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COURT OF APPEAL.

OCTOBER 22ND, 1910.

REX v. KEHR.

Criminal Law — Usury — Conviction — Reasonable Evidence to Support—Money Lenders Act—"Money Lender"—Aider and Abettor—Servant of Lender.

Case stated by one of the Junior Judges of the County Court of York upon an indictment and conviction of the defendant for usury.

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

W. J. Tremeear, for the defendant.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A.:—The single question reserved is, substantially, whether there was any reasonable evidence to support a conviction—whether, if the case had been tried with a jury, there was any reasonable evidence of guilt to go to the jury: it is not whether, upon the findings of the trial Court, the conviction can be sustained, and we have no power to consider any matter not involved in the question reserved; if this had been the question, I would feel bound to say that one of the findings was not entirely consistent with the verdict. But it is not.

No one can well doubt that, had the case been tried with a jury, it could not rightly have been withdrawn from them on the ground that there was no reasonable evidence of guilt. The whole circumstances of the case were such that it must have been submitted to the jury to find whether or not the whole method of dealing, in-

volved in the case, was real or only a sham to enable those who conducted it to exact a greater rate of interest than twelve per centum. Whether the positive testimony of the persons chiefly concerned in the lending of the money ought to be believed or not would have been a question for the jury, and was one for the trial Court; and is one with which this Court cannot now rightly concern itself.

I am also unable to see why one who is not a money lender, within the meaning of the Act, may not be an aider and abettor of one who is, in an infraction of its provisions. It does not follow, from the fact that the person who aids in the commission of a crime is, by the Criminal Code, declared to be a party to and guilty of the offence, that one who could not alone have committed it, cannot be convicted. One may be physically incapable of committing a crime and yet guilty of it, through the act of another who is capable, and whose act is the act of both; and why not equally so where there is legal incapacity? That which the accused did would have been none the more harmful, none the more against the object of the enactment, if the accused, as well as his employer, had been a money lender. Whether any one is merely a manager, agent, or servant of a money lender, can be held to be a money lender, within the meaning of the enactment—can be said to be carrying on the business of money lending—need not be considered.

I would answer the question, as I have stated it, in the affirmative.

OCTOBER 22ND, 1910.

*CITY OF WOODSTOCK v. COUNTY OF OXFORD.

Municipal Corporations—Separation of City from County—Agreement as to Assets—Surplus Fund not Taken into Consideration—Right of City to Share in Fund—Municipal Act, 1903, sec. 408—Trust—Enforcement.

Appeal by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., dismissing the action, which was brought to recover part of a surplus fund, amounting to about $37,000, standing to the credit of the defendants at the time of the separation of the city from the county.

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

* This case will be reported in the Ontario Law Reports.

G. H. Watson, K.C., and N. Sinclair, for the plaintiffs.
J. Bicknell, K.C., and G. F. Mahon, for the defendants.

Moss, C.J.O.:—There is now no dispute as to the facts. Most of them appear or are to be gathered from documents. The only dispute on oral testimony was one involving a charge by the plaintiffs against the defendants of fraud, misrepresentation or concealment, and it was determined in the defendants' favour at the trial. Any element of want of good faith or intentional wrongful conduct must now be regarded as eliminated from the case.

In the year 1901 an Act of the legislature was passed, at the instance of the Town of Woodstock, erecting it into and incorporating it as a city. In the month of February, 1902, the plaintiffs (the city) and the defendants (the county) entered into an agreement, ratified by by-laws of both corporations. This agreement was at that time apparently taken and accepted by both parties as comprising and settling all questions between them arising out of the erection of the plaintiffs into a city, and it was subsequently acted upon and its terms complied with by the plaintiffs until shortly before the commencement of this action on the 23rd December, 1907.

The reason for the action was the discovery by the plaintiffs, as they allege, that at the time of their erection into a city there was in existence a surplus standing to the credit of the defendants amounting to $37,000 or thereabouts, which had been collected through the various local municipalities comprising the county, including the Town of Woodstock, from the ratepayers thereof, and that, in the negotiations preceding, and in the making of, the agreement, this surplus fund was not taken into account or dealt with in any respect.

By the 4th section of the special Act 1 Edw. VII. ch. 75 it was enacted that "the City of Woodstock shall in all matters whatsoever stand and be in the place and stead of the Town of Woodstock, and all property of every kind and all rights, interests, assets, and effects, taxes, rates, dues, revenues, obligations, and income, now belonging to or accruing due to or which may be assessed for by the said town, shall pass, belong to, and be the rights, property, assets, and effects, taxes, revenues, and obligations of the City of Woodstock . . . the meaning and intention hereof being that in all matters and things the said city shall be and stand in the place of the said town."

And the plaintiffs say that, in virtue of the said Act and of the Municipal Act, they are entitled to receive from and be paid by the defendants some part of the surplus fund in question. And they

make their claim in several forms. . . . But these wide and general claims virtually narrow down to two inquiries: are the plaintiffs entitled to any relief, and, if so, in what form?

As already said, the matter is not to be dealt with as the footing of no fraud or misrepresentation or intentional concealment or overreaching on the part of the defendants. It is also to be observed that the plaintiffs do not in terms ask that the agreement of the 10th February, 1902, be set aside, but assume that it should stand as regards the matters dealt with by it, and on that footing they seek some modification or reformation of its terms. Yet, if the parties are, with relation to the surplus fund, to be put back into the position in which the plaintiffs say they were at the time of their erection into a city, it is difficult to see how this is to be accomplished with the agreement standing in the way.

It is difficult, too, to understand the position which the plaintiffs take with reference to their right to a portion of the fund. Putting it at the highest for them, the legislation did no more than to place them in the position the town occupied with reference to the fund at the date of the erection of the plaintiffs into a city. What was that position?

However or through whatever means the fund was permitted to accumulate—and they are to be assumed not to have been improper or dishonest—it constituted and was a surplus fund. It represented rates received from the municipalities comprising the county provided for and raised by the county as prescribed by secs. 402 to 407, inclusive, of the Municipal Act. Under the provisions of the Assessment Act then in force, these rates were collected by the tax collectors for the various municipalities, and with this duty the councils of the municipalities have nothing to do; it is a statutory obligation which the clerk of the municipality owes to the county and is bound to perform: Mowat, V.-C., in Grier v. St. Vincent, 13 Gr. at p. 519; R. S. O. 1897 ch. 224, secs. 129, 130-133, 144, 265.

For several years the sums collected appear to have exceeded the estimates, and so, by operation of sec. 408 of the Municipal Act, the balance would form part of the general fund of the municipality.

Whether or not, by means of an information by the Attorney-General at the instance of one or more of the minor municipalities or of a ratepayer or ratepayers in one of them, the defendants could have been compelled to administer the fund in accordance with the terms of sec. 408, need not be inquired into. No such proceedings were taken. It seems plain that not one of the muni-

cipalities comprising the county had, as a distinct entity, any property in or right to an aliquot or even a proportionate part.

Any benefit that might accrue to them or any of them could come only through the action of the county council; and whether any disposition of it would benefit any particular municipality, as apart from the other portions of the county, would depend upon considerations which it would be the province of the county council to deal with.

If the plaintiffs had continued as a town in the county, these would be their sole rights; and the legislation under which they withdrew does not appear to have placed them in any more advantageous position.

Then it is said that this is a trust fund upon which the Court may fasten and direct its administration. But it is a trust fund only in the sense that it is in the hands of the county and under the control of the county council, whose duty it is to deal with it in accordance with the Municipal Act. It cannot be said that it is a trust fund held for the benefit of the plaintiffs, nor that they represent in this action the ratepayers by whom the rates were paid, for the purpose of enforcing any supposed trust in respect of it. If a trust is to be enforced, it could only be at the instance of some person or body of persons entitled as an entity to benefit by the trust, and in an appropriate form of action, with all parties interested in the trust properly represented.

The agreement of the 10th February, 1902, was made with reference to matters with which the parties were competent to deal as consequent upon the erection of the plaintiffs into a city, but in no case could it have dealt with the fund in question, unless, perhaps, by consent of all the municipalities.

From no point of view does it appear to me that the plaintiffs are entitled to relief in this action; and, in my opinion, the judgment appealed from should be affirmed and the appeal dismissed with costs.

MEREDITH and MAGEE, JJ.A., agreed in the result, for reasons stated by each in writing.

GARROW and MACLAREN, JJ.A., dissented, each stating reasons in writing.

