

Held, also that this case came within the general rule which restricts the damages of the purchaser to the costs of the investigation of the title and did not come within the doctrine that a purchaser is entitled to substantial damages from a vendor who, to save trouble, or moderate expense or from caprice refuses or wilfully neglects to perform his share of the contract—the rule being in the absence of fraud or other special circumstances “If a purchaser takes possession under a contract and afterwards rejects the title he must relinquish the possession, and equity cannot prevent the vendor turning him out by an ejectment although he may have expended money in improvements”; and a reference to title was ordered. Judgment of MACMAHON, J., reversed in part.

Warren, for the appeal. *Watson*, K.C., and *Payne*, contra.

Meredith, C.J.C.P.]

PHILLIPS v. HANNA.

[April 10.

Prohibition—Division Court—Instalments of principal and interest due on mortgage—Division of cause of action—Jurisdiction.

Plaintiff on Nov. 2, 1901, brought an action in a Division Court for one year's interest due Feb. 1, 1901, and for interest on that interest amounting together to \$81.50 due on a mortgage, the principal of which was overdue.

Held, that the interest sued for, being interest per diem, was not due the plaintiff qua interest, but was recoverable only by way of damages and the case did not come within R.S.O. c. 60, s. 79, sub-s. (2).

Held also that the plaintiffs if entitled to recover interest from Feb. 1, 1900, they were entitled to recover as their damages interest down to the date of the issue of the summons so that the sum to which they were then entitled would be about \$140, which sum was divided for the purpose of suing in the Division Court and that is forbidden by s. 79; and prohibition was granted.

R. McKay, for the application. *F. E. Hodgins*, contra.

Divisional Court.]

[April 10.

MORRISON v. GRAND TRUNK R.W. Co.

Evidence — Discovery — Examination before trial—Railway company—Engine-driver.

An engine-driver in the employment of a railway company is an officer thereof, within the meaning of Con. Rule 439, and may be examined for discovery under the provisions of that rule.

Knight v. Grand Trunk R.W. Co. (1890), 13 P.R. 386, overruled; *Leitch v. Grand Trunk R.W. Co.* (1888), 12 P.R. 541, 671 (1890), 13 P.R. 369; *Dawson v. London Street R.W. Co.* (1898), 18 P.R. 223; and *Casselman v. Ottawa, Arnprior and Parry Sound R.W. Co.* (1898), 18 P.R. 261, considered and applied.

J. G. O'Donoghue, for plaintiff. *D. L. McCarthy*, for defendants.