The
Ontario Weekly Notes

VOL. XVIII. TORONTO, MAY 7, 1920. No. 8

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 26TH, 1920.

*REX v. COPPEN.

Criminal Law—Murder—Trial—Order of Addresses of Counsel—Criminal Code, sec. 944—Right of Counsel for Crown to Address Jury last—Waiver—Reply—Prejudice of Prisoner—Commenting on Failure of Accused to Testify—Canada Evidence Act, sec. 4 (5)—Remarks of Counsel for Crown—Judge's Charge—Verdict of Manslaughter not Possible on Evidence—Misdirection or Nondirection.

Case stated by LATCHFORD, J., after the trial and conviction of the prisoner on a charge of murder:—

(1) Was I right in my interpretation of sub-sec. 3 of sec. 944 of the Criminal Code, and was the accused prejudiced in his defence by his counsel being refused the privilege of addressing the jury last, subject to the right of counsel for the Attorney-General to reply?

(2) Were the provisions of sub-sec. 5 of sec. 4 of the Canada Evidence Act violated by the Crown prosecutor stating to the jury that all the evidence was given by the Crown, and that certain facts had appeared from the evidence, and that no explanation of these facts had been offered, and no explanation was possible?

(3) Did I fail to sufficiently instruct the jury upon the distinction between murder and manslaughter?

(4) Should I have directed the jury that on the charge laid they could find one of three verdicts, namely, "murder," "manslaughter," or "not guilty?"

(5) Was there misdirection or nondirection of the jury by the use by me of the following words?

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

"I am simply pointing out certain facts established in the evidence here. It is for you to believe them and give them such force as you think proper."

"But in any case if she" (the deceased) "were overcome by smoke, how do you account for the clothing heaped and the other stuff that was heaped up and around her body? You have to account for that, it seems to me."

"Now it seems to me that there is a circumstance here that excludes absolutely the explosion of the lamp. A circumstance like that you cannot get away from."

(6) Should I have put to the jury the defence suggested by counsel for the prisoner and brought to the jury's attention the medical testimony on this point?

(7) Did I misdirect or omit to direct the jury on the doctrine of reasonable doubt to the benefit of which the prisoner was entitled?

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

T. A. Gibson and T. J. Agar, for the prisoner

Edward Bayly, K.C., and T. P. Brennan, for the Crown.

MEREDITH, C.J.O., read a judgment in which he said that the ruling of the Judge at the trial was: "The Crown counsel is not obliged to address the jury first. He may waive, as the statute calls it, and confine his whole address to what he has the absolute right to do—reply." That ruling was right. There is no reason for construing sec. 944 of the Criminal Code as meaning that counsel for the prosecution must sum up before counsel for the prisoner addresses the jury; counsel for the prosecution may waive that right or privilege; the language of the section is that he "may," not "shall," and "may" as used is permissive. The first branch of question 1 should be answered in the affirmative, and it was unnecessary to answer the second branch. The learned Chief Justice added, however, that he was unable to see that the prisoner was prejudiced or put at any disadvantage because his counsel had not the advantage of hearing a summing up by counsel for the Crown before himself addressing the jury.

Question 2 must be answered in the negative. What sec. 4 (5) of the Canada Evidence Act forbids is the commenting on the failure of the accused to testify. It was argued that this provision had been violated by counsel for the prosecution in his address to the jury. What was said by him was, after discussing the evidence: "You have the record of a crime: you have the record of an act wrongfully done upon that woman, which resulted in her death: you have the record of murder. No explanation

has been offered, and no explanation is possible, of these facts that will exculpate the criminal whom we have not yet inquired as to in regard to that act." It was evident that in making these observations counsel was referring to the address of counsel for the prisoner, and to his not having suggested any theory as to the woman's death that would explain the condition in which her body was found, which, according to the case of the Crown, indicated that she had been murdered.

Question 3 must also be answered in the negative. Upon the evidence, if the woman was killed, there could be no question as to its being anything but murder, and there was no suggestion by counsel for the prisoner of manslaughter. The defence was that the prisoner had no part in the killing, if the woman was killed.

Questions 4, 5, 6, and 7 should also be answered in the negative.

Reference to Rex v. Wyman (1918), 13 Cr. App. R. 163, 165; Rex v. O'Donnell (1917), 12 Cr. App. R. 219, 221.

The case was fairly and properly conducted by counsel for the Crown, and the charge of the learned Judge indicated clearly to the jury what their functions were and the conclusion to which they must come before pronouncing the prisoner guilty—that they must, in order to justify a finding of guilt, reject the theories put forward on behalf of the prisoner, and come to the conclusion that it was established beyond all reasonable doubt that the woman had been murdered and that the prisoner had murdered her.

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

FERGUSON, J.A., read a judgment in which he discussed only the first question stated. His view was that "our law gives the Crown Counsel a right to decline to sum up, and that the trial Judge was right in so ruling; that, if the prisoner was prejudiced in fact, he was not prejudiced in the eyes of the law, and I would answer the question accordingly."

On the other questions he agreed in the conclusion of the Chief Justice.

MASTEN, J., agreed with FERGUSON, J.A.

Conviction affirmed.

FIRST DIVISIONAL COURT. APRIL 26TH, 1920.

ELLIOTT v. HEWITSON.

Water—Obstruction of Flow of Natural Watercourse by Building of Tunnel—Flooding of Neighbour's Land—Cause of—Evidence—Onus—Finding of Trial Judge—Appeal—Future Damage—Reasonable Apprehension.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 16 O.W.N. 364.

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

I. F. Hellmuth, K.C., and Thomas Moss, for the appellant.

W. N. Tilley, K.C., and G. W. Mason, for the defendant, respondent.

FERGUSON, J. A., in a written judgment, said, after stating the facts, that the erections of the defendant were upon her own property; as owner of the land, she had the right to build on the banks and bed of the stream and to prevent the water from overflowing her low lands, provided that she did not, by the building or works, back or throw water on the plaintiff's lands or otherwise interfere with the reasonable use and enjoyment by the plaintiff of his lands and of the waters of the stream: Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839. The onus of establishing that the defendant's works or erections backed water on the plaintiff's lands, and thereby caused the flooding and damage or interfered with the plaintiff's riparian rights, was upon the plaintiff: Greenock Corporation v. Caledonian R. W. Co., [1917] A. C. 556; Smith v. Ontario and Minnesota Power Co. Limited (1918), 44 O.L.R. 43, 51; Coulson & Forbes's Law of Waters, 3rd ed., pp. 100 to 104.

The plaintiff failed to convince the trial Judge that any of the damage claimed by him was the result of flooding caused by the erections or works of the defendant.

The evidence was not sufficient to enable the Court to find that these works of the defendant had backed or would back water on the plaintiff's lands, or cause any appreciable change in the natural flow of the waters of the creek as they pass through the plaintiff's lands or cause damage to the plaintiff's land or property.

It was not necessary for the purpose of this appeal to find that the defendant's works might not, in the future, cause damage to the plaintiff or interfere with the flow of the waters through

his lands. It was sufficient to say that the evidence now before the Court did not establish interference or damage or any reasonable apprehension of either.