GARROW, J.A., adopted the statement of law of Brady, L.C., in Attorney-General v. Belfast, 4 Ir. Ch. 119, and said that it justified the plaintiffs' contention that, without any special provision in the Municipal Act upon the subject, the defendants were trustees

of the fund in question for the various local municipalities who had been made to contribute to it, to the extent of their several contributions. And, no legal appropriation of the fund having been made, it should have been taken into account, and the plaintiffs' share therein allowed, in the settlement consummated by the agreement of February, 1902; and it seems to follow that the settlement then arrived at cannot, in the circumstances, be allowed to stand, but must be opened up, unless the parties can agree upon the extent of the relief to which the plaintiffs are entitled, apart from the agreement, which covers so many matters not in dispute.

OCTOBER 22ND, 1910.

*BROOKS-SANFORD CO. v. THEODORE TELIER CONSTRUCTION CO.

Mechanics' Liens—Material-man—Preservation of Lien—Last Delivery—Article Used for Temporary Purpose—Contract—Registry of Lien—Time — Mechanics' and Wage Earners' Lien Act, sec. 4.

Appeal by the defendants Leo Frankel and Frankel Brothers from the judgment of a Divisional Court, 20 O. L. R. 303, 1 O. W. N. 385, reversing the judgment or decision of an Official Referee in a proceeding under the Mechanics' and Wage Earners' Lien Act, R. S. O. 1897 ch. 153.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., and RIDDELL, J.

George Wilkie and E. W. Wright, for the appellants.

R. G. Smythe, for the plaintiffs.

MOSS, C.J.O.:—The plaintiffs claim a lien under the Act upon certain lands, the property of the appellants, for materials supplied to the defendants the Theodore Telier Construction Co., who were the contractors for the erection of a building upon the appellants' land. Under the contract, which bears date the 10th April, 1907, the construction company were to complete the building ready and fit for occupation by the 1st October, 1907. They failed to complete within the time limited, and the appellants were

* This case will be reported in the Ontario Law Reports.

only able to enter into occupation during the first week in January, 1908, there then remaining some comparatively trifling matters to be attended to in order to complete. The construction company were dealing with the plaintiffs for materials for use in connection with the contract in question and other building contracts. They also procured some working tools from the plaintiffs, and some items of the character appear in the account kept by the plaintiffs with the construction company, in connection with the building upon the appellants' land.

The plaintiffs registered their claim of lien against the appellants' land on the 30th April, 1908. They claimed $325.92, as shewn in the itemised account. The two last items in the account are, "March 7, 1908, $1.40," and "April 1, 1908, $0.84." The first of these ($1.40) appears to have been for tools, and was properly disallowed as an item in respect of which no lien could be claimed; but, assuming it to have been a proper item, the material was not furnished within thirty days preceding the registration of the claim of lien. The only item, therefore, which appears to bring the account within the terms of the Act, so as to entitle the plaintiffs to a lien, is the item of 84 cents under date of the 1st April. It is conceded that, unless this item has that effect, the plaintiffs had no right of lien on the 30th April. Their claim depends upon the slender thread of these 84 cents. And it is also conceded, and rightly so, that, unless the articles representing the 84 cents were of such character and were so furnished and supplied as to give rise to a lien in themselves, they cannot revive the claim in respect of the remainder of the account. The articles furnished on the 1st April are said to be four coach-screws or expansion balls and four expansion shields. They were not in any way contemplated as things to be procured for the purposes of the work to be done under the contract, nor were they procured for the purpose of being put into the building, and they do not now form part of the material of the structure. . . . The articles . . were procured by the construction company for the purpose of making . . experiments, but, . . . they were never intended to be used except for the purpose of experimenting. The experiments having been tried and failed, the articles were put aside.

Were they, in the circumstances, materials in respect of which the plaintiffs could claim a lien upon the appellants' land?

It is to be borne in mind that these articles were supplied to and upon the credit of the construction company, and that the appellants had nothing to do with their procurement. Their only connection with them was that they were brought to their pre-

mises for the purpose of a demonstration which came to nought. So far as they were concerned, these articles stood in no higher position than tools or implements used by workmen in their trades.

. . .

[Reference to Bunting v. Bell, 23 Gr. 584, 588.]

While the object and the policy of these Acts is to prevent an owner from obtaining the benefit of the labour and capital of others without compensation, it is not the intention to compel him to pay his contractor's indebtedness for that which does not go into or benefit his property. Suppose, for instance, that a contractor for the erection of a brick building, thinking in good faith that he will need a certain quantity of bricks, procures that quantity to be furnished, but ultimately finds that he has over-estimated, and that, after completion of the building, a considerable quantity remains unused because not required, and causes them to be taken away and uses them for some other purpose. Could it be successfully maintained that the person supplying the bricks to the contractor is entitled to a lien upon the land of the owner of the building for the whole quantity supplied? No decision has been cited, nor have I seen any, which goes the length of upholding such a proposition. The question is glanced at by Killam, J., in McArthur v. Dewar, 3 Man. L. R. 72, at p. 79, but the actual decision was based upon the special terms of the contract. . . .

[Larkin v. Larkin, 32 O. R. 80, distinguished.]

The often-quoted language of sec. 4 of the Act is made applicable to a variety of persons, as well as a variety of acts and circumstances. . . . It is capable of being read distributively, and, I think, was so intended. The land of an owner may and in general should be subject to a lien for materials supplied or furnished to him to be used in the construction, etc., of a building, whether actually used or not; his land may and in general ought to be subject to a lien for materials furnished or supplied to a contractor to be used in the construction of a building, when actually used, and so as regards a sub-contractor, but in these cases limited to the sum justly owing by the owner to the contractor. The significance of the term "furnishes any material to be used" is that, unless the material is furnished by the material-man for the purpose of being used in the building or other work, it cannot be the subject of a lien, even though used.

In my opinion, the articles costing 84 cents supplied by the plaintiffs to the construction company on the 1st April, 1908, were not furnished in such manner as to enable the plaintiffs to claim a lien for their price upon the appellants' land, within the

meaning of the Act. And, therefore, the whole claim falls to the ground.

This being so, it is unnecessary to discuss the other branch of the case.*

I would allow the appeal and restore the judgment or decision of the Official Referee with costs throughout.

RIDDELL, J., gave reasons in writing for the same conclusion.

GARROW, MACLAREN, and MEREDITH, JJ.A., also concurred.

MEREDITH, J.A., may give written reasons later.

OCTOBER 22ND, 1910.

*TREASURER OF ONTARIO v. PATTIN.

Succession Duty—Property of Person Resident in Ontario at Time of Death—Mortgages on Foreign Lands—Specialties—Domicile—Situs of Debt.

An appeal by Frank L. Pattin, the administrator of the estate of John H. Pattin, deceased, from the judgment of the Judge of the Surrogate Court of Essex determining that certain mortgages on lands situated in the State of Michigan, made by mortgagors residing in that State, the property of the deceased, were liable to duty under the Succession Duty Act.

John H. Pattin died at Windsor, Ontario, on the 18th February, 1907, having resided there for about seven years.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

F. D. Davis, for the appellant.

J. R. Cartwright, K.C., J. W. Hanna, K.C., and J. B. McLeod, for the Treasurer.

MOSS, C.J.O.:—The question raised upon this appeal, while comparatively simple in statement and in regard to the facts, is

* As to the effect of the negotiation of the note given for part of the debt, see 10 Edw. VII. ch. 69, sec. 28.

* This case will be reported in the Ontario Law Reports.

not altogether free from difficulty. It is whether the estate of the late John H. Pattin, who at the time of his death was resident in the city of Windsor, is liable to succession duty in respect of a large number of mortgages upon real estate situate in various parts of the State of Michigan, U.S.A., made in favour of Mr. Pattin, and executed by mortgagors who were, at the respective dates of the instruments and the mortgagee's death, resident in Michigan. No question arises as to the ability of the mortgagors to pay, or as to the value of the securities. Some question was raised as to Mr. Pattin's domicile at the time of his death, but nothing appears to turn specially upon it. The difficulties arise out of the other circumstances.

Before finally dealing with the appeal, we deemed it desirable to obtain evidence with respect to the nature and effect of the instruments according to the law of the State of Michigan. This was taken before the Judge of the Surrogate Court of Essex on the 28th September, and is now before us.

