The
Ontario Weekly Notes

VOL. XIX. TORONTO, NOVEMBER 5, 1920. No. 8

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 27TH, 1920.

*FULLER v. CITY OF NIAGARA FALLS.

Highway—Nonrepair—Injury to Person Walking on Sidewalk—Municipal Act, sec. 460.—Construction and Effect—Failure to Give Notice under sub-sec. 4—Absence of "Reasonable Excuse" under sub-sec. 5—Evidence—Finding of Trial Judge—Appeal—Costs.

Appeal by the plaintiffs from the judgment of LENNOX, J., 18 O.W.N. 129.

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

A. C. Kingstone, for the appellants.

George Wilkie, for the defendant corporation, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the sole question for decision on the appeal was whether or not the appellants had established that there was reasonable excuse for their failing to give the respondent corporation notice of the injury within 7 days after the happening of it, as required by sec. 460 (4) of the Municipal Act.

In the cognate case of a failure to give notice of the injury as required by sec. 4 of the Employers' Liability Act, the cases under that Act have decided that if the mental attitude of the injured workman is that he says to himself, "I have had an accident the results of which are serious, but I think they will alter for the better—I shall not give to my employer notice of the accident, because, if, as I hope, the results alter for the better, I shall never give notice of a claim for compensation at all," that is not a reasonable cause for the failure to give notice of the accident; but, if he says to himself, "If things continue as they are, I shall never require

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

to give notice of any claim for compensation," that would be reasonable cause for not giving notice.

A majority of the Court adopted that view in Wallace v. City of Windsor (1916), 36 O.L.R. 62; and this Court was bound to follow that decision if on the facts of the case at bar it fell within either of these classes.

The injury which the appellant Mabel Fuller sustained was from the outset a serious one, though, owing partly to the directions of her medical adviser not having been followed, more serious consequences ensued than would have followed if she had obeyed his directions. She did not know until after the time for giving it had passed that it was necessary to give notice of the injury; and she was on the horns of this dilemma: either she intended from the first to claim damages or did not know that she could do so until she heard that another woman "got about $2,000 out of the city for falling on a slippery sidewalk;" and, being herself asked when she made up her mind to make a claim against the respondent corporation, she replied that it was after the 17th November. As the injury was sustained on the 7th November, it was then too late to give the notice. The notice given was dated the 27th November, but it was not posted until the 5th December.

The appellants had failed to bring their case within the rule applicable where failure to give the notice is excused, because the appellant Mabel had not shewn that her attitude of mind was that if things continued as they were at first she would never require to give notice of any claim for compensation. Having regard to the fact that the injury was from the first a serious one, causing great pain and incapacitating her from performing her household duties, it was impossible to apply the rule." The most that she proved was that she did not at first anticipate that the result of her injury would be as serious as it ultimately turned out to be; not that it was not from the outset a serious one.

An attempt was made at the trial to establish that, owing to the administration to her of morphia, her mental condition was such that she was unable to apply her mind to business, and that that afforded reasonable excuse for not giving the notice; but the trial Judge's conclusion was that she had failed in establishing this; and in that conclusion the Court agreed.

The learned Chief Justice pointed out the hardship of the law in requiring that both reasonable excuse for not giving the notice and absence of prejudice to the corporation from the failure to give it be proved.

The appeal should be dismissed, with costs if costs are asked.

Appeal dismissed.

FIRST DIVISIONAL COURT. OCTOBER 27TH, 1920.

FURNIVAL v. EDWARDS.

Contract—Goods Manufactured for Purchaser—Action by Vendor for Price—Evidence—Finding of Trial Judge—Appeal.

Appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of $492.74 and costs in an action for the price of cans to be manufactured by the plaintiff for the defendant.

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

G. A. Jarvis, for the appellant.

H. A. Newman, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that there was a conflict between the evidence of the respondent and the appellant as to what the bargain was. The learned trial Judge had believed the respondent as to the contract, and there were some facts which tended to confirm his version of it.

The appellant, after delivery of some of the cans, obliterated the stencilling and substituted painted words. He also, after complete delivery, expressed his willingness to take probably 400 a month of the cans to be manufactured by the respondent, though he declined to bind himself to any stated amount. The expert, Chapman, called by the appellant to condemn the cans, says, in reference to those made by the respondent and the American cans, that, "as far as the commercial proposition is concerned, the other one might do the business as well as what this one would," though he thinks they would not sell as well, because the American cans were of much finer finish.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. OCTOBER 27TH, 1920.

SHIPMAN v. MORRELL.

Ship—Towage—Contract—Navigation—Duty of Master of Tug—Bad Seamanship—Evidence—Allowances from Contract-price—Findings of Trial Judge—Appeal—Salvage Services.

Appeal by the defendant from the judgment of the County Court of the County of Simcoe in favour of the plaintiff for the recovery of $308 and costs in an action for the value of services rendered to the defendant in towing his barge, and dismissing the defendant's counterclaim.

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

John Birnie, K.C., for the appellant.

R. McKay, K.C., for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the findings of the trial Judge were in favour of the respondent throughout; they related to several important points where the evidence of the respondent and appellant were in conflict; and, as the trial Judge had the advantage of seeing and hearing the witnesses, it was not possible to disturb them.