It was contended for the plaintiff that proof that the grate or bars at the entrance to the defendant's tunnel, and the roof of the tunnel, were erected and maintained in and over the bed of the creek, was sufficient evidence to make out a prima facie case of interference with the plaintiff's right to the natural flow of the waters, and that the onus of shewing that these erections did not constitute injurious obstructions was on the defendant, and Bickett v. Morris (1866), L. R. 1 Sc. App. 47, and Menzies v. Lord Breadalbane (1828), 3 Wilson & Shaw (Sc. App.) 235, were cited; but the case at bar was distinguished from these cases in that the lands of the plaintiff and defendant were shewn to be separated by Market street, and that it does not follow that the erections complained of must necessarily change the flow of the waters on the plaintiff's land, as was the fact in both of the cases cited, the parties to which were owners on opposite sides of a river. See the judgment of Lord Blackburn in Orr Ewing v. Colquhoun, 2 App. Cas. at pp. 853, 856, 857.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 26TH, 1920.

MARKS v. TORONTO R.W. CO.

Negligence—Street Railway—Injury to Child Attempting to Cross Track by Street-car Striking him—Negligence—Failure to Give Warning—Contributory Negligence—Question for Jury—Nonsuit Set aside and New Trial Directed.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE C.J.K.B., at the trial with a jury, dismissing the action, which was brought to recover damages for injuries sustained by the infant plaintiff, a boy between 7 and 8 years old, owing to his having been struck by a moving car on the defendants' railway, and for the loss sustained by the other plaintiff, the boy's father, in consequence of the injury to the boy.

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

J. M. Ferguson, for the appellants.

Peter White, K.C., for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the car by which the boy was struck was proceeding southward on the west track of the respondents' railway in Spadina avenue. Richmond street, which runs at right angles to Spadina avenue, crosses it, though there is a jog of 60 or 70 feet, the part of Richmond street which is west of Spadina avenue being that distance north of the part which lies east of the avenue. The accident occurred about 5 o'clock in the afternoon of the 12th September, 1919. According to the testimony of George Noble, he and some other boys were playing in the vicinity of the crossing; the car by which the injured boy was struck had just been passed by a car moving northward; the boy waited for that car to pass, and when it had passed went on to the west track, and was struck by the car that was going southward on that track. There was also evidence that no gong was sounded or warning given of the approach of the car going south, which was "going at a good speed."

The injured boy said that he looked but did not see the car that was approaching him, and "so I went across." Upon cross-examination he admitted that, when examined for discovery, he had said that he did not look before he went on the track, and said that that was true. There was not necessarily any inconsistency between the two statements. He might have meant by his answer on discovery that he did not look before he went on the east track, and by his statement at the trial that he did look before going on to the west track. The case was withdrawn from the jury because the boy admitted that he did not look, and because the trial Judge thought that negligence could not be imputed to the motorman when he did not look, and when he did look he was too late to do anything. It was apparently conceded upon the argument of the appeal that the view of the trial Judge was that the boy, on his own admission, was guilty of contributory negligence.

It was open to the jury to find that it was negligence on the part of the motorman not to have sounded his gong as he approached Richmond street and in crossing it, and not to have slackened the speed of the car at that point—there was evidence that he did neither.

The accident occurred in a business part of the city of Toronto, at the hour when workmen are leaving work, and the jury might have reasonably concluded that, in such circumstances, a proper regard for the safety of foot-passengers and others lawfully using the highway made it incumbent on the motorman to give warning of the approach of the car.

The boy was so young that at the time of the trial the Judge did not permit him to be sworn. The question of contributory negligence is for the jury, and it was for the jury to say whether, having regard to his age and intelligence, the injured boy had not

exercised that standard of care which might reasonably be expected of him. Even in the case of adults failure to look before crossing a railway track cannot be said as a matter of law to be contributory negligence. Whether or not it was such negligence, having regard to all the circumstances, it was for the jury to say, especially in view of the fact that a car moving in the opposite direction had just passed as the boy went on the west track.

The appeal should be allowed with costs, the judgment set aside, and a new trial directed, and the respondents should pay the costs of the last trial forthwith after taxation.

New trial directed.

FIRST DIVISIONAL COURT. APRIL 26TH, 1920.

*RE McCONKEY ARBITRATION.

Landlord and Tenant—Termination of Lease—Payment by Landlord for "Buildings and Improvements" of Tenant—Fixtures not Removed by Tenant—Construction of Lease—Arbitration and Award—Effect of Opinion of Judge upon Case Stated by Arbitrators—Arbitration Act, sec. 29—Award Following Opinion Expressed—Motion to Set aside Award upon Ground that Opinion Erroneous—Appeal.

Appeal by the Toronto General Trusts Corporation, lessors, from an order of SUTHERLAND, J., 17 O.W.N. 329, refusing to set aside an award dated the 13th October, 1919.

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

E. G. Long, for the appellants.

M. H. Ludwig, K.C., for E. G. E. McConkey, the lessee, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that in making the award the arbitrators followed the opinion of Middleton, J., in Re McConkey Arbitration (1918), 42 O.L.R. 380, given on a case stated by the arbitrators under sec. 29 of the Arbitration Act, R.S.O. 1914 ch. 65.

The appellants did not complain that the arbitrators failed to interpret properly and follow the opinion of Middleton, J.; the appellants maintained that the opinion was wrong; that it

was not a judgment binding on the parties; and, in that the award embodied and followed an erroneous opinion, error appeared on the face of the award; and the award could and should be set aside.

Section 29 of the Arbitration Act is in the same words as sec. 19 of the English Arbitration Act, 1889. The English cases establish that an appeal lies from an award following an opinion expressed under sec. 19: see British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London, [1912] 3 K.B. 128, affirmed in [1912] A.C. 673; also cases collected in White & Stringer's Annual Practice, 1920, p. 2220.

It was not contended for the respondent that the opinion of Middleton, J., was binding upon the parties or that the practice established in England should not be followed.

The appeal was confined to the value of certain articles which the award required the lessors to pay for as "buildings and improvements" under the terms of a covenant in the lease—articles in the nature of fixtures used in the business of a restaurant, such as dumb waiters, refrigerators, sinks, etc.

All of the articles in dispute were attached to the building and were such as would, on a sale of the land, pass to a purchaser: see Stack v. T. Eaton Co. (1902), 4 O.L.R. 335; In re Bedson's Trusts (1885), 28 Ch. D. 523, 525.

The words "buildings and improvements" are wide enough to include tenant's fixtures; and such a meaning is not inconsistent with or repugnant to the other provisions of the lease wherein the word "fixtures" instead of "improvements" is used. "Fixtures" is clearly wide enough to include tenant's as well as landlord's fixtures; and there is nothing in the context or in the circumstances in which the words were used, or in the object for which they were used, which would lead one to think that the parties intended to modify the ordinary meaning and effect of either of the words "improvements" or "fixtures".

The lease was a renewal of a prior long term lease. Such buildings as were on the property had been built by the tenant pursuant to the covenant to build and to maintain upon the premises buildings of a certain value, and the object of the parties was to provide for payment to the tenant of the value of these or such other buildings and improvements as might be erected and "standing" at the expiration of the term.