The effect of the evidence is to shew that by the law of the State of Michigan the mortgages are in fact or are to be deemed as in fact instruments under seal creating debts by specialty. Upon the whole evidence now before us, as well that taken before as after the appeal, and on inspection of the mortgages, sufficient appears to shew that the mode and form of execution of them was such as to render them sealed instruments capable of creating debts by specialty according to the law of this province: Hamilton v. Dennis, 12 Gr. 325; In re Sandilands, L. R. 6 C. P. 411 (commented upon in National Provincial Bank v. Jackson, 33 Ch. D. 1); Re Bell and Black, 1 O. R. 125. See also Thompson v. Skill, 13 O. W. R. 887. Neither by the law of Michigan or of this province are they instruments creating merely simple contract debts. And, although it may be true that the executor or person administering the trusts of the will, in order to collect the debts or to discharge the mortgage, would be obliged, apart from any special directions contained in the will, to obtain ancillary letters in Michigan, yet the rule adopted in Commissioners of Stamps v. Hope, [1891] A. C. 476, and virtually adhered to in Payne v. The King, [1902] A. C. 552—although in the latter the debt was held to be a simple contract debt in Victoria, although a specialty debt in New South Wales—appears to have application to this case. In the well-considered case of Estate of Sir William Clarke, 28 Vict. L. R. 447, at p. 457, Madden, C.J., points out that the decision in Payne v. The King adopts a view which forms part of the artificial rule as to bona notabilia, though it also consists

with the common law general rule that the residence of the debtor is the place at which payment of a simple contract debt may be enforced; and this seems to me to be the correct view.

At the time of Mr. Pattin's death the mortgages were in his custody at Windsor. Thus by the artificial rule of law they were bona notabilia in this province, and as such were subject to be, and were in fact, comprised in the list of properties held by the personal representative upon his application for letters in this province. Had the instruments been located in Michigan or anywhere out of Ontario at the time of the testator's death, it is quite probable that the rule laid down by the Judicial Committee in Woodruff v. Attorney-General, [1908] A. C. 508, would prevail.

In several of the cases cited it appeared as a fact that the lands comprised in the mortgage securities in question were situated outside of the jurisdiction of the Courts of the place of the deceased mortgagee's residence or domicile, but the decisions do not appear to have in any way turned upon that circumstance. The determining factors seem to be (a) domicile or (b) the nature and situs of the debt.

In my opinion, the learned Surrogate Judge rightly determined the case. I think that the appeal fails and should be dismissed with costs, except those incurred in taking the additional evidence, as to which there should be no costs.

MACLAREN and MEREDITH, JJ.A., agreed in the result, for reasons stated by each in writing.

GARROW, J.A., dissented, for reasons stated in writing.

OSLER, J.A., had retired from the Bench before judgment was given.

HIGH COURT OF JUSTICE.

RIDDELL, J. OCTOBER 20TH, 1910.

*GROCERS WHOLESALE CO. v. BOSTOCK.

Sale of Goods—Costs of Canned Fish — Warranty, Express and Implied—Fitness for Human Food—Goods Sold for Particular Purpose—Knowledge of Purpose for which Intended—Inspection and Acceptance—Quality not Determinable by Examination—Goods Bought by Description—Third Parties — Claim against Canners for Indemnity—Undertaking to Protect Vendors from "Legitimate Claims"—Exclusion of Implied Warranty—Liability to Indemnity—Jurisdiction—Cause of Action Arising and Defendants and Third Parties Residing out of Province — Unconditional Appearance — Defence of Want of Jurisdiction—Waiver—Con. Rule 173—Third Parties Taking Part in Trial—Evidence of Place of Residence—Costs.

Action for damages for breach of warranty upon the sale of canned salmon to the plaintiffs.

D. L. McCarthy, K.C., and J. G. Gauld, K.C., for the plaintiffs.

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendant.

L. F. Stephens, for the Canadian Canning Co., third parties.

RIDDELL, J.:—The plaintiffs are a wholesale firm carrying on business in Hamilton, Ontario; the defendant, a broker in Vancouver, British Columbia.

In September, 1906, the plaintiffs bought from the defendant 573 cases of salmon, 48 cans to the case. These were "do-overs" and sold as such. It was explained that, when salmon is being canned, upon examination some cans are found defective and are laid aside; they are within 24 hours re-cooked and the cans made perfect as far as possible. This salmon so re-cooked is, I find on the evidence, wholesome and fit for human food, and is little inferior as such food to that which is not re-cooked, but is somewhat deficient in flavour and is softer than first-class salmon should be. This is what is called "do-overs," and is sold for approximately $1.50 per case on the average less than first class salmon.

The goods, these "do-overs," were guaranteed free from "blown, burst, dry, and leaks." "Blown" means with the can bulging—the usual cause being fermentation of some kind within; "burst,"

* This case will be reported in the Ontario Law Reports.

can "blown" so far as to give way; "dry," a can not containing the proper amount of fluid within; "leaks" is self-explanatory.

The salmon had been canned at the Star cannery of the Canadian Canning Co. Ltd.; and the defendant on the 14th September, 1906, procured the goods from that company, with a writing which reads: "In reference to 573 do-overs this day delivered to you from our Star cannery, we hereby undertaking to protect you from all legitimate claims for blown, swell, dry, and leaks in respect of said lot of do-overs." "Swells" are not, I understand, to be differentiated from "blown," while "leaks" will include "bursts." The undertaking, therefore, substantially covered the defendant's warranty.

On the 14th September, 1906, or thereabouts, the salmon was sent on, accompanied by a sight-draft for the price, $2,234.70; and arrived at Hamilton in October. The plaintiffs had stipulated for the right to inspect the goods at Hamilton; and when they arrived the servant of the plaintiffs opened, of each of the three brands, four cases near the door, and out of each case took two cans, thus taking twenty-four cans in all. There was nothing except pressure of time to prevent him from taking a sample from each case, but he supposed that in a business way the samples taken should shew fairly what the consignment was. Mr. Zealand, the plaintiffs' manager, himself examined eleven tins and found ten all right and one rotten. I find as a fact that in a lot of "do-overs" there may be expected to be up to ten per cent. bad—in extreme cases fifteen per cent., but no more—and that in a shipment of such goods no more than from ten per cent. to fifteen per cent. should be defective in any way—all the rest should be good for human food. Zealand, finding only one in eleven defective (it would seem that the same result was found from all the twenty-four, but this was not made clearly to appear), took over the shipment and paid the draft.

The plaintiffs forthwith put the salmon on the market and sold 520 cans out of the lot. But, almost immediately, complaints were made, and the goods began to come back. The plaintiffs examined the goods and found that a great part of the shipment was "drys, blowns," etc., and that many cans which had no external signs of defect contained salmon unfit for human food, rotten, etc. "Drys" can be detected by tilting the can; but there were many cans not "drys," etc., which contained bad stuff.

The plaintiffs went into the matter with their customers, and have had to allow $1,514.09 in settling the rightful claims made; and have still 140 cases of the shipment on hand.

The plaintiffs claim under two heads: (1) the written warranty; and (2) the implied warranty that the goods were fit for human food.

The defendant admits the warranty, but says that the salmon complied with the warranty, that the plaintiffs inspected the salmon and accepted it. At the trial the defendant argued against any other warranty than that expressed.

The Canadian Canning Co. had been originally parties defendants in the action, but the action is discontinued against them.

The defendant served a third party notice upon the Canadian Canning Co.; the company moved to set the notice aside; and the Master in Chambers on the 3rd March, 1910, made an order dismissing the motion, ordering the company to file their defence in the third party proceeding, and "that the order is made without prejudice to the rights of the third parties, should they be advised to plead the jurisdiction of the Court." The company thereupon entered an unconditional appearance, and afterwards pleaded to the merits, and added "that as both . . . parties are residents in the province of British Columbia, and the contracts in question arose and are to be fulfilled there, the said cause of action should be tried and disposed of in the province of British Columbia, and is not within the jurisdiction of this Court. . . .

At the opening of the case, Mr. Stephens, for the third parties, raised the question of the jurisdiction of the Court, and I said I would find the facts irrespective of his plea, and pass upon that afterwards. Mr. Stephens himself asked a question of a witness, and had Mr. McCarthy ask another witness a question for him.

On the facts it is quite plain that the warranty given by the defendant has been broken, and the plaintiffs are entitled to a reference to determine the damages. But the plaintiffs claim further damages as on an implied warranty that the goods were fit for human food, i.e., reasonably fit for the purpose for which they were intended.

Bigge v. Parkinson, 7 H. & N. 955, in Cam. Scacc., is authority for the proposition that an express warranty does not exclude the warranty implied by law that the goods should be reasonably fit for the purpose for which they were intended, in cases in which such a warranty is implied by law: Moody v. Gregson, L. R. 4 Ex. 49; Readhead v. Midland R. W. Co., L. R. 4 Q. B. 379, at p. 386, in Cam. Scacc.

The quality of the fish could not be determined by examination. . . .

[Reference to Fitz-Herbert, 94 C.; Burnby v. Bollett, 16 M. & W. 644; Emmerton v. Matthews, 7 H. & N. 586; Smith v.