The appellant's barge was not completely seaworthy, as she was leaky above the water-line, and the appellant declined to have steam put in her for the purpose of more easily pumping her out on the journey. His reason was conclusive, namely, that the boiler in her was entirely worn out.

The barge had a crew of two, both experienced lake captains, and one of them, Captain Cook, was consulted with regard to the condition of the barge and the places at which stops should be made on the way from the Sault to Collingwood. The duty of the respondent, as master of the tug, if no directions were given to the tug apart from the general directions at the commencement of the towage, was to take the barge on a safe course to Collingwood, allowing for possible contingencies and a change of weather: The Robert Dixon (1879), 5 P.D. 54, 56.

On the 21st November, 1917, Captain Cook and the respondent discussed the advisability of starting, and agreed to go on. The vessels passed Cabot Head about 2 p.m., making then about 5 miles an hour. At about 3.30 p.m., Captain Cook notified the respondent that the barge was leaking, and asked him to run into Lion Head harbour. It was contended that bad seamanship was

shewn by the respondent in passing the harbour of Cabot Head when the storm-signal was up and his glass was low.

In view of a difference of opinion between two expert witnesses at the trial, and the fact that neither of the two lake captains on the barge suggested turning into Cabot Head harbour, it was impossible to conclude that bad seamanship was exhibited by the respondent in going on to Lion Head under the conditions then existing.

The other matters chiefly contested were the claim of the respondent to salvage and the allowance from the contract-price made by the respondent, which, the appellant said, was not large enough. The finding of the trial Judge that the respondent was released from completing his contract, that is, towing to Collingwood, was borne out by the evidence. But the allowance made was not sufficient. The credit on the contract-price should be increased from $90 to $120.

In the circumstances, the salvage claim ought to be disallowed in part. The barge broke away from her moorings in Lion Head harbour early in the morning of Thursday the 22nd November. Nothing was done by the respondent with his tug from that time until Sunday, when he went alongside the barge to see if he could syphon her out, but found that he could not stay alongside her because there was too much sea. He returned on Monday and for three hours worked the syphons, getting the water down only about 8 inches. So he gave it up. On Tuesday afternoon about 4.30 the appellant arrived with a more powerful tug, the "Maitland," and about an hour afterwards the respondent took his tug alongside the barge, and, together with the "Molyess," syphoned the barge off and on until next morning about 10 o'clock, when it was pumped dry. The salvage was in fact done by the "Maitland" apart from the assistance which the respondent's tug gave in syphoning from Tuesday afternoon until Wednesday morning. As regards the attempts made by the respondent previous to the arrival of the appellant with the "Maitland," these were either the duty of the tug under the towage contract or were salvage services. There is ordinarily an obligation on a tug in performing a towage contract to do whatever is necessary to keep the tow afloat and to give any necessary assistance in order to enable the contract to be completed. If these services were performed in furtherance of the contract, no extra allowance could be made for them. If, on the other hand, it was asserted that these were services in the nature of salvage which must be compensated, the answer was that salvage could be allowed only where the service was effectual. Any claim for salvage prior to the arrival of the appellant with the salving tug must necessarily fail.

When the appellant got to Lion Head, he took charge of the salvage operations. The respondent's tug was employed or allowed to assist, though no bargain was made for her remuneration. The appellant was not obliged to use her, but he availed himself of her presence, and she aided the "Molyess" in syphoning the barge and in towing her off. That was an essential part of the actual salvage service, and there was no reason why the respondent should not recover for what he did. Under the Merchant Shipping Act, R.S.C. 1906 ch. 113, sec. 759, the rendering of such services is recognised as giving a claim for salvage. The respondent's claim for $95 was not unreasonable.

The respondent was entitled, in the result, to the contract-price, $500, less an allowance of $120, and to $95 for salvage, making in all $475. From this should be deducted 5 tons of coal at $8, $40, and the amount of the cheque received by the respondent, $250, in all $290, leaving a balance due to the respondent of $185, for which he should have judgment.

The judgment below should be varied by reducing the amount to $185, with costs of action; and, as the appellant succeeded only in part, there should be no costs of the appeal.

Appeal allowed in part.

FIRST DIVISIONAL COURT. OCTOBER 27TH, 1920.

SEAFORTH CREAMERY CO. v. ROZELL.

Libel and Slander—Slander of Plaintiffs in their Business—Loss of Profits — Evidence — Damages — Counterclaim for Libel of Defendants in their Business—Privileged Occasion—Express Malice—Internal Evidence of—Jury.

Appeal by the plaintiffs from the judgment of LENNOX, J., upon the findings of a jury.

The action was for slander of the plaintiffs in their business; and the defendants counterclaimed for libel of them in their business. At the trial judgment was given for the plaintiffs for $200 damages and for costs, and for the defendants upon their counterclaim for $200 damages and for costs.

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

R. S. Robertson, for the appellants.

William Proudfoot, K.C., for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiffs' allegation as to damages and claim for relief were as follows: "In consequence of the slanders hereinbefore set forth and the publication and circulation thereof, the plaintiffs were injured in their credit and reputation as produce dealers and butter manufacturers and in their said business, and they lost the services of the said Edward J. Trewartha and Elmer Finch as cream and milk gatherers, they having left the employ of the plaintiffs to become employees of the defendants and taken over with them all their customers and patrons, and the plaintiffs also in consequence of the said wrongs lost many other customers and patrons, and since the uttering of said slanders and in consequence thereof the plaintiffs have suffered a general decline in their said business and a considerable loss of profits, amounting to $2,000. The plaintiffs therefore claim $2,000 damages for slander."