There was no proviso in the lease requiring the tenant to exercise his right or privilege, if any, to sever from the freehold what would be his fixtures. Even if the lessee had the right under this lease to remove his fixtures, it was a privilege which he could

waive. He had not exercised that right, but had elected to allow these articles to remain as part of the building.

Therefore, on a fair construction of the document, the words "buildings and improvements" included articles in good faith brought upon the demised premises for the purpose of the lessee's business, and so affixed as to form part of the building, whether landlord's fixtures, tenant's fixtures, or trade fixtures, but did not include purely chattel property.

This was the meaning and effect given by the arbitrators to the opinion of Middleton, J., and they rightly awarded that the articles in dispute should be taken and paid for by the lessors.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 26TH, 1920.

*ROUTLEY v. GORMAN AND CORAN.

Principal and Surety—Promissory Notes Endorsed by Surety—Securities Held by Creditor Entrusted to Principal Debtor for Collection—Loss of Securities—Absence of Negligence on Part of Creditor—Evidence—Findings of Fact of Trial Judge—Appeal—Assent of Surety to Course Taken.

An appeal by the defendant Coran from the judgment of MCKAY, Judge of the District Court of the District of Thunder Bay, in favour of the plaintiff for the recovery against both defendants of $1,004.31 and costs, in an action in the District Court upon two promissory notes made by the defendant Gorman in favour of the plaintiff and endorsed by Gorman and Coran. There was also endorsed on each note a memorandum signed by both defendants, "We hereby waive presentment and notice of protest and guarantee payment of the within note."

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

W. A. Dowler, K.C., for the appellant.

W. Lawr, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said, after stating the facts, that the defendant Coran appealed on the ground that he should have been credited with all the moneys found to have been collected by the defendant Gorman, contending that as surety he was entitled to the benefit of all securities held by the creditor, and that he was relieved from liability to the

extent that these securities were lost by reason of the plaintiff placing them in Gorman's hands for collection.

In such a case as this the creditor holds the collaterals for all the parties interested, and is bound to use ordinary diligence in the care of them, and upon payment by the surety to assign them to the surety, and if the creditor has, without the knowledge or consent of the surety, negligently suffered the securities to be diverted from the purpose of the pledge, to the prejudice of the surety's right to be subrogated, the surety will be discharged to the extent of the actual loss: De Colyar on Guaranties, 3rd ed., p. 321; Taylor's Equity, para. 250; 32 Cyc. 217.

The questions for decision seemed to be:—

(1) Was it negligence on the part of the plaintiff to employ Gorman, the principal debtor, as his agent to collect premium notes deposited as collateral security?

(2) Did Coran, the surety, assent to such a course?

Reference to authorities, especially Crim v. Fleming (1884), 101 Ind. 154.

What is reasonable or what is negligent depends on the circumstances adduced in evidence in the particular case. The circumstances here were peculiar. The collateral security consisted of 25 premium notes, for amounts ranging from $16 to $145, all made by foreigners unable to speak English, and all obtained by Gorman, or his sub-agent, Coran. It was not suggested that the plaintiff had any reason to suspect the honesty of Gorman. The nature of the transaction, the character of the notes and the makers thereof, indicated that something out of the ordinary would be required to insure the collection of the notes as they matured, and that it would be advisable, if not necessary, to make use of both Gorman and Coran in effecting collections. There was evidence that, before Coran endorsed the last renewal and the waiver and guarantee, he knew that Gorman was collecting the notes or some of them. In Coran's affidavit, made part of the record, he deposed that he was induced to sign the note on the representation of the plaintiff and Gorman "that no risk or liability would attach to me by so doing, as the notes taken for the insurance would be collected *by them*."

The learned County Court Judge had found that the plaintiff was not negligent; and, after a careful perusal of the evidence and consideration of all the circumstances, the learned Justice of Appeal was not prepared to say that the trial Judge was wrong.

The proper conclusion as to the second question was, that the defendant Coran knew of and acquiesced in the employment of Gorman for the purpose of making the collections.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 26TH, 1920.

*MUSHOL v. BENJAMIN.

Evidence—Corroboration—Claim against Estate of Deceased Person—Ontario Evidence Act, sec. 12—Items of Account—Separate Corroboration for each—Findings of Trial Judge—Appeal.

An appeal by the plaintiff from the judgment of MCKAY, Judge of the District Court of the District of Thunder Bay, whereby, on taking an account between the parties, he found a balance of $1.11 in favour of the defendant, and awarded payment by the plaintiff of that sum and costs.

The plaintiff was the administrator of the estate of Elias Benjamin, deceased; the defendant, a brother of the deceased. The plaintiff claimed $800 for money lent by the deceased to the defendant, and the defendant counterclaimed for money collected for him by the deceased.

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

W. A. Dowler, K.C., for the appellant.

W. Lawr, for the defendant, respondent.

FERGUSON, J. A., reading the judgment of the Court, said that the findings of the County Court Judge were as follows: The defendant, on the 29th April, 1913, advanced to Elias Benjamin $276.11 and authorised him to collect $750 and interest due under an agreement for sale between the defendant and one Owens, which the deceased did collect. Jons Mushol owed the defendant $100 and paid that amount to the deceased. Sargis Yuman paid the deceased $150 for the defendant. The deceased received at least $1,276.11 from the defendant, besides interest. He remitted to the defendant a total of $1,275. It was not clear that George Jacob paid $100 to the deceased. The deceased probably paid an instalment of $107 due on a lot purchased by the defendant. The letter of the deceased enclosing the last $300 to the defendant indicated that the deceased did not expect the defendant to repay any portion of the amount therein enclosed. The plaintiff's claim should be allowed for $1,275 and the defendants counterclaim or set-off for $1,276.11, leaving a balance of $1.11 due to the defendant.

The appellant accepted the finding in reference to the item of $750.

The Court, at the hearing, disposed of the items of $100 and $150 allowed to the defendant, being of opinion that the defendant's

testimony as to them had been sufficiently corroborated as required by sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76, but reserved for further consideration the question of the sufficiency of the corroborative evidence in reference to the item of $276.11.

The trial Judge believed the defendant's story that, when he left Canada in April, 1913, he had transferred his balance in a private bank to his brother, the deceased Elias, and appointed him his agent to collect certain moneys that were owing to him, but he did not find that the amount of the bank-account was $600, as the defendant at first asserted. The Judge found that it was only $276.11, and allowed that sum.

Reference to Thompson v. Coulter (1903), 34 Can. S.C.R. 261, 264; Voyer v. Lepage (1914), 7 W.W.R. 933; McGregor v. Curry (1914), 31 O.L.R. 261, 270.

The learned trial Judge believed the defendant; his testimony was corroborated on all the other items of the account; the cheques and papers produced by the private bankers supported the defendant's testimony that he transferred the moneys standing to his credit to the deceased, and so dovetailed with the other circumstances surrounding the dealings of the two brothers as to add materially to the other evidence corroborating the defendant's whole story. The defendant's claim as to this item could not and should not be separated from and considered without reference to the other items of his claim—the evidence corroborative of his story should be considered as a whole: see Voyer v. Lepage, 7 W.W.R. at p. 937.