Baker, 40 L. T. R. 261; Bigge v. Parkinson, supra; Jones v. Just, L. R. 3 Q. B. 197; Wallis v. Russell, [1902] 2 I. R. 585; Beer v. Walker, 46 L. J. N. S. Q. B. 677; Parkinson v. Lee, 3 East 314; Randall v. Newson, 2 Q. B. D. 102.]

The distinction between the case of a specific article in esse and goods ordered of a specified description is very clearly shewn . . . and I venture to think that the cases are nearly all reconcilable when that distinction is borne in mind, if there is added the further principle that "where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied:" Jones v. Just, L. R. 3 Q. B. at pp. 202, 203.

The present case is not one of a specific chattel chosen by the purchaser, like Smith v. Baker, but of goods which are not specific goods supplied by a dealer, as in Beer v. Walker, and "sold for a particular purpose, i.e., for consumption as human food." . . .

[Reference to the Imperial Sale of Goods Act, 1893, sec. 14.]

This did not, I think, change or modify, but only codified, the common law; and I accept it as correctly stating the law. And, of course, a condition becomes a warranty when the purchaser has received a substantial part of the goods. . . .

However the case be put in the present instance, the defendant undertook to supply to the plaintiffs goods for human consumption, and the implied warranty arose—or the goods were bought by description, from which an implied warranty arose that they are of merchantable quality, i.e., that not more than ten per cent., or fifteen per cent. at the outside, are bad. In either view the defendant is liable on the implied warranty. . . .

[Reference to Moody v. Gregson, L. R. 4 Ex. 49; Randall v. Newson, 2 Q. B. D. 102; Drummond v. Van Ingen, 12 App. Cas. 284; Jones v. Padgett, 24 Q. B. D. 650.]

There must be judgment for the plaintiffs declaring the defendant liable, not only on the express warranty, but also on the implied warranty that at least eighty-five per cent. of the goods supplied were fit for human food; and a reference to the Master in Ordinary to determine the amount of damages.

The third parties do not dispute liability for their express warranty, but deny liability upon any implied warranty; and chiefly on the ground that the circumstances of the sale by them rebut any such warranty.

[References to and extracts from the evidence.]

It seems to me that the defendant, being aware of all the risks of bad fish in that lot which he was buying, and inspecting the goods with all the risks in his mind, and, after that inspection, being fully alive to all the risks, and thereupon asking for and receiving an express warranty, or at least indemnity, cannot set up any warranty to be implied. . . .

[Reference to Addison on Contracts, 10th ed., p. 412; Barbeau v. Piggott, 10 O. W. R. 715, at p. 716.]

Nothing could be further from the mind of the defendant than that he was contracting for goods to be fit for human food, or that he was doing anything else than taking his chances. He thought, he says, that the plaintiffs could not claim against him on anything but the express warranty he had given; and it is, I think, clear beyond peradventure that all he was asking or expecting from the canning company was protection against loss upon that warranty; and it cannot, in my opinion, be said that, in the circumstances of the purchase here, it would be in furtherance of the ends of justice to infer a contract which neither party contemplated.

Nor do the authorities compel me to hold that there is an implied warranty by the third parties: Sale of Goods Act, 1893, sec. 14; Jones v. Just, L. R. 3 Q. B. at p. 202; Pemmerton v. Matthews, 7 H. & N. 586; and other cases.

It is plain that the defendant did not at all rely upon the skill or judgment of the third parties; and he must, therefore, base his whole claim upon the agreement in express terms by the third parties to indemnify him.

The third parties raise the question of the jurisdiction of the Court, and refer to McCheane v. Gyles, [1902] 1 Ch. 287, as establishing that a third party notice cannot be served on a party out of the jurisdiction except in circumstances in which, had he been a defendant in an action by the defendant, he could have been served.

The first argument of the defendant is based upon the form of the document. It is not exactly a warranty—"We hereby undertake to protect you against all legitimate claims for blowns," etc. The argument is that just as soon as the plaintiffs made a legitimate claim against the defendant, or at least as soon as the canning company had notice of it, it was their duty to settle with the plaintiffs and then protect the defendant against the claim. Therefore, the defendant might at once have sued the plaintiffs and the canning company to compel the plaintiffs to accept and the company to pay the legitimate claim. As the plaintiffs are within the jurisdiction, it would follow that the company would

be rightly added: Con. Rule 162 (g): or, as it is put in the alternative, the place at which the contract is to be performed by the third parties is in Hamilton, and the performance is the payment by the third parties to the plaintiffs of their legitimate claim. Or, as it was put, the real contract of the canning company was to pay to the plaintiffs the amount of their legitimate claim; and this was a contract to be performed within Ontario.

If the words were not "protect . . against," but "indemnify and save harmless . . of and from," Sutherland v. Webster, 21 A. R. 228, would be conclusive against the former position. . . .

I do not think that the wording of the document in the present case is materially different from that in Mewburn v. Mackelcan, 19 A. R. 729. I can find no case in which the word "protect" in such a document is interpreted; and I think this and the document in Mewburn's case are practically the same.

The result is that there is no action to compel the third parties to pay the claim of the plaintiffs, and so bring the place of performance of the contract within Ontario; nor can it be considered that the plaintiffs are proper or necessary parties to the action. The only action would be for a declaration of the rights of the defendant; and that would not have an Ontario locus.

Then it is said that the appearance without protest or objection to the jurisdiction bars the third parties from objecting.

There are many cases in our own Courts upon this subject: but Con. Rule 173, it seems to me, has now made most of these inapplicable. It was thought in many cases that the mere appearance without objection to the jurisdiction was a waiver of his right to object (see the cases in Holmested & Langton, pp. 298, 317); and to avoid this rule working any hardship the new Con. Rule was passed, whereby, in a proper case, all the rights of the defendant may be saved. It seems to me that now any one who does not avail himself of this Rule must be considered as waiving any right he may have to object to the (local) jurisdiction. The fact that the third parties here plead in their statement of defence to the jurisdiction does not help them—their election was made on entering their apearance, and, that appearance standing, they cannot take a new position.

The later cases in England, too, seem to hold that if, without pressure and voluntarily, the defendant attends the trial and takes part in it, he is not allowed to take advantage of his plea to the jurisdiction, even though that might otherwise be available. See

Westlake's Private International Law, 4th ed., pp. 376, 377; Dicey's Conflict of Laws, 2nd ed., p. 370, and the cases cited.

I can, moreover, find no evidence that the "residence" of the third parties is not in Ontario—there is no evidence except that the contract was made in British Columbia.

I think the Canadian Canning Co. must indemnify the defendant against loss so far as the express warranty is concerned, and they should also pay his costs, if any were paid by him to the plaintiffs so far as the express warranty is concerned. But the costs in this action are to a certain extent increased by the contest over the implied warranty. I think, therefore, the third parties should pay one-half of the costs of the third party procedure, one-half of the costs paid by the defendant to the plaintiffs, and one-half of the costs paid by the defendant to his solicitor—all these costs being taxed up to and including judgment.

The costs of the reference (at which the third parties must have leave to appear and to take part in) will be reserved until after the Master shall have made his report.

RIDDELL, J., IN CHAMBERS. OCTOBER 21ST, 1910.

MEAKINS v. MEAKINS.

Solicitor—Costs—Charging Order—Fund in Court—Land Ordered to be Reconveyed — Representations of Solicitor — Conflict of Evidence—Agreement.

An application under Con. Rule 1129 by a solicitor for a charging order on a fund in Court and upon certain land, for his costs.

J. G. O'Donoghue, for the applicant.

Frank McCarthy, for the plaintiff.

RIDDELL, J.:—The plaintiff had a claim against the defendant in respect of a trust deed. An action was brought, and at the trial the plaintiff admitted that the deed he had asserted to be fraudulent and void had been prepared by his own solicitor; a reference was made to the Master at Hamilton to take the accounts under the trust deed; the Master found that the defendant had $506.54 of the plaintiff's in his hands; by order on further directions the defendant was allowed to retain his solicitor and client costs out of this sum; and the defendant was ordered to reconvey the property to the plaintiff and to pay the balance of the sum of $506 54 to the plaintiff. The solicitor applied for a charging order, and on the 21st July, 1910, an order was made for pay-

ment by the defendant into Court of the balance, $290.33, and directing that the bill of costs theretofore delivered by the solicitor should be referred to the Master at Hamilton for taxation, that the deed of the property should be retained by the solicitor for the defendant until further order, and that the costs of the order of the defendant and of the solicitor should be paid out of the fund in Court forthwith after taxation. These costs will reduce the fund to $212.92 and any accrued interest.