Pursuant to demand, the plaintiffs named a number of customers who had, as the plaintiffs alleged, in consequence of the alleged slanders, ceased to deal with them, but they did not call these customers as witnesses. They sought to establish their damages by calling Finch and Trewartha, both of whom stated that they left the employ of the plaintiffs in consequence of the slander. The plaintiffs proved the amount of butter-fat that each gatherer had collected for the defendants, and then sought to give evidence of the profit that the plaintiffs would have made if that butter-fat had been collected by Finch and Trewartha for the plaintiffs, instead of for the defendants. The trial Judge refused to allow this evidence or any amendment of the statement of claim for the purpose of permitting evidence of such profits to be given. From this ruling the plaintiffs appealed.

The evidence appeared to have been excluded on two grounds: (1) that the plaintiffs' allegation and prayer amounted to a claim for damages for general loss of business only, and not for loss of particular business; (2) that the plaintiffs had not laid the foundation necessary for the giving of the testimony rejected, in that they did not, by calling their customers or by any other evidence, establish that the slander caused the loss of the plaintiffs' customers, and the weight of testimony was that these customers left the plaintiffs because the two gatherers of fat persuaded them to do so.

The ruling of the trial Judge was right. Before the plaintiffs could give evidence of the profits which they would have derived from the butter-fat which they did not get from their former customers it was necessary for them to prove, not only that they had lost the butter-fat, but that the fat was lost by reason of

the slander, and this they failed to do: Odgers on Libel and Slander, 5th ed., pp. 382, 383.

The plaintiffs also appealed from the judgment on the counterclaim, on the ground that, the trial Judge having ruled that the occasion on which the alleged libel was published was a privileged occasion, it was necessary for the defendants to prove express malice, and on the ground that there was no evidence on which a finding of express malice could be made.

The trial Judge ruled and instructed the jury that the words of the libel, read in the light of the surrounding circumstances, could be looked at as evidence on which the jury could make a finding of express malice, and the jury, on this direction, found that the letter complained of was sent with malicious intent. The learned trial Judge was right in his ruling.

Reference to Adam v. Ward, [1917] A.C. 309, 326, 329.

It was clear that the learned trial Judge was of the opinion that the words of the letter complained of were capable of affording evidence of express malice, and he was right in leaving it to the jury to say whether, on the reading of these words in the light of the surrounding circumstances, there was in fact express malice.

The defendants did not appeal or question the ruling that the statement complained of by the plaintiffs was defamatory or the ruling that the libel set out in the counterclaim was published on a privileged occasion; and, for the purposes of this judgment, it had been assumed that both rulings were right.

Appeal dismissed with costs.

HIGH COURT DIVISION.

ORDE, J., IN CHAMBERS. SEPTEMBER 24TH, 1920.

REX v. ARSINO.

REX v. SANTARPIO.

Criminal Law—Demanding with Intent to Steal—Kidnapping—Criminal Code, secs. 297, 452—Preliminary Inquiry by Magistrates—Evidence—Commitment for Trial—Motions to Quash Warrants.

Motions by the prisoners for orders quashing warrants committing them to gaol.

D. B. Sinclair, for the prisoners.
F. P. Brennan, for the Crown.

ORDE, J., in a written judgment, said that two informations were laid against Antonio Arsino before two Justices of the Peace at Caledonia, in the county of Haldimand: one, that he did with menaces demand from one Frank Thomas the sum of $150 with intent to steal the same, contrary to sec. 452 of the Criminal Code; the other, that he did forcibly seize or confine or imprison Frank Thomas, contrary to sec. 297 of the Code. At the same time, two similar informations were laid against Guiso Santarpio. By consent, the charges against the two accused were dealt with together, and the evidence taken as if in one case. The magistrates committed Arsino for trial upon both charges, and also committed Santarpio for trial on the charge of demanding money with menaces, but dismissed the charge against Santarpio of kidnapping.

The prisoners now moved to quash the warrants of commitment, on the ground that there was no evidence to justify them.

The Court will review the decision of a magistrate upon a preliminary inquiry in a criminal matter, and will order the discharge of the prisoner if there does not appear to be sufficient cause for his detention: Regina v. Mosier (1867), 4 P.R. 64.

The depositions, though meagre in the matter of detail, disclosed certain facts.

Upon the charge against Arsino of demanding money with menaces, Thomas swore that Arsino told him he wanted $500 and held a long knife over his head. That alone disposed of the motion upon that charge.

Upon the charge of kidnapping, the story was somewhat involved, but there was evidence to indicate that Thomas was taken to Hagersville against his will, apparently as the result of the threats made against him. While the evidence on this point, as it stood on paper, was not very convincing, the learned Judge was unable to say that there was no evidence upon which a jury, seeing and hearing the witnesses, might not find a verdict of "guilty."

