DYKE v. STEPHENS.

Production—Infant—Next friend.

The Court refused either to order the next friend of an infant plaintiff to make an affidavit as to documents or stay the action till he made such affidavit.

Higginson v. *Hall*, 10 Ch. D. 235, dissented from.

[30 Chy. D. 189.

PEARSON, J. . . . "The next friend is not a party to the action, he is just there simply to protect the interest of the infant, and to show that the interest is of such nature that he is willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action, and I have no jurisdiction to make an order on him as if he were a party. Mr. Wilkinson asks that an order may be made staying the action, unless the plaintiff's next friend makes an affidavit as to documents. . . . To do so would be to make the rights and interests of the infant depend on the conduct of the next friend; that is what the Court never does." Speaking of the case of *Higginson* v. *Hall*, 10 Ch. D. 235, the learned judge said: "All I have to remark on in that case is that counsel for the lunatic consented, and almost invited the order, and I cannot help thinking that if the case had been properly argued the Vice-Chancellor would have seen that the order ought not to have been made."

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Wilson, C. J.]

MAY v. ONTARIO AND QUEBEC RY. CO.

Railway company — Negligence — Railway employe—Common employment—Dominion Railway Act, 42 Vict. ch. 9 s. 27 (D.)—Limitation of action—"By reason of the railway."

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used; that they also directed and required him to be carried, as part of his employment, on the defendants' trains; that accordingly he was received by the defendants "to be safely carried" on a train; and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured.

Held, (1) That if the plaintiff accepted a different employment from that originally contemplated he became the defendants' workman in that new employment, just as he had been in his former employment.

(2) That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment, and that there was no cause of action.

The defendants set up that the injuries complained of happened more than six months before the action brought, and that the action was barred by the 27th section of the Consolidated Railway Act, to which the plaintiff demurred.

Held, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway": *Brown* v. *Brockville and Ottawa Railway Co.*, 20 U. C. R. 202; *McCallam* v. *G. T. Ry. Co.*, 31 U. C. R. 527; and *Kelly* v. *Ottawa Street Ry.*, 3 A. R. 616, referred to and followed.

Semble, that the concluding words of the 27th section of the Consolidated Railway Act, viz., that "the defendants may prove that the same (that is the damage) was done in pursuance of the authority of this Act and the special Act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," etc.

F. E. Hodgins, for demurrer.

R. M. Wells, contra.