An appointment was taken out before the Master at Hamilton to tax the solicitor's bill, as had been ordered; a solicitor for the plaintiff attended on the taxation, and contended that under an agreement mentioned the solicitor was not entitled to any costs. This contention was overruled, and the bill taxed at $436.75.

The solicitor swears that the lands and money were recovered through his instrumentality: the plaintiff swears that he could have got more from the defendant than he did without any action, but was advised against it by the solicitor, who represented to him that more could be recovered: the solicitor replies by swearing that the plaintiff never was willing to accept less than $2,000, and denies that he ever made any such representations as stated by the plaintiff.

In this state of conflict, I am bound to hold that the plaintiff has not met the onus cast upon him.

Moreover, taking the allegations of the plaintiff at their face value, there is no allegation of fraud; and, at the most, the advice of the solicitor was due to an error of judgment. A solicitor does not undertake with his client not to make mistakes, but only not to make negligent mistakes.

Then it is contended that the solicitor is not entitled to costs by reason of an agreement produced. The solicitor swears that this agreement does not refer to this action at all. The Master at Hamilton has found against the plaintiff, and, there being no appeal, I cannot, if I would, interfere.

All these matters should have been, and, no doubt, were, fought out before the Master in the taxation proceedings. If they were, the Master's decision is binding; if not, they cannot be raised now: Humphries v. Humphries, [1910] 1 K. B. 796.

Upon the material before me, I must hold that the solicitor has made out his case. The solicitor may add the costs of the present motion to his costs as taxed. An order will go for the payment out to him of the money in Court, with any accrued interest, to be applied pro tanto on his costs, and he will be declared to have a charge upon the land referred to for the balance.

If any special or further order be required, I may be spoken to.

MIDDLETON, J. OCTOBER 21ST, 1910.

RE HENDERSON AND TOWNSHIP OF WEST NISSOURI.

Schools—Continuation School—Erection of School-house—Township By-law—9 Edw. VII. ch. 90, sec. 9—9 Edw. VII. ch. 91, sec. 4.

Motion by James Henderson to quash by-law No. 208 of the township, purporting to be a by-law to levy a rate for the erection of a school-house for a continuation school.

J. M. McEvoy, for the applicant.

T. G. Meredith, K.C., for the township corporation.

MIDDLETON, J.:—A continuation school shall not be established in a high school district: 9 Edw. VII. ch. 90, sec. 9.

Under R. S. O. 1887 ch. 226, the county council in 1888 established the separate high school district in question. No trustees were ever appointed, no site purchased, and no school built. Nothing has been done under this by-law up to the present time.

In the same year the council made a grant to the London high school, and, though nothing is said in the material, I am told grants have been made annually, and the pupils have attended high schools in London and other municipalities. The county council have now passed a by-law establishing a continuation school in the township of West Nissouri, part of the district in question. This by-law has not been attacked, but is said to be void by reason of the provisions of sec. 9. Requisitions having been made upon the township for funds for the purchase of a site and the erection and equipment of a school-house, the by-law now in question was passed.

Under 9 Edw. VII. ch. 91, sec. 4, wherever a high school district "has existed in fact for three months," it shall "continue to exist," and shall be deemed to be a high school district under the new Act, no matter whether originally regularly formed or not. The effect of this is to continue all districts which were in actual operation for three months before the passing of the Act in question. All districts not organised and actually maintaining schools were suffered to perish as the result of the repeal of the former legislation. To attribute any other meaning to the expression "existing in fact" would be to render the statute meaningless. It is intended to contrast the actual, living, working districts with those that exist "in law" upon paper or as a matter of theory

only. The intention was to have a clean slate and to start anew with the real, as distinct from the imaginary, as well as to remove any stigma attaching to the origin of the survivors.

Motion dismissed with costs. The money paid in will be applied in payment of these, and the balance returned to the applicant.

RIDDELL, J., IN CHAMBERS. OCTOBER 22ND, 1910.

STAVERT v. HOLDCROFT.

Judgment Debtor—Examination—Con Rule 907—Unsatisfactory Answers—Refusal to Disclose Assets—Income of Physician and Surgeon—Moneys Owing—Books not Kept—Duty of Debtor to Inform himself—Opportunity given to Debtor to Answer upon Re-examination, in Lieu of Immediate Committal.

Motion by the plaintiff (judgment creditor), under Con. Rule 907, for an order for the committal of the defendant for unsatisfactory answers and refusal to disclose his assets upon his examination as a judgment debtor.

A. C. Macdonell, K.C., for the plaintiff.

Grayson Smith, for the defendant.

RIDDELL, J.:—Several series of questions and answers are referred to in the notice of motion as objectionable, the notice in this respect conforming with what is said in Foster v. Van Wormer, 12 P. R. 597, at pp. 600, 601, by the Chancellor.

The first series, questions 187-199, is a set of answers shewing that the defendant (a medical practitioner) when he attends cases does not make any charge, leaves the amount to the patients themselves, and keeps no books—although up to a year ago, i.e., until the judgment was recovered against him, he did keep books.

There is nothing in the law to compel a debtor to work to earn money to pay off his debt; there is nothing to compel a debtor to make a charge for his services so that the creditor may have the advantage of it, or for any other reason, and there is nothing to compel a debtor to keep any record of what he does—in short, to keep books. A debtor can only be compelled to pay on his debt what he has—not what he can make by his exertions. These answers are not and do not constitute a refusal "to disclose his property or his transactions," within the meaning of Con. Rule 907, or any rule or law.

The second series is questions 422-431. In these the defendant says that he could not say if his practice on an average is as

good as last year, he does not know his average income a year, he has no opinion at all, just takes in enough money to keep him going, and keeps no track of what he does take in. In answer to questions whether he makes $10,000 a year or $12,000 a year or more than $15,000 or $18,000 a year, he persists in saying uniformly, "I don't know what I make." He keeps no track whatever of his income; he will not swear to any amount; he does not know, and cannot tell because he does not know.

In respect of the statements concerning the gross amount of his yearly income, "no reasonable man could believe him or them;" and the cases followed by the Chancellor in Foster v. VanWormer, at p. 600, lay down the rule that under such circumstances the defendant should be committed.

So also, where no books have been kept, the defendant must apply, if necessary, to persons who can give him the information and inform himself of the amount, as nearly as possible, of money taken in, and his dealings with it: S. C., p. 600.

But it is pointed out that, after adjournment for two hours, the defendant says that he could not possibly make $18,000 a year or perform 300 operations—he could not possibly perform 50 major operations. Counsel then does not pursue the inquiry as to the yearly income; and expressly tells the defendant (Q. 467) that he will not go into the number of operations, although (questions 704, 705) he returns to the number, but is satisfied with the answer that the defendant is unable to state, though the defendant had at a former stage (questions 465, 466) said he had telephoned to the hospital (Mrs. Campbell) for the number of patients. Ultimately the defendant fixes the number of major operations at 12 or 15 (Q. 712), and he is not further questioned.

I do not think that the plaintiff can complain as to the discovery of the number of major operations . . . even if he was entitled to such discovery; but it is, I think, clear that there is a refusal to disclose the property so far as it is composed of annual income.

It would, in view of the manner in which the examination was conducted, be too drastic to order the committal of the defendant at once, without giving him an opportunity of making a better shewing as to his income. The information given in answer to specific questions as to specified persons is not at all such information as should prevent an order being made.

The third series (questions 441-462). The defendant cannot call to mind the name of any pay patient other than those which had been mentioned to him, between 40 and 50 in all; does not know the number of major operations—might be 100 or 200; has

no idea how many; but, after the adjournment, he answers as I have already said in discussing the second series. I have dealt with the latter line of answers; as to the former, I do not think that it can be said to be wholly incredible that on the spot the defendant could not remember more or other patients than the very considerable number already specifically named to him; but, on the other hand, the answer is not wholly satisfactory, and he must make all reasonable efforts to find out, in order truly and satisfactorily to disclose his transactions.

The fourth series (questions 468-487.) The defendant does not know the names of those who have not paid him; he has not rendered bills; he does not know their names and addresses or the amounts owed; cannot place anybody who owes him, or any amount, although certain men and women do owe him money.

All this is wholly unsatisfactory, and would warrant an order for committal if wilful and persisted in.

The defendants, through his counsel, asks an opportunity to answer the questions; and, considering all the circumstances, he should have that chance.

He will appear before the examiner at his own expense, upon proper notice, and give full and as far as possible satisfactory disclosure as to his property and transactions, not restricting the disclosure because of any answers heretofore given upon the examination. So far as he has no record of his transactions, he must inform himself as best he can.

The costs of this motion will be added to the claim or ordered to be paid by the defendant, at the plaintiff's option.

BOYD, C.

OCTOBER 22ND, 1910.