Then as to the charge against Santarpio of demanding money with menaces: he was with Arsino when the latter demanded the money with the knife in his hand. Santarpio had called for Thomas and got him into his motor-car, and they were afterwards joined by Arsino. The whole evidence led to the conclusion that this was all the result of previous arrangement between Arsino and Santarpio. Counsel for Santarpio relied upon the statement, made by Thomas upon cross-examination, that San-

tarpio never threatened him. But Thomas was then referring to what occurred after the party reached Hagersville, and not to what took place in the motor-car when Arsino demanded the money. In the circumstances, Santarpio's presence in the car connected him sufficiently with Arsino's act to make him (Santarpio) particeps criminis.

Motions dismissed with costs.

KELLY, J., IN CHAMBERS. OCTOBER 25TH, 1920.

REX v. SILVERMAN.

Criminal Law—Magistrate's Conviction—Warrant of Commitment—Variance—Amendment—Discretion—Evidence—Motion for Discharge of Prisoner on Habeas Corpus—Offence against Ontario Temperance Act, sec. 40—Selling Intoxicating Liquor without License—Entry and Search of Private Dwelling House without Warrant—Costs.

Motion, on the return of a writ of habeas corpus, for an order for the discharge of the defendant from custody.

R. H. Greer, for the defendant.
F. P. Brennan, for the Attorney-General.

KELLY, J., in a written judgment, said that on the 1st October, 1920, the accused was convicted, by one of the Police Magistrates for the City of Toronto, of the offence of unlawfully having kept intoxicating liquor for sale without having first obtained a license, in contravention of the Ontario Temperance Act, and it was adjudged that he should forfeit and pay $1,000, and also pay to the complainant $3 for his costs, and in default of payment of these sums forthwith that he should be imprisoned in the municipal farm for men for 3 months, unless the said sums and the costs and charges of the commitment and conveying of the accused to the municipal farm should be sooner paid; and, in addition, that he be imprisoned in the municipal farm for 30 days. The warrant of commitment set forth that for such offence the defendant had been "fined $1,000 and $3 costs, or in default of payment to be committed to the Toronto municipal farm for 3 months, and in addition is committed for 30 days to said farm," and it was ordered that he be taken to prison accordingly.

The defendant contended that the warrant of commitment did not follow—that it substantially departed from—the conviction.

A variation, though substantial, is, on an application such as the present, within the discretion of the Court to remedy by amendment: Rex v. Degan (1908), 17 O.L.R. 366.

It was urged on behalf of the accused that, in the circumstances surrounding and leading up to the information against him, and in view of happenings at the hearing before the magistrate, that discretion should not now be exercised in favour of the prosecution.

If, upon the merits of the case, any reasonable doubt could be entertained as to the correctness of the magistrate's conclusion of guilt, that discretion might very properly be exercised in the prisoner's favour. But, having no such doubt, the learned Judge directed the necessary amendment to be made, and, confirming the conviction, dismissed the application.

In so doing, he was far from expressing approval of the entry and search of the defendant's dwelling house without a warrant. The Ontario Temperance Act is a part of our laws and should be duly observed; but the difficulty which exists in effectively administering it does not justify the introduction of improper or illegal methods in its enforcement. Unwarranted invasion of the privacy of homes is not to be tolerated, even in an endeavour to attain a desirable end. When it becomes necessary or advisable, for any legitimate purpose, that officers of the law should enter private houses, practice and the statute provide the procedure for so doing. The dismissal should, therefore, be without costs.

MIDDLETON, J. OCTOBER 25TH, 1920.

RE SEXTON.

Will—Construction—Absolute Gift to Widow—Repugnant Restriction—Power of Appointment.

Motion by Francis W. Kidd, upon originating notice, for an order determining questions arising upon the will of one Sexton, deceased.

The motion was heard in the Weekly Court, Toronto.

T. H. Barton, for the applicant.

H. H. Shaver, for the executors of the testator's widow.

B. N. Davis, for persons claiming under Ethel L. Sexton.

MIDDLETON, J., in a written judgment, said that Francis W. Kidd, a grandson of the testator, whose mother, the testator's

daughter, predeceased him, applied to have it declared that Ethel L. Sexton, a granddaughter of the testator, whose parents survived the testator, could not take any interest in the estate of her grandfather under the power of appointment from her grandmother by his will.

Three questions were presented for determination:—

First, it was contended that the whole of the grandfather's estate passed to his widow as her own property.

Second, that this had been treated as being the effect of the will, and in the proceedings in the Surrogate Court, to which the applicant was a party, all the assets had been dealt with as forming part of the widow's estate, and the applicant had received a large sum of money, which he would not otherwise have been entitled to, from her executors.

Third, if this was not so, the applicant, a grandchild, had no status, as the power given by the will could be exercised only in favour of children.

It was not necessary to consider the last two questions—the learned Judge was, so far as he had considered them, against the applicant on both—because the case appeared to be clear upon the construction of the will.

It was one in which there was an absolute gift to the widow, to which the testator had sought to add a repugnant restriction, by dealing with "any of my said estate" which "shall remain undisposed of at the time of his decease."

As put in Theobald: "There can be no gift over of so much as a legatee does not dispose of, where an absolute interest has been given to a legatee." The cases are cited in the 6th edition, p. 623. Apart from this gift over, the testator could not have made the gift to his widow more absolute. She may use and dispose of it "precisely the same as I myself might do were I living." She may sell it. She may give it away—it is hers.