Even if this item were separated from the others and from the evidence and circumstances corroborating them, yet the books and records produced by the private bankers furnished evidence which could and should aid the Court in arriving at the conclusion that the defendant's story was to be believed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 30TH, 1920.

F. E. SMITH LIMITED v. CANADIAN WESTERN STEEL CORPORATION LIMITED.

Contract — Breach — Ear-marked Goods — Waiver — Injunction — Interim Order—Appeal.

Appeal by the defendants from the order of LOGIE, J., ante 160, granting an interim injunction and giving directions for a speedy trial of the action.

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

G. H. Sedgewick, for the appellants.

T. N. Phelan, for the plaintiffs, respondents.

THE COURT allowed the appeal and set aside the injunction order; costs of the motion and appeal to be costs to the defendants in the cause.

HIGH COURT DIVISION.

LENNOX, J. APRIL 26TH, 1920.

*ROTMAN v. PENNETT.

Damages—Breach of Agreement for Lease of Premises—Infirmity of Title of Lessor—Bona Fides—Measure of Damages—Proper and Necessary Legal Expenses—Costs.

Action for $5,000 damages for breach of the defendant's agreement to grant the plaintiffs a lease for 5 years from the 1st September, 1919, of a store and premises in the town of Smith's Falls.

The action was tried without a jury at Brockville.

H. A. Stewart, K.C., for the plaintiffs.

H. A. O'Donnell, for the defendant.

LENNOX, J., in a written judgment, said that the defendant admitted at the trial that the written agreement, though very informal, was sufficient to satisfy the Statute of Frauds.

The defendant submitted that she was unable to carry out her agreement with the plaintiffs, by reason of a subsisting lease to one Johnston, who refused to give up possession, and that she was, if liable in damages at all, liable only for any expenses the plaintiffs had incurred for solicitor's charges and disbursements in preparing to carry out the agreement.

The learned Judge was of opinion that the defendant's contention was well-founded.

The plaintiffs gave evidence to shew that, relying upon the agreement, they had purchased greater quantities of goods than they otherwise would have done, and were compelled to handle them in adjoining store premises, which they also held under a lease, at a disadvantage and without sufficient room for convenient

handling or proper display. They gave evidence of their "turnover" and of the better facilities available in the defendant's store, but no evidence of having made profits in past years, or that they would make profits in the defendant's premises.

The plaintiffs' counsel relied upon Coe v. Clay (1829), 5 Bing. 440, 30 R.R. 699; Wallis v. Hands, [1893] 2 Ch. 75; Mayne on Damages, 5th ed., p. 702; and Marrin v. Graver (1885), 8 O.R. 39.

Assuming that in an action such as this a plaintiff may sometimes recover for loss of profits as special damages, and assuming, without admitting, that the plaintiffs here could recover for loss of profits, if the defendant wilfully refused to carry out her agreement, the plaintiffs would not be advanced if the decisions as to the measure of damages where the default is owing to infirmity of title govern the decision of this case. In the learned Judge's opinion, they do govern. The utmost that the plaintiffs could have established a right to recover by way of damages are their proper and necessary preparatory legal expenses.

All the parties to the agreement believed that Johnston's lease could be terminated by a month's notice from the defendant, but they were all mistaken. The defendant acted in good faith.

Reference to Bain v. Fothergill (1874), L.R. 7 H.L. 158; Gas Light and Coke Co. v. Towse (1887), 35 Ch. D. 519; Rowe v. School Board for London (1887), 36 Ch. D. 619, 623.

A sum of $45 was paid into Court by the defendant. To that sum and the interest accrued thereon, the plaintiffs were entitled, and they should recover $10 in addition, for the expenses referred to. There should be judgment for the plaintiffs for $55 with Division Court costs, and for the defendant for her costs upon the scale of the Supreme Court, the amount allowed to the plaintiffs to be applied on the defendant's costs.

[See also McCune v. Good (1915), 34 O.L.R. 51.]

MIDDLETON, J. APRIL 26TH, 1920.

RE CHAUVIN.

Deed—Construction—Conveyance of Land—Remainder after Grant in Fee Simple—Repugnancy.

Motion by Arthur Chauvin, upon originating notice, for an order determining the construction of a certain deed of conveyance of land.

The motion was heard in the Weekly Court, Toronto.
D. B. Sinclair, for Arthur Chauvin.
I. F. Hellmuth, K.C., for Alphonse Chauvin

MIDDLETON, J., in a written judgment, said that, by the conveyance in question, Alexander Chauvin, on the 2nd February, 1911, conveyed the lands in question to Arthur Chauvin in "fee simple," in pursuance of the Short Forms of Conveyances Act; habendum to the grantee, his heirs and assigns, to and for his and their sole and only use for ever, subject to certain conditions. These conditions provided for the maintenance of the grantor and his wife, and then followed: "and that the said party of the third part have not the privilege to mortgage or dispose of said premises without the consent of the said parties of the first and second part, and if the said party of the third part die without leaving any living children the said premises become by the fact the property of Alphonse Chauvin the grandchild of the parties of the first and second part."

This is followed by the provisions looking to the payment of legacies to other relatives of the parties. There is also provision that upon default of the grantee complying with his obligations the grantor may re-enter, and the deed shall be null and void.

The grantor is now dead.

The grantee claims to be the owner in fee free from any estate or interest on the part of Alphonse.

His contention is right; the case is one falling within the rule that there can be no remainder after a grant in fee simple. Had the provision been found in a will, then Alphonse might have taken in the event contemplated under an executory devise; but, the provision being found in a conveyance, it is void.

The costs of the Official Guardian must be paid by the applicant.

MIDDLETON, J. APRIL 27TH, 1920.

RE WILSON.

Will—Construction—Distribution of Estate among Children and Grandchildren—Several Periods for Distribution Fixed by Will—Grandchildren Surviving their Parents—Vested Estates—Right of Executors of Grandchild—Power of Appointment.

Motion by the trustees under the will of C. S. Wilson, deceased, for an order determining questions as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.

J. H. Bone, for the trustees.

F. W. Harcourt, K.C., Official Guardian, for infants.

MIDDLETON, J., in a written judgment, said that, as he read the will, the intention of the testator could be gathered from the document itself without resorting to case-law.

By clauses 28 to 34, the testator directed divisions to be made 5, 10, 15, 20, and 21 (or 25) years after his death—such divisions to exhaust his estate. Each division was directed to be "among my said four children share and share alike." In clause 35 the testator provided for substitutional gifts to the issue of any child who might die—realising that the death of all his children during the term of "the 4th trust" was to be expected. In fact the clause so stated: "As all my children will die before the final and complete subdivision of my estate," it is my will, etc.

The provision made applies to the state of affairs found to exist at each period of division. If the child is alive, it takes. If the child is dead, then the share is to be divided among that child's children; and, if any of those children have died during the parent's life, the issue of such grandchild shall take; but, if there is no issue of the grandchild who dies in its parent's life, that share goes into the residue and goes for the benefit of all beneficiaries, and does not go to benefit its brothers and sisters. There is no such provision in the case of grandchildren who survive their parents. All such take vested interests; and, if any one of them dies, his executor or administrator will take.