DOMINION IMPROVEMENT AND DEVELOPMENT CO. v. LALLY.

Limitation of Actions—Real Property Limitation Act—Occupation of Land by Permission of True Owner—Use of Pasture—Payment of Taxes and Performance of Road-work—Entry by Owner—Execution of Lease—Evidence—Trespass—Injunction—Damages—Deduction for Taxes Paid—Costs.

Action for a declaration as to the plaintiffs' title and right to possession of certain land, and for an injunction and damages in respect of trespasses by the defendant.

The defendant set up a title by possession under the Statute of Limitations.

G. H. Watson, K.C., and C. J. Foy, for the plaintiffs.

H. A. Lavell, for the defendant.

BOYD, C.:—I do not decide this case upon the question raised, whether the possession of the defendant was per se sufficient to ripen the continued occupation into a statutory title, but upon another aspect of the evidence, viz., that the acts of the defendant upon and in reference to the property were in recognition of the rights of the true legal owner. That is, the evidence leads me to the conclusion that the occupation of the defendant was not exclusive of the owner, but by his sanction and permission. If this be the right view, the Statute of Limitations never began to run in the defendant's favour,

It is proved beyond serious controversy that the defendant agreed to pay the taxes and do road-work, in return for being allowed the use and enjoyment of the pasture. This was a bargain made for the advantage of the defendant, who expended less than $5 for the assessment, and collected ten times the amount as the proceeds of the pasture. The only matter of discussion is how long this continued and when it began.

The solution of this which satisfies me rests on a situation which I find well proved. About 1890 the legal owner of an undivided half of the lot went upon the land in company with the defendant and went over the mining area of the land, which constitutes its chief value. This was an entry on the land which of itself would give a new point of departure, even if the Statute of Limitations had begun to run. Superinduced on that entry, however, there was a further act implicating the defendant. A lease was then prepared for a year between the owner and the defendant, by which it was agreed that the latter should enjoy the pasturage on condition of paying the taxes and doing the road-work charged on the lot. The lease is not forthcoming, but I have no doubt it was duly executed and operative. There is, besides, general evidence that this lease merely expressed the relation which had existed in fact between the owners and the defendant prior and subsequent to that year, 1890. The payment of taxes and doing of road-work began a year or so after the defendant went into possession of his lot 14 as owner, and so continued for at least five or six years, and probably longer thereafter. Documentary evidence establishes this as against the defendant, which he endeavoured (vainly, I think) to controvert. I refer specially to the letter written for the defendant by Glossop—a trustworthy witness—of date the 22nd November, 1902—seeking to purchase

the lot in question. The letter states "that the lot is convenient to him" (Lally), "and, as he has had the pasturage from you" (Cummins, the half owner) "for a number of years for taxes and road-work." Cummins answered this directly to Lally on the 30th November, 1902. Lally himself replied to this by letter of the 31st December, 1902, objecting to the price, but saying: "I have been in charge of the lot for a long time, and I trust you will give as reasonable a chance as you can, and I feel entitled to the first chance to purchase." Lally denied the signature to be his, saying at first that he could not then write his name, but, on being confronted with his signature to mortgages made in 1881, he said that his signature to the letter was not like his signature to the mortgages. It may be that the signature to the letter was not manually his, but he admits that letters were written for him by his wife and his two daughters, who are not called. The letter in itself and in its being a link in the chain of correspondence possesses elements of authenticity which are, to my mind, entirely satisfactory. The action was begun in 1908 or 1909, and I can find no period in which to place ten years of undisputed possession adverse to or inconsistent with the right and title of the legal owners. The possessory claim of the defendant fails, and the plaintiffs are entitled to succeed on their legal registered title to the lot. The defendant should perhaps be allowed for taxes, etc., paid after 1902; but, without going into details as to the claim of the plaintiffs for damages in regard to wood cut and operations interrupted and the like, I will for present purposes assess the plaintiffs' damages at $50, with right to either party, if dissatisfied, to have a reference to the Master—in such case the Master will dispose of the subsequent costs of reference. Meanwhile the defendant should pay $50 damages and costs of suit. Injunction may go to restrain further interference by the defendant, and possession to be given forthwith to the plaintiffs.

One set of costs (including reserved costs) to be taxed to the plaintiffs, beginning from the time when the proper plaintiff was made a party.

The status of the corporation is not attacked in the pleadings, and I do not consider the objections raised on that head by the written argument for the defence.

DIVISIONAL COURT. OCTOBER 22ND, 1910.

*CROWE v. GRAHAM.

Judgment — Action in County Court on Division Court Judgments — Jurisdiction — "Final Judgment" — Authority of Decisions of Courts.

An appeal by the plaintiff from the judgment of the Junior Judge of the County Court of Hastings dismissing an action in that Court brought to recover $438.59, the amount alleged to be due on three Division Court judgments recovered by the plaintiff against the defendant.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

W. S. Morden, for the plaintiff.

W. N. Ponton, K.C., for the defendant.

RIDDELL, J.:—If the County Court had jurisdiction, judgment should have been entered for the plaintiff; but it is contended that the objection to the jurisdiction is fatal.

The matter has been considered in our own Courts in two cases and referred to in a third.

In McPherson v. Forrester, 11 U. C. R. 362, and Donnelly v. Stewart, 25 U. C. R. 398, the decision of the Court was that there was no jurisdiction in the Queen's Bench or a County Court on a Division Court judgment—while in Aldrich v. Aldrich, 24 O. R. at p. 128, Mr. Justice Meredith says this is well settled law.

It has been pointed out both before and since the Ontario Judicature Act and before and since 58 Vict. ch. 12, sec. 19, now sec. 81 of the Ontario Judicature Act, that a Court sitting in appeal from a County Court decision, being the final Court, is not bound by previous decisions: per Hagarty, J., in Donnelly v. Stewart, 25 U. C. R. 398; per Armour, C.J., in Canadian Bank of Commerce v. Perram, 31 O. R. 116, at p. 118; Mercer v. Campbell, 14 O. L. R. 639, at p. 645 (in the first two cases giving the judgment of the Court).

If the case stood thus without anything further, we might not follow the cases in 11 and 25 U. C. R. without inquiring into the soundness of the decisions in our view.

* This case will be reported in the Ontario Law Reports.

But there are authorities which we are bound to follow, whether they recommend themselves to our judgment or not.

In Trimble v. Hill, 5 App. Cas. 342, at p. 344, the Judicial Committee say, speaking of a decision of the Court of Appeal in England, which is binding on all the Courts in England until a contrary determination is reached by the House of Lords: "Their Lordships think that in colonies, where a like enactment has been passed by the legislature, the colonial Courts should also govern themselves by it." It seems to me that this lays down a canon by which all colonial Courts must govern themselves.

Now the Court of Appeal in England in The Queen v. County Court Judge of Essex, 18 Q. B. D. 704, have approved as law Berkeley v. Elderkin, 1 E. & B. 805, 22 L. J. Q. B. 282, 17 Jur. 1153.

Edwards v. Coombe, L. R. 7 C. P. at p. 523, and Bailey v. Bailey, 13 Q. B. D. 855, at p. 860, are to the same effect.

Berkeley v. Elderkin is a case upon the statute 9 & 10 Vict. (Imp.) ch. 95, and decides that an action cannot be brought in the Court of Queen's Bench upon a judgment in the County Court. The chief reason given is that by sec. 100 of that Act the judgment of the County Court was not in the nature of a final judgment. That section is in substance sec. 252 of R. S. O. 1897 ch. 60, and we are therefore bound to hold that a Division Court judgment is not in the nature of a final judgment.

Nor does 32 Vict. ch. 23, sec. 1, advance matters at all—all that that section does is to make the judgments of the same effect, &c., as judgments of a Court of record. But a judgment such as we find in Division Courts, if it were to be made in the High Court, would still not be final, but in its nature interlocutory, such as a decree for a fixed amount of alimony in the future: In re Robinson, 27 Ch. D. 160 (C.A.); Stone v. Cooke, 7 Sim. 22, 8 Sim. 321n.; Prescott v. Prescott, 20 L. T. N. S. 331; Bailey v. Bailey, 13 Q. B. D. 855, at pp. 857-8; Linton v. Linton, 15 Q. B. D. 239 (C.A.); and the like cases. So that this section does not help.

Some of the arguments made before us were based upon the hypothesis that the former cases were based in whole or in part on the fact that the Division Court was not a Court of record, and this section had dignified the Court. But this is not the case; and it is the fact that the English County Court is by statute a Court of record (9 & 10 Vict. ch. 95, sec. 3).

The appeal must be dismissed; but, as the commentators on the Division Courts Act have indicated doubt as to the law since the Act of 1869, there should be no costs of the appeal.