If the widow had only a power of appointment under the husband's will, that was only "to appoint the same among my said children," and the one-sixth given to each of the four children by the widow's will would be well appointed and the one-sixth given to the Kidd family and the one-sixth given to Ethel L. Sexton would not be validly dealt with, and these shares would then fall to be distributed under the 3rd clause of the will, and would be divided among the four surviving children (each of such children taking four-eighteenths), and the issue of the deceased children (each stirps taking one-eighteenth), a result disastrous to the applicant.

The motion should be dismissed; costs to be charged against the applicant's share of the estate.

HODGINS, J.A. OCTOBER 25TH, 1920.

RE VAIR.

Executors—Money Borrowed for Repairs—Apportionment—Capital Account—Interest Account—Tenant for Life—Remaindermen—Mortgage—Interest—Costs.

An appeal by the executors of John Vair, deceased, from a report of the Local Master at Napanee.

The appeal was heard in the Weekly Court, Toronto.

J. I. Grover, for the appellants.

W. Lawr, for the testator's widow, the respondent.

HODGINS, J.A., in a written judgment, said that objection was taken to the interest on a mortgage and certain repairs being charged to capital account.

The widow was life-tenant, and by the will the executors were to pay over the rents and profits to her quarterly during her life and widowhood. The estate consisted of "Ontario Hall," in the city of Belleville.

The executors were in possession of the property, and the Local Master had apportioned the repairs between the life-tenant and those in remainder. The executors received authority to raise $700 on mortgage, and did so. The $700 was expended in repairs allowed in report of 1918, $287.37; part of an account for repairs, $158.30; costs of various parties, $220.50; and interest for two years on the sum so raised, $84. The only items challenged were the $158.30 and the $84.

Reference to In re Hotchkys (1886), 32 Ch. D. 408, at p. 416.

Here the Local Master had charged only part of the repairs to capital account, namely, what was paid for repairing the roof, and the life-tenant did not object to what had been apportioned against her.

As the Local Master had exercised his discretion, and as the repairs seem to be of a nature to benefit the inheritance, his decision could not be disturbed.

In regard to the interest on the mortgage, having in view the purpose for which the money was raised, the principle that any reduction of capital must lessen the life-tenant's income must be applied here: In re Freman, [1898] 1 Ch. 28; Re Elliot (1917), 41 O.L.R. 276.

In applying these decisions to the case in hand, and bearing in mind that what is equitable is what ought to be done, it is clear that only interest on that part of the mortgage attributable to

repairs could be charged against the tenant for life. That part is $445.67, made up of $287.37 and $158.30, on which the two years' interest would be $53.40. This amount of interest, therefore, must be borne by the life-tenant. No other items making up the mortgage total were challenged, nor was any authority shewn for deducting the remainder of the interest from income.

The result was a small success to the appellants, and there should be no costs of the appeal.

As to the motion for leave to raise an additional sum of $892.49, authority should be given to the executors. As the items making up this amount are set out in para. 11 of the present report, the Local Master can, when the accounts in regard to the payment of these items are passed, report whether they or any part of them, as well as any portion of the interest on the new mortgage, should properly fall upon the interest of the life-tenant. The costs of both parties to this application to raise and complete this mortgage, are to be taxed and may be added to the amount of $892.49.

MIDDLETON, J. OCTOBER 26TH, 1920.

RE ADDISON.

Will—Construction—Devise of Land to Son for Life and after his Decease unto "his Lawful Issue and their Heirs and Assigns" —Gift over in Event of Son Dying without Issue—Nature of Estate—Rule in Shelley's Case.

Motion by Austin Addison for an order determining the meaning and effect of a provision in the will of his father, Edmund Addison, deceased.

The motion was heard in the Weekly Court, Toronto.
T. R. Ferguson, K.C., for the applicant.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, said that the testator died in 1892, and by his will gave to his son Austin Addison, during his natural life, certain lands, fully described, subject to the right of his mother to occupy certain portions thereof and to certain charges in her favour. The gift to the son was followed by this provision: "After the decease of my said son Austin Addison I give devise and bequeath unto his lawful issue and to their heirs and assigns forever all the lands mentioned in the fourth clause of this my will"—i.e., the clause giving Austin the life-estate— "but subject nevertheless to the payment of one-third of the proceeds

or income derived from the said lands to his widow during the term of her natural life should she so long remain unmarried, and I hereby bequeath unto her the said one-third of the income of the said lands as aforesaid, and I make the same a charge upon the said lands during the period aforesaid. If, however, my said son shall die without leaving issue then in that case I give devise and bequeath the aforesaid property to my other three children hereinafter mentioned share and share alike." There were other provisions dealing with the case of the death of any of the other children leaving issue.

It was contended on behalf of Austin that the effect of the will was to give him an estate tail, and he had assumed to convey the lands in fee simple to his wife, and the wife joined with him in a conveyance to Percy Maxwell Addison, their only son, reserving to the parents a life-estate. The son Percy had now contracted to sell the lands and had tendered the purchaser a deed from himself and his father and mother. The father and mother had another child, a daughter, who had married and was now dead, leaving issue. The purchaser refused to accept the title, apprehending that the issue of the deceased daughter might be entitled to some interest under the will of her deceased grandfather.

Austin contended that the effect of the will was to give him an estate tail, and the effect of the conveyances to bar the entail, and so destroy not only the right of the daughter and her issue, but the right of any executory devisees.