The case now arising was that of the share of C. A. Wilson, a son of the testator's son Herbert Charles Wilson, who died on the 17th December, 1909. C. A. Wilson died on the 3rd June, 1916, testate, and his will had been duly proved. In the learned Judge's view, the executors of C. A. Wilson should take.

All this was based on the fact that the son H. C. Wilson did not exercise the power of appointment given by clause 51 of the will. His will was produced, but it was not shewn that there was no appointment by deed. This should be proved if more than a general interpretation of clause 35 was sought.

Costs out of the estate. These may be fixed in the order.

MIDDLETON, J. APRIL 28TH, 1920.

RE SMITH AND LOVE.

Will—Construction—Devise of Land to Son "and at his Decease to his Surviving Children as he may Devise"—Gift over in Event of Death of Son without Issue—Issue of Son Living—Estate Tail in Son.

Motion by Ebenezer Smith, a vendor of land, under the Vendors and Purchasers Act, for an order determining the validity or invalidity of an objection to the title raised by the purchaser.

The motion was heard in the Weekly Court, Toronto.

D. O. Cameron, for the vendor.

C. H. Porter, for the purchaser.

F. W. Harcourt, K.C., Official Guardian, representing a class of absentees.

MIDDLETON, J., in a written judgment, said that Ebenezer Smith died on the 19th January, 1887. By his last will, dated the 13th January, 1887, he gave to his son Ebenezer the lands in question—"and at his decease the said homestead shall go to his surviving children as he may devise but should he die without issue the said real estate shall be equally divided between John George Smith, Oliver and John Smith, my brothers, and Mary Ann Corbett, my sister, share and share alike, and in the event of any of them dying the share of such as may be dead shall be inherited by his or her surviving children, share and share alike, at their majority." These brothers and sisters are dead, and it is said that their children cannot now be found. The Official Guardian has been appointed to represent this class.

At the time of the will and of the testator's death, Ebenezer was an unmarried man; he has since married and has issue, a son and a daughter, the daughter being married and having now four living children, so that it is not at all likely that he will die without issue.

Under the rule in Wild's Case (1599), 6 Co. Rep. 17, the devise to Ebenezer confers upon him an estate tail. The only question that appears to present any difficulty is the power of appointment by which he may direct that the whole property may go to any one or more of his children; but it appears to be clearly settled that this does not prevent the operation of the rule: see Clifford v. Koe (1880), 5 App. Cas. 447. In that case, Lord Selborne, after pointing out that the rule in Wild's Case is based upon the theory that the gift is an estate tail, in which the children can

take and will take only by way of concession to the parent, adds (p. 458): "A power, therefore, which contemplates that very state of things, which contemplates that the parent will remain in possession until his death, and that any control over the succession which is given to him may be exercised by his will, is not only not repugnant to the rule in Wild's Case, but it is most plainly consistent with it."

There should be a declaration that vendor can, by an appropriate conveyance, bar the entail and make a good title.

There should be no order as to costs, save that the applicant pay the costs of the Official Guardian.

LENNOX, J. APRIL 29TH, 1920.

RE DUNLOP AND ELLIOTT.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Building Restrictions—Severance of Tenement—Erection of Garage on Northerly Half—Right of Access through Southerly Half—Easement—Way.

Motion by Dunlop, a purchaser of land, under the Vendors and Purchasers Act, for an order declaring that certain objections to the title of the vendors, Elliott and Brown, were valid and sufficient.

The motion was heard in the Weekly Court, Toronto.

H. H. Shaver, for the purchaser.

W. H. Ford, for the vendors.

LENNOX, J., in a written judgment, said that in the agreement for sale there was no reference to restrictive covenants. Lot 47, a part of which was the subject of the contract, was a corner-lot, bounded on the south by Rosemount street, and having a frontage on Lauder avenue of 49 feet 1½ inches. Armstrong and Cook registered the plan, and on the 7th September, 1915, conveyed lot 47 to Anderson, subject to three restrictions: (1) No building was to be erected on the land other than brick, stone, or concrete, and any building erected was to be used as a private residence only; private residences (except necessary outbuildings) were to be detached and at least two storeys high and to cost at least $2,000. (2) No residence was to be erected nearer than 20 feet to the street-line, and no garage or outbuilding was to be nearer than 80 feet to the street-line, and no light board fence was to

be built nearer than 20 feet to the street-line. (3) Each residence (together with its private grounds) was to occupy an area of not less than 24 feet frontage by the full depth. The vendee (Anderson) was to have the privilege of building not more than two detached houses on the lot, provided that he carried out the restrictions, which were to terminate on the 30th April, 1925.

Elliott and Brown, the present vendors, were not the owners of the northerly 24 feet of lot 47. There was a brick garage on the south-east corner of the northerly area, and the owner of that part of the property had the right to use a way, 9 feet in width, from Rosemount street to the garage over the rear end of the southerly portion of lot 47—the property in question.

There was no suggestion that the terms of the first restriction had not been complied with. The second applied only to distances from Lauder avenue.

The purchaser strenuously objected to the right of way, and insisted that its existence was contrary to the provisions of the third restriction.

The learned Judge said that the purchaser had no ground for complaining of the right of way, as an incumbrance or servitude, for he expressly agreed to take the property subject to the way. He could not complain that, by reason of the existence of the restriction, he would be impeded or interfered with in the enjoyment or exercise of any right or advantage he expected to have. If the restriction was operative at all in regard to the right of way, it would operate to deprive the owner of the garage of the right of access, and so enure to the benefit of the purchaser by eliminating a servitude in respect of which he must be presumed to have obtained a reduction in purchase-money.

Restriction No. 3 is not to be read as prohibiting the user of lot 47 in the way proposed. The sole purpose of all the restrictions was to prevent the user of lot 47 in a way to destroy or impair its character as a residential property. The erection of two dwellings was contemplated, and they were both to front on Lauder avenue, for only in this way could each have an allotment of land from front to rear with 24 feet frontage. There was nothing to prevent the erection of a garage—as conditions are, a practicably indispensable requirement—for the accommodation of each dwelling; and there was nothing to prevent a severance of ownership such as had occurred. It was a manifest physical necessity that the owner or occupant of the northerly half should have access to his garage over the southerly half.

The objections made could not be sustained. The question raised, however, was debatable and novel. The motion should be dismissed without costs.

MIDDLETON, J. APRIL 29TH, 1920.

RE SMALL.

Will—Construction—Devise of Dwelling-house—Bequest to Devisee of all Testator's Furniture and other Articles of Household Use—Articles in House other than one Devised, Included—Motor-boat Used in Connection with other House not Included—Boat not Necessary for Occupation of House Devised—Residuary Clause—Costs.

Motion by the executors of the will of John Turnbull Small, deceased, for an order determining a question arising as to the construction of the will.

The motion was heard in the Weekly Court, Toronto.
J. W. Carrick, for the executors and adults interested.
F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that the testator gave his residence in the city of Toronto to his brother, and also gave him "all my furniture, plate, plated goods, linen, glass, china, books, manuscripts, pictures, prints, musical instruments, and all other articles of personal, domestic, or household use or ornament not otherwise disposed of." The testator, in addition to his city residence, owned a summer house on Toronto Island. It was conceded that all articles of the description above quoted passed to the brother, even if found at the summer residence.