BOYD, C., gave reasons in writing for the same conclusion. As to costs, he said that the defendant should have the costs of the action and appeal, to be set off against his debt to the plaintiff.

MIDDLETON, J., for reasons stated in writing, was also of opinion that the appeal should be dismissed, and with costs.

BRITTON, J. OCTOBER 24TH, 1910.

STRIKER v. ROSEBUSH.

Costs—Scale of Costs—Jurisdiction of County Court—Defamation—Verdict for $100—Discretion of Trial Judge—Conduct of Defendant—County Court Costs Allowed to Plaintiff—Defendant Deprived of Set-off.

Action for defamation, commenced on the 2nd October, 1909, just after jurisdiction was given to the County Courts in actions for defamation up to $500. (See 9 Edw. VII. ch. 28, sec. 21 (1), and proclamation of the 22nd May, 1909; Moffatt v. Link, ante 56.)

The plaintiff's claim was for $1,000 damages.

The action was tried on the 10th and 11th October, 1910, before BRITTON, J., with a jury, at Cobourg.

J. B. McColl, for the plaintiff.
D. J. Lynch, for the defendant.

The verdict was for the plaintiff with $100 damages.

BRITTON, J.:—It seems to me a case for the exercise of my discretion as to costs, for the following, with other, reasons:—

(1) Although the defendant by his plea did not justify the use of the words alleged in the plaintiff's statement of claim: he came very close to insinuating that the plaintiff may have stolen the defendant's pocket-book; and the defendant in his evidence did not leave it clear that he did not intend to accuse the plaintiff of the theft mentioned.

(2) This case was entered for trial at the spring sittings, and was postponed. The order postponing is as follows: "Stands for trial at the next jury sittings, unless the defendant consents (the plaintiff having expressed his willingness to do so) that the

action be transferred to the County Court . . . Costs of the day in the cause. April 13, 1910." On the 20th September, 1910, the plaintiff's solicitor wrote to the defendant's solicitor offering to reduce the plaintiff's claim to $500, and have the action tried at the County Court sittings. On the 23rd September the defendant's solicitor wrote in reply that he "had seen the defendant and had suggested to him the advisability of having the case transferred to the County Court, to be tried in December next, but he flatly refused and said that he wanted it tried as soon as possible. As this is his attitude, there is nothing that I can see to do but to go on and have the case tried on the 10th prox."

The plaintiff will, therefore, get only County Court costs, but I direct that no set-off of costs be allowed to the defendant.

DIVISIONAL COURT. OCTOBER 24TH, 1910.

*RE RYAN AND TOWN OF ALLISTON.

Municipal Corporations—Local Option By-law—Voting on—Voters' List Certified by County Court Judge—Ontario Voters' Lists Act—Complaint—Notice of Holding Court — Duty of Clerk—Irregularities—Curative Clause of Statute, sec. 204.

Appeal by Ryan from the order of MEREDITH, C.J.C.P., 21 O. L. R. 582, 1 O. W. N. 1116, dismissing a motion to quash a local option by-law.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

J. B. Mackenzie, for the appellant.

W. A. J. Bell, K.C., for the respondents.

BOYD, C.:—My brothers are agreed upon the correctness of the result arrived at in the Court below upon the main matter under consideration, i.e., whether the proper voters' list was used upon the local option election. The list was one, no doubt, which in form complied with the statute; it was the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace.

The evidence shews that a complaint was made and that the Judge proceeded to hold a Court of Revision thereupon and made a slight change in the list submitted to him, adding two names without such notice being given for the holding of the Court as is made a pre-requisite by the Voters' Lists Act, 7 Edw. VII. ch.

* This case will be reported in the Ontario Law Reports.

4, sec. 17. Had the Judge not held such a Court, he would have accepted the list submitted without the addition of the two names. These two names may be taken to have been wrongly added, but the certified list was in no other respect illegal. This did not per se vitiate the list, and the error would be so immaterial as not to affect the result of the election—having regard to the votes cast.

Other slight irregularities appear, but not of such a character, singly or cumulatively regarded, as to withdraw the whole result from the curative clause of the Municipal Act (sec. 204). The general rule applicable to popular elections held not in strict conformity to law is that the onus is cast upon the complainant to shew affirmatively that the result would have been different if the illegality has not existed. In this aspect of the appeal, I would affirm the judgment with costs.

RIDDELL, J.:—I agree in the result.

MIDDLETON, J., also agreed in the result, for reasons stated in writing.

CLUTE, J., IN CHAMBERS. OCTOBER 27TH, 1910.

RE HENDERSON ROLLER BEARINGS LIMITED.

Assignments and Preferences—Assignment for Benefit of Creditors—Goods Seized by Sheriff but not Sold—Interpleader—Claim of Assignee—Rights of Execution Creditors—Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14 — Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 4— Priorities.

Appeal by N. L. Martin, the claimant, as assignee, from an order of the Master in Chambers, dated the 15th October, 1910, directing that a motion made on behalf of the Sheriff of Toronto for an interpleader order be adjourned until after the Sheriff shall have sold the goods seized, and further directing that the motion might be resumed at any time after the Sheriff should have held the sale, upon proper notice.

A. H. F. Lefroy, K.C., for the appellant.

Grayson Smith, for Fowler and Eckardt.

R. J. Maclennan, for the Sheriff of Toronto.

J. G. O'Donohue, for the Queen City Foundry Co.

McLarty (Heyd & Heyd), for certain creditors.

Shirley Denison, for the other creditors.

CLUTE, J.:—Seizure having been made under certain executions against the Henderson Roller Bearings Limited, by the Sheriff of Toronto, one Atkinson made claim thereto, and, upon the application of the Sheriff, an interpleader order was made, bearing date the 10th May, 1910, directing that, upon payment into Court by the claimant of the total amount of the executions and of other claims as therein provided, or upon giving security as therein required, and upon payment of the Sheriff's costs and expenses, the Sheriff should withdraw from possession of the goods, and that, unless such payment should be made or security given, the Sheriff should proceed to sell the goods and chattels, or sufficient of them to cover the amount of the executions, and pay the proceeds thereof into Court, to abide further order.

It was also thereby further ordered that the parties proceed to the trial of an issue in which the claimant Atkinson should be plaintiff and the execution creditors be defendants, the question to be tried being whether, at the time of their seizure by the Sheriff, the said goods and chattels were the property of the claimant as against the execution creditors, or any of them; and further provision was made that any other execution creditors desiring to take part in the contest of the said issue should be at liberty to do so, upon placing their executions in the hands of the Sheriff within twenty days from the date of the order, and notifying the solicitors for the execution creditor Fowler of their desire to come in, and of their agreement to contribute pro rata to the expenses of the contest. The question of costs as between the execution creditors and the claimant, and all other questions, were reserved to be disposed of by the Judge who should try the issue, and any questions not disposed of by him were to be disposed of thereafter in Chambers.

The issue was tried by Latchford, J., and decided in favour of the execution creditors; and, the interpleader costs and other costs not having been disposed of, and it further appearing that the Sheriff, in lieu of selling the goods and chattels in question pursuant to the order of the 10th May, 1910, at the request of the claimant and of the Henderson Roller Bearings Limited, and with the consent of the execution creditors, had continued in close possession of the goods and chattels pending the trial of the issue—it was further ordered on the 4th October, 1910, that the costs of the interpleader proceedings, and of that application, including costs of the Sheriff, be paid by the claimant to the execution creditors and to the Sheriff, and that, in default of such payment, the costs be paid by the Sheriff out of the proceeds of the sale of the goods and chattels as therein provided; and,

after making further provision for the payment of certain costs, it was further ordered that the Sheriff do proceed to sell the said goods and chattels in question or sufficient thereof to cover the executions of the creditors, including all the Sheriff's fees, poundage, &c., and costs of the Sheriff and the execution creditors of the interpleader proceedings, and of the issue, out of the proceeds of such sale, the Sheriff to pay all such executions and costs and expenses, the said execution creditors having a lien therefor.

On the 8th October, 1910, the Henderson Roller Bearings Limited made a general assignment for the benefit of creditors to N. L. Martin, and on the 11th October, Martin, as assignee, made a demand upon the Sheriff, claiming the property of which the Sheriff was in possession, whereupon the Sheriff, on the 15th October, 1910, made an application in Chambers for an interpleader order as between Martin, as assignee, and the execution creditors. Upon that application the Master in Chambers, on the same day, ordered that the motion be adjourned until after the Sheriff should have sold the said goods and chattels in question, and further ordered that the motion might be resumed after the sale. From that order this appeal is taken.