Reference to Jesson v. Wright (1820), 2 Bligh 1; Roddy v. Fitzgerald (1858), 6 H.L.C. 823; King v. Evans (1895), 24 Can. S.C.R. 356; Van Grutten v. Foxwell, [1897] A.C. 658, 684, 685.

Applying the principles deducible from these cases to the will in hand, the learned Judge had come to the conclusion that Austin took a life-estate only. Had the will simply provided that upon his death the property should go to his lawful issue, it must have been held that an estate tail was created; but the gift after his life-estate was to "his lawful issue and to their heirs and assigns forever." This does not denote the whole inheritable issue taking in course of succession or the whole line of heirs, or heirs of the body, but indicates an intention that those designated as lawful issue should take in fee simple, for the gift is to them and "their heirs and assigns forever."

Reference to King v. Evans, supra; Jarman on Wills, 5th ed., p. 1269; Montgomery v. Montgomery (1845), 3 Jo. & La T. 47.

The will should be read as expressing a gift to Austin for life, and then to his children in fee simple, with an executory devise in the event of his death without leaving children him surviving.

There should be an order so declaring. The applicant should pay the costs of the Official Guardian, and there should be no further order as to costs.

MIDDLETON, J. OCTOBER 26TH, 1920.

*STREET v. CRAIG.

Animals—Injury Done by Domestic Animal Trespassing from Highway—Escape of Animal from Railway Yard upon Highway—Absence of Negligence of Owner—Person Injured upon Land Adjoining Highway—Absence of Fence—Damage—Remoteness—Character of Animal—Scienter—Municipal By-law.

Action by a woman against a farmer for damages sustained by the plaintiff while in the garden of her brother, with whom she lived, by reason of an attack upon her by a cow owned by the defendant, which entered the garden from the highway, knocked her down, and inflicted most serious injury.

The action was tried without a jury at Orangeville.

W. D. Henry, for the plaintiff.

C. R. McKeown, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the defendant had sold some of his cattle to a drover and engaged to drive them from his farm to the town-line of Orangeville, where the purchaser was to meet him and take charge of the animals. These cattle had been on the defendant's farm for a long time, and were not accustomed to being driven, and so were likely to give trouble when brought into the town. The cow which injured the plaintiff was in no sense vicious, but had become nervous and excitable. This cow was driven with others into a railway yard; it escaped therefrom, and had become so wild and excited as to be dangerous; it ran through the streets and entered the unfenced garden where the plaintiff was and did the injury of which she complained; it then returned to the highway, and, after other acts of violence, was eventually captured.

The law relating to the liability of the owner or keeper of animals for injury done by them is in an unsatisfactory condition.

Reference to Robson on Trespasses and Injuries by Animals (1915); Osborne v. Chocqueel, [1896] 2 Q.B. 109, 110, 111; Ellis v. Loftus Iron Co. (1874), L.R. 10 C.P. 10, 13, 14; Lee v. Riley (1865), 18 C.B.N.S. 722; Cox v. Burbidge (1863), 13 C.B.N.S. 430, 436, 437; Hudson v. Roberts (1851), 6 Ex. 697; May v. Burdett (1846), 9 Q.B. 101; Filburn v. People's Palace and Aquarium Co. (1890), 25 Q.B.D. 258; Tillett v. Ward (1882), 10 Q.B.D. 17; and other cases.

Tillett v. Ward must be taken to establish an exception to the general rule in the case of an animal trespasser from a highway.

A by-law prohibiting animals being at large upon the highways of this municipality was proved; but it did not advance the plaintiff's case. This animal was not at large in the sense of the by-law. It had escaped from the custody of those in charge without negligence on their part. The by-law was aimed at preventing the turning of cattle loose on the highway without attendants.

In the result, the plaintiff failed because: (a) if the action was founded on trespass, the damage was too remote; (b) the trespass was from a highway and was not voluntary nor the result of negligence, and even in this case the damage would be too remote; (c) if the action was founded on a duty arising from the keeping of the animal, it was a domestic animal and not vicious, and there was no scienter.

The learned Judge regretted being driven by the cases to this conclusion. It would, in his opinion, be more in accordance with sound reason and principle to make the defendant answerable for the risks incident to taking his beasts to market, rather than to leave this unfortunate woman a cripple, without remedy for that which happened to her without the least fault on her part.

Action dismissed without costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 27TH, 1920.

*REX v. FEDDER.

Criminal Law—Magistrate's Conviction—Failure of Magistrate to File Depositions Taken at Trial—Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, sec. 8—Effect of Failure to Obey Statutory Command—Motion to Quash Conviction—Absence of Prejudice.

Motion to quash the conviction of the defendant, by a magistrate, for an offence against the Ontario Temperance Act.

R. W. M. Chitty, for the defendant.
F. P. Brennan, for the magistrate.

MIDDLETON, J., in a written judgment, said that the only thing alleged against the conviction was, that the magistrate did not

file the depositions with the Clerk of the Peace, as required by sec. 8 of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90. This default arose from the fact that the depositions were mislaid by the magistrate. They had been found since this motion was launched, and were now with the papers. The depositions amply supported the conviction.

It was argued that the fact that the depositions were not where they ought to have been had prejudiced the defendant, because he could not obtain satisfactory advice upon the question of the validity of his conviction. That he was in any way prejudiced was not shewn; and the learned Judge could find nothing to support this contention.