The question was, whether a motor-boat, owned by Mr. Small and used by him in connection with his summer residence, passed under this gift.

Reliance was placed upon the decision of Younger, J., in In re White, [1916] 1 Ch. 172, where the words of the bequest were practically identical with the words of the gift here, save that they had added to them, "and all my horses, carriages, harness, saddlery and stable furniture." It was there held that a motor-car, which the testator had purchased after the date of his will, having then sold all his horses and carriages, did not pass under the gift of carriages, but did pass under the gift of "furniture . . . and all other articles of personal, domestic, or household use or ornament;" the reason given being that from the words of the will he drew "an intention that the legatees should have all the effects necessary to enable them to occupy the house in the same state as the testator had done."

The present case was entirely distinguishable, without any attempt to contrast a motor-boat and an automobile, upon the

very ground upon which the decision in In re White was based. Had this been a gift of the Island house, it might well have been argued that the motor-boat was necessary to enable the devisee of that house to occupy it as it had been used by the testator in his lifetime; but the motor-boat in no sense was in any way pertinent to or used for the enjoyment of the city residence.

The learned Judge preferred to follow the decision of Latchford, J., in Re Greenshields (1914), 6 O.W.N. 303, that an automobile did not pass under words indistinguishable from those now in question, and that other articles of household use and adornment must be held to relate to things *ejusdem generis* with those specifically enumerated—plate, linen, glass, books, etc. The motor-boat fell, like the summer residence, into the residuary gift; and this appeared to be in accordance with the testator's intention. The residuary clause was not a mere sweeping up of unconsidered trifles, but was intended to carry the summer residence, and it was most improbable that the intention was to separate the boat from it.

The executors should have their costs out of the estate, and so should the Official Guardian, but other costs should not be awarded against those who succeed, which would be the effect of a direction to pay them out of the estate.

LENNOX, J. APRIL 30TH, 1920.

BROWN v. COLEMAN DEVELOPMENT CO.

Judgment—Report of Official Referee—Reference for Trial of Action—Necessity for Motion for Judgment—Judicature Act, secs. 65, 67—Costs.

Motion by the plaintiff for judgment on the report of J. A. C. CAMERON, an Official Referee.

The motion was heard in the Weekly Court, Toronto.
D. C. Ross, for the plaintiff.
W. J. McCallum, for the defendant Gillies.

LENNOX, J., in a written judgment, said that what the plaintiff sought was an order for judgment. The motion was opposed only upon the ground that it was unnecessary—primarily a question of costs—but, as a large amount was involved, and the title to land might ultimately depend upon or be affected by the regularity

and validity of the proceedings, the question raised was decidedly of consequence.

The action was brought to recover wages and moneys claimed to have been paid for the defendants at their request. On the 5th January, 1914, counsel for all parties consenting, an order was made referring the action "for trial to George Kappele, Esquire, Official Referee." The order also provided: "And this Court doth reserve further directions and the question of costs until after the said Referee shall have made his report."

After hearing part of the evidence, Mr. Kappele died; and thereupon, on the 21st October, 1914, with the like consent, an order was made, in similar terms, referring the action to Mr. Cameron, and directing that the evidence already taken be used on the trial. These orders were made under sec. 65 of the Judicature Act.

Mr. Cameron disposed of the questions to him referred as follows: "There will be judgment against the defendant Gillies for $7,000, with interest from the 17th of April, 1908. The plaintiff is also entitled to costs as against the defendant Gillies. The action will be dismissed against the defendant company without costs." Although in form a judgment rather than a report, the learned Judge regarded it as in effect a report.

On the 25th June, 1915, Middleton, J., set aside the report, and directed judgment to be entered in another way: Brown v. Coleman Development Co. (1915), 34 O.L.R. 210. On the 29th December, 1915, a Divisional Court of the Appellate Division set aside the order of Middleton, J., restored the report and finding of Mr. Cameron, the Official Referee, and gave the plaintiff the costs of both appeals: Brown v. Coleman Development Co. (1915), 35 O.L.R. 219. This judgment was affirmed upon appeal to the Supreme Court of Canada, with costs: Gillies v. Brown (1916), 53 Can. S.C.R. 557.

Entry of judgment for the plaintiff was not in terms directed by either the Divisional Court or the Supreme Court of Canada.

The learned Judge was of opinion that the plaintiff's motion for judgment was now proper and necessary.

Reference to Holmested's Ontario Judicature Act, p. 228.

Section 67 of the Judicature Act provides that "the Referee shall make his findings and embody his conclusions in the form of a report, and his report shall be subject to all the incidents of a report of a Master on a reference as regards filing, confirmation, appealing therefrom, motions thereupon and otherwise, including appeals to a Divisional Court."

"An Official Referee has no power to order judgment to be entered. The report must be brought before the Court on motion for judgment, when the Court will give judgment as formerly in

Chancery upon the report of a Master:" Holmested, pp. 232-3, citing Murphy v. Corry (1906), 12 O.L.R. 120, and other cases.

There should be judgment for the plaintiff as provided for by the report of the Referee, together with the costs directed to be paid by the Divisional Court and the Supreme Court of Ca ıada, and the costs of the motion.

MIDDLETON, J. APRIL 30TH, 1920.

HUNT v. HUNT.

Husband and Wife—Separation Agreement—Action by Wife to Set aside—Improvidence—Lack of Independent Advice—Alimony—Desertion—Quantum of Allowance—Costs.

Action by a married woman against her husband to set aside a separation agreement made on the 7th November, 1919, and to recover alimony.

The action was tried without a jury at Brantford.

S. Alfred Jones, K.C., for the plaintiff.

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

MIDDLETON, J., in a written judgment, said that the defendant went overseas in 1916, and on his return in 1919 found that his wife had been unfaithful. She admitted her guilt, and after much discussion there was a reconciliation and condonation, and he took her to live with his parents. Things did not go well, and, as a result of repeated quarrels, she left him, and he refused to take her back. She instituted police court proceedings, and he advertised his refusal to be responsible for her debts.

On the 7th November, 1919, an arrangement was made by which she agreed to drop the police court proceedings and to consent to a separation agreement, stipulating for the custody of her child (by her husband) and an expected unborn child, in consideration of a payment to her of $5 a week from that time on until six weeks after the birth of the expected child. The agreement was executed accordingly.

There was no fraud or duress or misrepresentation as to the effect of the agreement; but, in the circumstances disclosed, it ought not to stand. The wife was impecunious, expecting the birth of another child, and anxious to keep her elder child. She was ashamed of the situation and afraid of the revelation of her misconduct in the police court. The bargain made released her

husband from all his matrimonial obligations, and imposed upon her the full burden of the upbringing of both children, in consideration of the payment of a trifling sum.

Some principle is to be applied to agreements such as this entirely different from ordinary contracts. The agreement was drawn up hurriedly, signed apparently without further reflection and without real understanding of the effect, and without any independent advice. In the circumstances, it ought not to preclude the wife from asserting her rights.

The expected child was born in February, earlier than the date which had been mentioned; but the learned Judge found that the defendant was the father of it.