The question, therefore, is as to whether the assignment to Martin takes precedence of the executions and orders in this case, so as to give the assignee the right to the possession of the goods and chattels so seized, and in possession of the Sheriff. The assignee claims under the Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14. This section declares that assignments for the general benefit of creditors under this Act shall take precedence of . . . judgments and executions not completely executed by payment . . . subject to a lien, if any, of the execution creditor for his costs, where there is but one execution in the Sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the Sheriff's hands.

The creditors, on the other hand, contend that under the Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 4, they are entitled to have their executions paid in full. That section provides that "where proceedings are taken by a Sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute pro rata in proportion to the amount of their executions or certificates to the expenses of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates." . . .

[Reference to Clarkson v. Severs, 17 O. R. 592.]

The present case differs, in that the property has not been sold. Had the goods been sold as directed by the order of the 10th May, there is no doubt that the execution creditors would have been entitled to the proceeds of such sale, less the Sheriff's and other expenses in connection with the issue. . . .

[Reference to Durrell v. Bank of Hamilton, 15 A. R. 500.]

The differences of opinion in that case arose from the circumstance that, in the opinion of two Judges, the case did not fall within the Act, owing to the fact that no interpleader issue had been tried. In the present case, there having been an interpleader issue directed and tried, the observations of Patterson, J.A. (p. 508), are applicable to the present case: "The general scheme is that all creditors who have executions or certificates in the Sheriff's hands at the time of, or within 30 days after, his entry of the notice of the levy, shall share ratably in the money. But, if an adverse claim to property seized under the executions shall have been made, and if the sheriff has taken proceedings for relief under the Interpleader Act, and the adverse claim is contested by one or more of the creditors, only those creditors who are parties to the proceedings taken by the Sheriff, and who agree to contribute pro rata to the expense of contesting the adverse claim, shall be entitled to share in any benefit which may be derived from the contestation, so far as may be necessary to satisfy their executions or certificates."

In Reid v. Murphy, 12 P. R. 338, it is said by Boyd, C.: "After an interpleader order is made at the instance of the Sheriff, the special jurisdiction of the Court under the Act relating to interpleader arises, by which the writ of execution as such ceases to operate, and the Sheriff in selling the goods seized thereunder acts not for the execution creditor, but for the Court under the interpleader order."

In the present case the Sheriff under the interpleader order is directed to sell. The sale, if had, is not under the execution, but under the order of the Court. That order was not appealed from, and remains in full force. In such a case I am of opinion that sec. 6, sub-sec. 4, of the Creditors' Relief Act applies, and that the execution creditors are entitled to be paid their executions and the costs and charges directed by the order to be paid, in priority to other creditors of the insolvent company. In this respect it seems to me that the right of the assignee is no higher than that of the debtor as against the execution creditors.

As there would seem to be no facts in dispute, the order appealed from may be varied so as to declare that the execution

creditors are entitled to the proceeds of the sale as against the assignee. In other respects, the appeal will be dismissed with costs.

WHELIHAN v. KEHOE—MASTER IN CHAMBERS—OCT. 24.

Judgment—Entry on Default—Motion to Set aside—Terms—Costs.]—Motion by the defendant to set aside a judgment signed by the plaintiff in default of delivery of a statement of defence. There were negotiations for settlement of the action; but the Master was of opinion that the judgment was not entered in breach of faith; that it was entered to ensure the case being tried at the approaching sittings. Order made allowing the defendant to deliver a statement of defence in four days, upon his undertaking to go to trial on the 14th November; judgment to stand as security in the meantime; costs of the motion to the plaintiff in any event. H. S. White, for the defendant. J. M. McEvoy, for the plaintiff.

WALLACE v. STEVENSON—MASTER IN CHAMBERS—OCT. 24.

Summary Judgment—Con. Rule 603—Promissory Note—Defence—Account—Estoppel.]—Motion by the plaintiff for summary judgment under Con. Rule 603 in an action upon a promissory note for $1,477.38, given in settlement of an action for a similar amount. The defence suggested by the defendant's affidavit was that the note was given in reliance on the plaintiff's assurance that the amount represented the true state of accounts between the parties as brokers, but that the defendant had since discovered that this was not true, and that, upon an accounting, it will appear that the defendant is not indebted in any sum. The plaintiff submitted that the defendant could not set up this defence, but must bring a separate action. To this the Master does not accede, as it would be in contravention of sec. 57, sub-sec. 12, of the Judicature Act. Nor does he see that there is any estoppel as between the parties; and he thinks the case is well within the principle of Northern Crown Bank v. Yearsley, 1 O. W. N. 655, and Farmers Bank v. Big Cities Realty and Agency Co., 1 O. W. N. 397. He also suggests that, as the matter is one of account, an order should be made under Con. Rule 607, reserving further directions and costs. Motion dismissed; costs in the cause. Williams (Montgomery & Co.), for the plaintiff. R. C. LeVesconte, for the defendant.

YOUNG v. TOWN OF GRAVENHURST—DIVISIONAL COURT—OCT. 24.

Discovery—Examination of Servant of Defendant Municipal Corporation—Superintendent of Power and Light Works.]—Appeal by the defendants from the order of LATCHFORD, J., ante 118. The Court (MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.), dismissed the appeal, with costs to the plaintiff in the cause. N. F. Davidson, K.C., for the defendants. F. R. Mackelcan, for the plaintiff.

DAVIS v. CLEMSON—DIVISIONAL COURT—OCT. 24.

Contract—Work and Labour—Building Boat—Acceptance.]—Appeal by the plaintiffs from the judgment of BOYD, C., 1 O. W. N. 938. The Court (MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.), dismissed the appeal with costs. A. B. Cunningham, for the plaintiffs. A. J. Thomson, for the defendant.

GATTIE v. EATON & SON—BRITTON, J.—OCT. 26.

Trespass—Backing Water on Property of Plaintiff—Construction of Railway Siding — Vibration from Cars — Damages not Proved.]—Action for damages for injury to the plaintiff's house and land, in the town of Orillia, by water backed up by the defendants in constructing a railway siding to their planing mill, and from vibration caused by the running of cars on the siding. The learned Judge finds that no negligence or damage was proved, and that the defendants are not trespassers. Action dismissed with costs. J. T. Mulcahy, for the plaintiff. W. A. Boys, for the defendants.

STUART v. HAMILTON JOCKEY CLUB—MASTER IN CHAMBERS.—OCT. 27.

Pleading — Statement of Defence — Estoppel — Amendment — Particulars.]—Motion by the plaintiff to strike out paragraphs 2 and 4 of the statement of defence. The action was to recover three shares of the defendants' capital stock, said to have been wrongly transferred after the death of the owner—

the plaintiff being administratrix with the will annexed. By paragraph 1 of the defence, the defendants formally denied the transfer; and by paragraph 2 said that, if they permitted the transfer without authority, they did so in good faith and under the belief that they had authority to do so, and they submitted their rights to the Court. The third paragraph set up a claim against third parties for indemnity. Paragraph 4 was this: "The defendants believe that the plaintiffs may be estopped from denying the authority of the third party J. S. to authorise the defendants to make the transfer complained of . . . . if the said transfer was in fact made without authority, and submit their rights to the Court." The Master said that the usefulness of paragraph 2 to the defendants was not very apparent. It did not state any "facts on which the party pleading relies," as required by Con. Rule 268. It is, no doubt, an anticipation of what is set up in paragraph 4, alleging an estoppel, which, if proved, would be a good defence. Paragraph 4 in its present form is admittedly defective, as it does not state any facts giving rise to the estoppel, and should make the assertion positively and not as a matter of suspicion on belief merely. If paragraph 2 is amended by stating that the defendants relied on the representations of the third parties and the acts of the plaintiff as authority for the transfer, or whatever else they rely on, and amend paragraph 4 as above indicated, the order will go on to provide for delivery of particulars of the acts relied on, after discovery has been had: Townsend v. Northern Crown Bank, 1 O. W. N. 69, 19 O. L. R. 489. Costs to the plaintiff in the cause. W. J. Elliott, for the plaintiff. C. A. Moss, for the defendants.

JONCAS v. CITY OF OTTAWA—DIVISIONAL COURT—OCT. 27.

Highway — Nonrepair — Accumulation of Ice and Snow on Sidewalk — Injury to Pedestrian — Municipal Corporation — Gross Negligence.]—Appeal by the defendants from the judgment of BRITTON, J., 1 O. W. N. 737. THE COURT (MEREDITH, C.J.C.P., TEETZEL, and MIDDLETON, JJ.) dismissed the appeal with costs. W. N. Ferguson, K.C., for the defendants. F. Denton, K.C., and A. Lemieux, for the plaintiff.