The learned Judge's views as to the effect of failure upon the part of a magistrate to obey the provisions of a statute were given in Rex v. McDevitt (1917), 39 O.L.R. 138. Since that judgment was written the decision of the Privy Council in Montreal Street R.W. Co. v. Normandin, [1917] A.C. 170, had been received, and much the same rule was there stated.

To hold that a conviction became void by reason of the default of the magistrate occasioned by his mislaying the papers would not "promote the main object of the Legislature."

The learned Judge knew of no instance in which a failure to observe the requirement of a statute subsequent to the conviction had been allowed to render void a conviction valid and unobjectionable at the time it was made. All the cases were those in which a provision of the statute had been held to be a condition precedent to the jurisdiction to convict.

In any case which may arise in the future, in which it is shewn that the accused is really the victim of injustice arising from some accident or mischance by which the depositions are lost or destroyed, or in which there is evidence that the magistrate is acting in bad faith, a remedy may be found.

Motion dismissed with costs.

MIDDLETON, J. OCTOBER 28TH, 1920

RE BRITISH CATTLE SUPPLY CO. LIMITED.

HISEY'S CASE.

Company — Winding-up — Contributory — Companies Act, R.S.C. 1906 ch. 79, sec. 39—Amount Unpaid on Shares—Issue of Shares as Paid-up—Knowledge of Shareholder to Contrary—Estoppel—Liquidator—Agreement with Land Company—Set-off —Land not Conveyed.

Appeal by S. Hisey from an order of an Official Referee in a winding-up matter settling the appellant upon the list of contributories.

The appeal was heard in the Weekly Court, Toronto.
D. Inglis Grant, for the appellant.
Casey Wood, for the liquidator.

MIDDLETON, J., in a written judgment, said that certain matters were concluded, so far as he was concerned, by the judgment of a Divisional Court in Re British Cattle Supply Co. Limited, McHugh's Case (1919), 16 O.W.N. 206.

The stock subscribed by the land company was to be paid for partly in cash and partly by note. The land was to be paid for by the company. It was expected that one sum would be set off against the other, but the agreement was not an agreement to exchange stock for land. The stock was in fact unpaid. This had been found, and did not seem to admit of discussion.

In Re Dominion Permanent Loan Co. (1920), 47 O.L.R. 87, it was held that the limitation of liability on the part of shareholders in a company is that found in the statute, and that those who are in fact shareholders at the date of the liquidation must be placed on the list of contributories for the amounts unpaid upon their shares.

The Dominion Act under which this company was incorporated, the Companies Act, R.S.C. 1906 ch. 79, provides: "39. Every shareholder, until the whole amount of his shares has been paid-up, shall be individually liable to the creditors of the company to an amount equal to that not paid-up thereon."

When the company is insolvent this liability may be enforced by the liquidator so as to create a fund for payment of the creditors.

Ooregum Gold Mining Co. of India v. Roper, [1892] A.C. 125, and Welton v. Saffery, [1897] A.C. 299, shew that by no device or expedient can they destroy or alter this liability, which is the statutory incident of membership.

Notwithstanding this, a company may by its conduct preclude itself from asserting that stock is not paid-up. The common law doctrine of estoppel applies to its transactions, and this estoppel will bind the liquidator, as he cannot assert any greater right than the company: Bloomenthal v. Ford, [1897] A.C. 156.

But no holder of shares can invoke this doctrine unless all the elements of estoppel exist. He must have relied upon the statement of the company that the shares are paid-up and must have had knowledge of the truth. This is where Hisey fails. He was a director of the company, and knew of the terms of the agreement, and knew the land had not been conveyed. He knew the stock was not in fact paid-up, yet he seconded the resolution directing the allotment and issue of this stock to himself and others as fully paid-up.

He should have credit for honesty in all this. He expected the land company to live up to its contract, but he knew at this time that the land had not been conveyed. So that there was nothing yet due to set off against the liability upon this stock.

Had Hisey any right to be relieved from the situation he had thus created, he might have brought an action claiming the cancellation of his stock-holding, upon the theory that what was done was based upon mistake or fraud, and that he never really intended to assume this stock and its incidental liability for $20,000; but such action, to be effective, must have been taken before the liquidation began. The liquidation crystallised the situation, and it was now too late: In re General Railway Syndicate, [1899] 1 Ch. 770.

This does not in any way infringe upon the principle that the contract between a shareholder and the company is the measure of his liability. If a man agrees to exchange land for shares, and this is not ultra vires, and the contract is carried out, he is a paid-up shareholder. If the contract is not carried out, he is not a shareholder, and cannot be sued for calls, though he may be liable on his contract to sell land: Re Modern House Manufacturing Co. (1913), 28 O.L.R. 237, 29 O.L.R. 266.

Appeal dismissed with costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 30TH, 1920.

REX v. McEWAN.

Ontario Temperance Act—Magistrate's Conviction of Physician for Offence against sec. 51—Prescription for Intoxicating Liquor—Evidence—Good Faith—Onus—Sec. 88—Finding of Magistrate—Motion to Quash Conviction—Notice of Motion not Served within 30 Days—Sec. 102 (2) of Act (7 Geo. V. ch. 50, sec. 33).

