

Proof that the wife was much with another man, drove with him in cabs, was seated with him while he held her hand, that he accompanied her when travelling, and corresponded with her clandestinely, are not such matrimonial offences as will disentitle her to alimony.

A woman, both in law and in morals, is justified in leaving and in refusing to return to her husband who has committed adultery; but his act which breaks up the household does not relieve him from his duty to maintain her; and proof of that offence would be sufficient upon which to award alimony.

L. M. City for plaintiff.

R. G. Code and *J. E. Orde* for defendant.

Practice.

FALCONBRIDGE, J.]

[Dec. 23.]

FERGUSON *v.* CITY OF TORONTO.

Indemnity—Third party notice—Setting aside—Action for negligence—Insurance policy, construction of—Inconsistency of pleading with claim over for indemnity.

The plaintiff sued for a personal injury, which, by his statement of claim, he alleged he had received when acting as conductor of a street railway car operated by the defendants by reason of the negligence of a servant of the defendants, who was driving a scavenger wagon used by the defendants. The company who had operated the railway before the defendants assumed it were insured against all sums for which they should become liable to any employee in their service while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on the insurance company a third party notice claiming indemnity.

Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged.

An order was therefore made in Chambers setting aside the third party notice.

J. E. Smith, Q.C., for the insurance company.

H. M. Mowat for the defendants.

W. A. Leys for the plaintiff.

BOYD, C.]

[Dec. 30.]

IN RE RENWICK, RENWICK *v.* CROOKS.

Infants—Past maintenance—Special circumstances.

Where applications for past maintenance of infants are made, and especially where the only fund for payment is the *corpus* of the estate, the applicant should come on petition before a Judge in Chambers, showing and proving the special circumstances relied on to overcome the general rule that arrears of past maintenance are not given, which rule applies whether the claimant is father, mother, or other relative, a step-parent, or a stranger.

And where it appeared that a person making a claim for the past maintenance of his infant step-children against the proceeds of the sale of their father's farm realized in administration proceedings had not maintained the infants on the basis of being compensated therefor, but that his claim was an afterthought, a judge refused to confirm the master's recommendation of an allowance.

F. Stone for the plaintiff.

W. H. Blake for the claimant.

J. Hoskin, Q.C., for the infants.

BOYD, C.]

[Jan. 7.]

KIDD *v.* PERRY.

Evidence—Foreign commission—Examination of defendant—Discretion.

An application for a commission to examine witnesses out of the jurisdiction is one going to the discretion of the court, and this discretion will be more strictly exercised where the proposal is to examine an absent party on his own behalf.

In the case of a defendant proposing to have his own examination taken on commission, his personal affidavit may not be essential, but very cogent reasons should be given by some one who can speak with knowledge.

And where the affidavit in support of an application to have the defendant and his mother, by whom the negotiation was conducted with the plaintiff out of which the cause of action arose, examined abroad was made by the defendant's solicitor, who swore that he believed it was necessary to have their evidence; that it would save expense if it were taken on commis-