson in the summer of 1917, a short time after the death of William Johnson. Mary Johnson said that she gave Martha Medlar the money to keep for her (Mary). Martha said that the money was given to her for Mary's funeral expenses, when she should die—she was then 75 years old, and was blind. Later on, other moneys passed into Martha's hands. Upon an examination of the evidence, the learned Judge found that the plaintiff Mary Johnson was entitled to $1,050 and interest; and that the defendants were entitled to recover upon their counterclaim $294.92 and interest. Mary Johnson should recover the balance of the $1,050 and interest after deducting $294.92 and interest, with costs. J. S. Fraser, K.C., for the plaintiffs. O. L. Lewis, K.C., for the defendants the Medlars.

THOM v. THOM—KELLY, J.—FEB. 17.

Husband and Wife—Alimony—Evidence—Cruelty—Finding of Trial Judge—Dismissal of Action—Costs—Rule 388.]—An action for alimony, tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, said that to support her claim for alimony the plaintiff alleged several acts of wrongful conduct by the defendant, in respect of which and every one of which she failed. Any differences between her and the defendant were largely traceable to her own conduct, and not to his, though he was on many occasions provoked by her unreasonable attitude towards her duties as a wife and mother. They were married in 1893 and had had 11 children, 10 of whom were still living, the youngest being a little more than two years old. The defendant earned $22

a week. The evidence completely failed to support any charge entitling the plaintiff to alimony. The defendant was not guilty of cruelty causing danger or reasonable ground for apprehending danger to the plaintiff's person or health. It was clearly not a case where alimony could legally be granted. The action should be dismissed. The plaintiff should have only such costs as are provided by Rule 388. William Proudfoot jun., for the plaintiff. D. B. Goodman, for the defendant.

ROSS v. GAVIN—KELLY, J.—FEB. 20.

Landlord and Tenant—Tenant Continuing to Occupy Demised Premises after Expiry of Lease—Terms of Occupancy—New Agreement for Lease—Claim for Arrears of Rent—Claim for Use and Occupation of other Premises—Findings of Fact of Trial Judge—Dismissal of Landlord's Action.]—The plaintiff owned a store in Fort William, of which the defendant was the occupant from 1906 until the 14th April, 1919, as the plaintiff's tenant. On the 14th November, 1912, the plaintiff made a written lease to the defendant for 5 years, beginning on the 15th April, 1913, at a rental, payable monthly, of $1,980 a year for the 1st and 2nd years, $2,100 a year for the 3rd and 4th years, and $2,220 for the 5th year. At the end of that term the defendant continued to occupy the premises until the 14th April, 1919. The plaintiff, in his pleading in this action, set up that, on the expiration of the 5-year lease, the defendant continued as a yearly tenant at a yearly rental of $2,220; and further alleged that in December, 1918, he and the defendant entered into an agreement for a further lease for 2 years from the 15th April, 1919, at a yearly rental of $1,620; and he claimed: (1) a declaration that a valid lease was entered into for the further term of two years, or that the defendant had been, since the 15th April, 1919, a yearly tenant at a yearly rental of $2,220; (2) payment of $1,630 as rent in arrear under the lease of November, 1912; and (3) $220 for use and occupation of another store for a period of 11 months. The action was tried without a jury at Port Arthur. KELLY, J., in a written judgment, said that the issues were mainly, if not altogether, issues of fact; and he had no difficulty in finding the essential facts in the defendant's favour. After a review of the evidence, he found that the plaintiff had failed to establish any of his claims. Action dismissed with costs. R. J. Byrnes, for the plaintiff. W. A. Dowler, K.C., for the defendant.

CORRECTION.

In C. C. ROBBINS INCORPORATED v. ST. THOMAS PACKING CO., ante 449, there is a mistake in the naming and placing of the counsel.

At the trial at St. Thomas in March, 1919, the plaintiffs were represented by O. L. Lewis, K.C., and George S. Gibbons (since deceased), and the defendants by C. St. Clair Leitch and J. C. Elliott.

When further argument was heard in Toronto in January, 1920, the plaintiffs were represented by O. L. Lewis, K.C., and the defendants by John Jennings.