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Carleton Place, for an offence against sec. 51 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

J. P. Ebbs, for the defendant.
F. P. Brennan, for the magistrate.

MIDDLETON, J., in a written judgment, said that the defendant was a medical practitioner. The offence was said to have been committed on the 20th May, 1920, and the conviction was on the 24th June, 1920. A notice of motion for an order quashing the conviction was served on the 20th July, 1920; but this was irregular and not in conformity with the Act. No return having been made to this notice, no order was made. On the 24th September, 1920, a new notice was served. This was not served within 30 days from the date of the conviction; and so, under sub-sec. 2 of sec. 102 of the Act (see sec. 33 of the amending Act of 1917, 7 Geo. V. ch. 50), the learned Judge was precluded from hearing the motion. The irregular and inoperative motion did not help, as what the statute requires is "notice of such motion," that is, of the motion before the Judge.

Upon the merits, which were fully argued, the learned Judge referred to Rex v. Rankin (1919), 45 O.L.R. 96, as establishing that "a physician who honestly believes that liquor is necessary for the health of his patient and prescribes it in accordance with the provisions of the Act" is not guilty of an offence. But he could not say that there was not some evidence before the Police Magistrate upon which, if he chose to attach weight to it and less weight to other evidence, he could fairly reach the finding which he made. If there is any evidence to sustain a conviction, the magistrate's tribunal is that in which it is to be weighed.

The application therefore failed.

In the circumstances, the learned Judge hoped that the matter would be allowed to end, and that the conviction might not be used as the basis for an attack on the defendant's professional standing.

Had the learned Judge been hearing the case in the first instance, he would not have convicted on the evidence and would have given the defendant the benefit of the doubt. He was reckless in prescribing as he did, but he may well have acted in good faith, as he had sworn.

As the result of hearing many motions against convictions under this Act, the learned Judge is inclined to believe that there is an impression among magistrates that the Act has done much more than it purports to do. Section 88 shifts the onus, on proof that the accused had in his possession the liquor concerning which he is being prosecuted; but the Act does not abolish the fundamental principle that the accused is to be presumed innocent until guilt is proved, nor does it take away the right of the accused to the benefit of the doubt.

Any unduly harsh administration of the Act is to be regretted, as it tends to create an unnecessary and unjustifiable antagonism to the wishes of the Legislature as embodied in the Act.

The motion should be dismissed, with costs, fixed at $20.

COUNTY COURT OF THE COUNTY OF YORK.

WIDDIFIELD, JUN. CO. C.J. JULY 13TH, 1920.

RE ALLEN AND TOWN OF MIMICO.

Assessment and Taxes—Assessment of Land—Value of Land—Evidence—Equitable Assessment—Comparison with Assessment of Adjoining Parcel—Reduction by County Court Judge of Amount of Assessment Confirmed by Court of Revision.

An appeal by Norman Allen from the decision of the Court of Revision for the Town of Mimico confirming an assessment of the appellant in respect of land in the town.

G. T. Walsh, for the appellant.
C. Swabey, for the town corporation.

WIDDIFIELD, Jun. Co. C.J., in a written judgment, said that in 1916 Allen purchased the property in question from a Mrs. Crow for $13,500. It consisted of a triangular piece of land, with a frontage of 1,056 feet on the main street. At the time of the purchase, Allen was not aware that his vendor had sold to the radial railway company a strip 25 feet wide along about 800 feet

of the front of the lot, and in an action against the vendor she was compelled to rebate $4,500 of the purchase-money, making the purchase-price of the land $9,000. The land was wholly unimproved, unfenced, and unproductive. Its only value was the price it would bring in the market.

In 1918 the land was assessed at $9,000, its actual cash value, in 1919 at $11,000, and in 1920 at $21,000. It was against this last assessment that the appeal was taken.

The assessor swore that his aim was to assess the real estate at 60 per cent. of its cash value; the assessment on improvements was much less.

In 1919 there was a revival in building in Mimico, and the assessment was increased generally, this property being increased $2,000. There was not as great a demand in the town for residental building lots in 1920. Mr. Ford said that the building boom had declined owing to the increased cost of labour and materials. There certainly was no evidence to justify a jump of more than 80 per cent. in the taxable value of this land. The easterly portion of this triangular block was owned by Crow and Falconer. Crow's portion had been increased 44 per cent. and Falconer's 30 per cent. Their portions were certainly the most valuable. They were nearer the business section, and were not depreciated by the railway switch in front of them, as two-thirds of Allen's property was. The property immediately opposite, having a depth of some 400 or 500 feet, in a high state of cultivation and having a frontage on the lake and the advantage of water-lots, was increased only 5 per cent. The property in question had no increased value from water-lots, works, or sewers. For this reason, it was not valuable. It might be sold off, but the town authorities had held up the filing of a subdivision plan. The learned Judge said that he had much hesitation in placing his judgment on values against those of men who were aware of local conditions, but in this case the evidence was convincing that the enormous special increase in this assessment was not justified.

A year or two ago, Allen made a sale at $17,000, not all cash, but the purchaser fell down. This was the only offer received for the property.

An equitable assessment is one where all owners are assessed in the same proportion of value. That was not the case here. A fair assessment, under all the circumstances, would be $13,000. The amount of the assessment should therefore be reduced to that sum.