The wife sought to establish a waiver of the separation agreement by subsequent cohabitation; but the learned Judge found against her on that issue, and also on the specific matters which she set up as justifying her leaving her husband.

The husband's conduct, on the other hand, amounted to desertion, and the wife was entitled to alimony.

As the plaintiff has to maintain her two children, the alimony should be fixed at $10 a week, which is more than the usual proportion of the husband's income, $25 a week: it is not possible for the woman to maintain herself and her two children for less.

The learned Judge suggested that the solicitors should fix their costs at a sum within the defendant's power to pay.

ROSE, J. APRIL 30TH, 1920.

DEVANEY v. MCNAB.

Way—Easement—Interference with Right of Way—Fire-escape Overhanging Lane—Absence of Present Inconvenience—Apprehended Inconvenience in Future—Damages—Injunction.

Action by the executors of the will of John Albert Devaney, deceased, to recover damages for and an injunction against the obstruction of a way.

The action was tried without a jury at a Toronto sittings.

R. U. McPherson, for the plaintiffs.

R. S. Robertson, for the defendant.

ROSE, J., in a written judgment, said, after setting out the facts, that in Devaney's lifetime, a building at the corner of Bloor and Bathurst streets, in the city of Toronto, was used as an hotel. It extended northerly from Bloor street not more than 100 feet;

north of it, and fronting on Bathurst street, was a frame stable or barn used in connection with the hotel; and the principal purpose in securing the right of way now in question, or in stipulating for a way 20 feet wide, was to insure access to this stable for loads of hay, etc., coming down a public lane from London street or from Markham street.

The defendant had recently purchased the westerly 50 feet of lots 1, 2, and 3, and had erected thereon a brick theatre fronting on Bloor street. The northern wall of this theatre coincided with the southern limits of the public lane and of the westerly part of the land over which the plaintiffs have their right of way. On this northern wall the defendant had put two iron fire-escapes. One of these was the subject of dispute in this action. It overhangs the land over which the right of way exists, projecting 3 feet 4½ inches from the wall.

The way in question is now used by the plaintiffs in bringing in fuel for the heating of apartments over Bathurst street shops, which replaced the hotel, and by the tenants of these apartments in bringing in their furniture. It is also used to some extent by the tenants of the plaintiffs' Bloor street shops and apartments.

There is no present inconvenience from the fire-escape, but the plaintiffs suggested future inconvenience. These suggestions the learned Judge considered far-fetched and unlike what were considered in Sketchley v. Berger (1893), 59 L.T.R. 754.

The learned Judge said that he had come to the conclusion that there was no interference with the easement granted, or, to use the language of Cockburn, L.C.J., in Hutton v. Hamboro (1860), 2 F. & F. 218, practically and substantially the right of way could be exercised as conveniently as before, and the plaintiffs had lost nothing by the alteration made by the defendant.

Obviously it was not a case for damages, because the plaintiffs had not suffered any loss; and it was not a case for an injunction because it is highly improbable that they ever will be inconvenienced in the slightest degree by the fire-escape. They say that they ought to have an injunction because it is possible that in some way they may in the future suffer some inconvenience, and when the inconvenience does arise they may be held to have lost by acquiescence their right to object. But, the plaintiffs having brought this action, there is not the slightest danger of its being held that they have acquiesced in any interference with the right of way, unless and until, the fire-escape proving to be an interference, they desist from objecting. An injunction which will harm the defendant ought not to be granted for the sake merely of protecting the plaintiffs against some future interference with the exercise of their right of way, which they apprehend, but which it is difficult to believe will ever take place.

Action dismissed with costs.

LENNOX, J., IN CHAMBERS. APRIL 30TH, 1920.

REX v. WILLISON.

Criminal Law—Procedure—Motion to Quash Police Magistrate's Conviction for Vagrancy—Rules of 1908 Made pursuant to Criminal Code—Rule 1285—Motion not Made Returnable within 6 Months after Conviction—Fatal Objection.

Motion by Barbara E. Willison to quash a conviction recorded against her by George T. Denison, Police Magistrate for the City of Toronto, for vagrancy.

The defendant, in person.
T. P. Brennan, for the magistrate.

LENNOX, J., in a written judgment, said that several preliminary objections were taken, the most formidable being that the motion was too late. Rule 1285 (Rules of 1908, made pursuant to the Criminal Code, and printed in Appendix II. to vol. 16 O.L.R.) provides that "the motion shall not be entertained unless the return-day thereof be within 6 months after the conviction . . . , or unless the applicant is shewn to have entered into a recognisance with one or more sufficient sureties in the sum of $100 . . . or . . . to have made the deposit of the like sum of $100, with the Registrar of the Court," etc.

If the motion had been made within the time limited, the applicant might probably have been relieved to the extent of allowing her to give the necessary security now, and a proper endorsement of the notice of motion, within the provisions of Rule 1281, might now be made; but, the motion being late, there was no help for the applicant. Rule 1285 is clearly prohibitive if the notice of motion is not made returnable within six months.

The motion should be dismissed, but there should be no costs.

MIDDLETON, J., IN CHAMBERS. MAY 1ST, 1920.

WILLISON v. WARD.

Malicious Prosecution—False Imprisonment—Action for—Conviction Standing Unreversed—Dismissal of Action as Frivolous and Vexatious—Misconduct of Solicitor.

Motion for an order dismissing the action, on the ground that it was frivolous and vexatious.

S. W. Graham, for the defendants.
The plaintiff, in person.

MIDDLETON, J., in a written judgment, said that the plaintiff sued in person. She was convicted as a vagrant, and served her sentence of 3 months' imprisonment. The conviction stood, and it afforded a complete answer to an action such as this, wherein damages for malicious prosecution and false imprisonment were claimed. The action must be dismissed as frivolous and vexatious and because the statement of claim shewed no cause of action.

The learned Judge delayed making this order to allow the plaintiff, if she so desired, to obtain legal advice and ascertain if she had any real grievance and any possible remedy. No application had been made on her behalf, and the order must go dismissing the action with costs.

The technical language of the pleading indicated that the plaintiff had some professional assistance. Any barrister or solicitor preparing for a suitor in person a pleading which he must know is vexatious and shews no cause of action, is guilty of serious misconduct.

MIDDLETON, J. MAY 1ST, 1920.

GORDON v. ADAMSON.

Infant—Custody of Illegitimate Child—Right of Mother—Abandonment—Adoption of Child by Strangers—Welfare of Child—Finding of Judge upon Oral Evidence.

Issue as to the custody of an illegitimate child, tried without a jury at a Toronto sittings.

J. E. Lawson, for the plaintiff.
W. K. Murphy, for the defendant.

MIDDLETON, J., in a written judgment, said that the issue arose out of an application upon habeas corpus, which came before RIDDELL, J., who directed the trial of an issue, upon oral evidence.

The plaintiff, the mother, affirmed her right to the custody as against the present custodian, the defendant, who received the child when very young from its father.

The plaintiff is now the wife of another man. She is a white woman, while the father of the child and the plaintiff's husband are both negroes.

The defendant and her husband, both negroes, have adopted the child, who is coloured, and the child has a good home with them.

The plaintiff, as the mother of an illegitimate child, would, unless precluded by her own conduct, be entitled to possession of the child.

As the result of much anxious thought, the learned Judge had come to the conclusion that the child ought to be allowed to remain with the defendant. The responsibility of taking the child from a home where its future is certain as far as anything can be, and handing it over to the mother, is too great. It may fairly be said that she has waived her right by the practical abandonment of the child. The father had no right whatever to it, and the defendant cannot succeed by virtue of any right derived from him.

Where a parent has voluntarily parted with the possession of a child, much less need be shewn by way of misconduct or unfitness to justify the refusal of the Court to restore it to the parent's custody than it would be necessary to establish in order to justify a removal from the parent's custody: see Regina v. Gyngall, [1893] 2 Q.B. 232.

The finding upon the issue should be that the plaintiff is not entitled to have the custody of the child awarded to her as against the defendant.

The learned Judge, if he had power over the costs, would award none to or against either party.

The plaintiff should have the right to see the child at stated times.

She ought seriously to consider the wisdom of her allowing the child to be brought up by the Adamsons as their own child, without any knowledge of its origin—such a sacrifice is due to the child.

WILLETT v. MCCARTHY—LENNOX, J.—APRIL 27.

Deed—Conveyance of Land (Farm Lot)—Covenant for Quiet Possession Free from all Incumbrances save as Mentioned—Recital of Agreement for Sale of Standing Timber upon North Half of Lot—Agreement in Fact Covering Part of South Half—Vendor Standing by Agreement—Claim for Reformation of Deed—Breach of Covenant—Damages—Reference.]—Action for damages for breach of a covenant. The action was tried without a jury at Barrie. LENNOX, J., in a written judgment, said that the defendant, in consideration of the payment of $6,000, conveyed to the plaintiff, by deed of the 20th May, 1918, lot 91 in the 1st concession of Tay, containing 200 acres, subject to a certain agreement for the sale of all the standing timber on the north half of the lot, made between

the defendant and one Chew. This agreement was not in fact limited to the north half of the lot, but covered the timber and trees upon a portion of the south half lying north and west of a diverted highway or "given road." The defendant stood by his sale to Chew, notwithstanding his deed to the plaintiff. The onus was upon the defendant to shew why he should not be bound by his deed. The defendant endeavoured to shew that he and the plaintiff both understood that by the north half of the lot was meant the part north of the "given road," but the learned Judge was of opinion that no case was made for reformation. The defendant in the deed covenanted for quiet possession free from all incumbrances "save as aforesaid," and released all his claims upon the land. After a careful examination of the evidence, the learned Judge found that there had been a breach of the defendant's covenant, declared that the plaintiff was entitled to damages, directed a reference to the Local Master at Barrie to ascertain the amount, and directed that judgment should be entered for the plaintiff for the amount found by the Master with costs of the action and reference. Frank Denton, K.C., and F. W. Denton, for the plaintiff. W. A. Boys, K.C., and D. C. Murchison, for the defendant.

CLARKSON v. O'BRIEN—LENNOX, J.—APRIL 28.

Appeal—Findings of Referee—Evidence.]—Appeal by the defendants from the report of J. A. McAndrew, an Official Referee, upon a reference to him for trial of the action. The appeal was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that the appeal involved a very considerable sum of money, and the disposal of it was a matter of serious consequence. He had given it earnest consideration, with the result that he could not say that the conclusions of the learned Referee were wrong. The appeal should, therefore, be dismissed with costs. W. N. Tilley, K.C., and Harcourt Ferguson, for the defendants. R. S. Robertson and G. H Sedgewick, for the plaintiff.

CLARKSON v. DAVIES (TWO ACTIONS)—ORDE, J., IN CHAMBERS—APRIL 30.

Stay of Proceedings—Motion to Stay Second of two Actions—Refusal to Stay—Directions as to Trial—Practice.]—Motion by the defendants Dunn and Crawford to set aside the writ of summons and statement of claim in the second action and to stay

all proceedings therein. See Clarkson v. Davies (1920), ante 62, 125. ORDE, J., in a written judgment, said that all the points made by counsel for the applicants were, in his (the learned Judge's) opinion, matters to be determined by the trial Judge, and should not be dealt with on this motion. The second action was not of such a character that it ought to be stayed pending the completion of the trial of the first action. Merely to stay the second action would probably result in the very thing of which counsel for the applicants complained, that is, a second trial involving substantially the same issues as the first. And it would be obviously unjust to grant a perpetual stay of the second action. Substantial justice to all parties would be secured by directing that the second action be tried immediately after the conclusion of the trial of the first action, but reserving power to the trial Judge to direct that the two actions may be tried together or that such evidence as may be common to both actions shall be taken at the same time, as the trial Judge may see fit; and it should be so ordered. The costs of both motions should be costs in the cause, to be dealt with as the trial Judge may see fit. J. H. Fraser, for the applicants. J. W. Bain, K.C., and M. L. Gordon, for the plaintiff. J. M. Godfrey, for the defendant Deacon. J. J. Maclennan, for the defendants Galbraith and Lytle.

MILLER v. HUNT—LATCHFORD, J.—MAY 1.

Contract—Building Contracts—Amount Due to Contractor—Amount Overpaid to Contractor—Claim and Counterclaim—Evidence—Findings of Fact of Trial Judge—Dismissal of Contractor—Justification.]—The plaintiff's claim was upon two contracts, each for the erection of a dwelling-house for the defendant—one in Hillsdale avenue and the other in Stibbard avenue—and for $300 for the preparation, at the defendant's request, of floor-plans for a third house. The defendant counterclaimed for moneys overpaid the plaintiff. The action and counterclaim were tried without a jury at a Toronto sittings. LATCHFORD, J., in a written judgment, said that the plaintiff alleged that no amount was agreed to be paid in respect of the building in Hillsdale avenue; but that he was to be paid the reasonable value of the material, labour, and services supplied and rendered, and a fair profit for himself. The learned Judge finds, on the evidence, that the contract for the Hillsdale avenue house was for an amount certain —$4,200. There were some extras, which brought the amount up to $4,340. The defendant paid to the plaintiff and to creditors of the plaintiff sums aggregating $4,788.55, or $448.55 in excess

of the sum properly payable. The plaintiff left unpaid accounts for materials to the amount of $541.31. The house in Stibbard avenue was begun before that on Hillsdale avenue was completed. There was a contract for the erection of this house for $4,700. The work proceeded slowly and the part of it that was done was defective both in materials and workmanship. The defendant dismissed the plaintiff's workmen, and proceeded himself to complete the building. The learned Judge finds that the plaintiff was justified in what he did. It was impossible to determine that any sum was due to the plaintiff on that building. The plaintiff claimed to have expended about $70 more than he received, but the defendant's loss must be far in excess of that amount. For the floor-plans of the third house, the plaintiff should have $40. In the result, the action should be dismissed with costs, and the counterclaim allowed for $408.55 with costs. Erichsen Brown and P. Home, for the plaintiff. A. C. Heighington and G. H. Shaver, for the defendant.

CORRECTION.

In ERNST BROS. CO. v. CANADA PERMANENT MORTGAGE CORPORATION, ante 136, 7th line from top of page, "LOGIE, J." should be "ORDE, J."