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TORONTO :
THE CARSWELL COMPANY, LIMITED
1912.

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THE

ONTARIO WEEKLY REPORTER

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HON. MR. JUSTICE MIDDLETON. APRIL 29TH, 1912.

ONTARIO & MINNESOTA POWER CO. v. RAT PORTAGE LUMBER CO.

3 O. W. N. 1078, 1182.

Pleadings—Statement of Defence — Motion to Strike out Part—Embarrassing—Action for Interference with Riparian Rights—Injunction—Damages — Equitable Relief—Trying Actions by Piecemeal.

Motion by plaintiffs to strike out 11 paragraphs of statement of defence as embarrassing. Statement of claim alleged that plaintiffs were riparian owners of certain lands on the north shore of Rainy river, and had constructed large and valuable dams, machinery, etc., a power plant and a pulp mill on these lands, and that the defendants had interfered with the natural flow of the water of the river, to their great loss and damage. An injunction and damages were sought. The allegations in the statement of defence objected to were two-fold: (1) that the plaintiff was "a mere creature of or appendix to," the Minnesota and Ontario Power Co., an American corporation, having no charter nor license to do business in Ontario, and the action was being maintained for its benefit; (2) that the works of plaintiff company had been constructed under the authority of certain provincial statutes imposing conditions on plaintiff company, which had not been complied with.

MASTER-IN-CHAMBERS dismissed the motion with costs in the cause to defendants.

Stratford Gas v. *Gordon*, 14 P. R. 407, and *Flynn* v. *Industrial*, 6 O. L. R. 635, 2 O. W. R. 1047, 1075, referred to.

MIDDLETON, J., dismissed plaintiffs' appeal. Costs in cause to defendants.

Semble, that a party litigant must assert all his rights and any title he may have in one action, and cannot try his action piecemeal.

Motion by plaintiff by way of appeal from an order of the Master in Chambers refusing to strike out certain paragraphs of the statement of defence.

The statement of claim alleged that plaintiff company was a riparian proprietor in respect of certain lands on the north shore of Rainy river, and as such was entitled to the use of the waters of that river, naturally flowing over and past such lands; that plaintiff had constructed a large and valu-

able dam and works on this said land, and erected a large and valuable power house, and plant, and machinery for generating hydraulic and electrical power and also was erecting a pulp mill for grinding pulp.

It was then alleged that the eight defendants had obstructed the natural flow of the waters of the Rainy river, and had thereby interfered with the rights of plaintiff as a riparian proprietor and caused great loss and damage to plaintiff.

The plaintiff, therefore, claimed (1) an injunction against such interference, and (2) damages for the interference with the natural flow of the waters past the said lands and works of the plaintiff.

The statements of defence of four of the defendants had been delivered—and plaintiff moved to strike out certain paragraphs thereof as being embarrassing.

R. C. H. Cassels, for the plaintiff.

J. Grayson Smith, for the defendants.

CARTWRIGHT, K.C., MASTER (10th April, 1912):—The paragraphs complained of are Nos. 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, and 28 of the statement of defence of the Rainy River Lumber Co., and the corresponding paragraphs in those of the other three. They may be summarised as follows:—

Paragraph 16 says that the plaintiff "is a mere creature of or appendix to" the Minnesota and Ontario Power Company, which controls the plaintiff company, and owns its assets—and that this action is really being maintained for the benefit of the American company—though it has no charter or license to do business in the province, and that it is not entitled to envoke the equitable jurisdiction of the Court or to receive any relief herein from the defendants. It should have been noted that this paragraph begins by alleging that the plaintiff company has no office or place of business in the province, nor any officeers nor business nor assets nor property under its control in the province.

In support of the pleading generally it was pointed out that the remedy by way of injunction is not as of right, but is entirely within the discretion of the Court. It was submitted that the facts stated in these eleven paragraphs were relied on by the defendants as reasons why the Court should not give the relief asked for by the plaintiff in this action—whether

those set up in this or the other paragraphs would be given effect to by the Court it was confidently said was not to be decided on this motion. I accede to this contention which I understand is the result of the well known judgment in the *Stratford Gas Co.* v. *Gordon,* 14 P. R. 407—applying what was said there by Armour, C.J., I do not think that this 16th paragraph is one which can be summarily excised at this stage; especially in a case of so much importance to the defendants. This also applies to paragraphs 27 and 28 which are referable to the allegation in the beginning of par. 16 that this action and proceeding are really brought, and taken in the interest of the U. S. company, and should not be assisted by the courts of this province.

They may be unnecessary, but this does not make them embarrassing. See *Stratford Gas Co. Case,* supra, at p. 413. The remaining paragraphs are objected to for a different reason.

It was said by Lord Watson in *White* v. *Mellin,* A. C. (1895), at p. 167: "Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The onus resting upon a plaintiff who asks an injunction and does not say he has yet suffered any special damages is if anything heavier."

Here the statement of claim in the 7th par. alleges the construction of a valuable dam and works upon the company's lands for utilizing and selling the water power obtained from the waters of Rainy river—and in par. 8 allege special damage from the actions of the defendants as therein fully set out—and in the prayer for relief asks "damages for the interference of the natural flow of the waters past the said lands and works of the plaintiff." This complies with the principle in *White* v. *Mellin,* supra—that to obtain an injunction it is most important to allege and prove special damage.

The works of the plaintiff company were constructed under the authority of 4th and 5th Edw. VII. (Dom.) ch. 139, 6th Edw. VII. (Ont.), ch. 132, and 1 Geo. V. (Ont.), ch. 7, as set out in the affidavit of the president of the plaintiff company used on the motion for an interim injunction. These statutes imposed certain conditions on the plaintiff company. These the defendants in the paragraphs now objected to allege

were not complied with, and that the plaintiff company by reason thereof is not entitled to invoke or rely on the statutes in question. They further say that such Acts are void and ineffective and ask a declaration to that effect.

It was argued that the plaintiff company was relying on its rights as a riparian proprietor and that defendants could not set up its alleged defaults as a defence to this action.

The answer to this is that it is by no means clear how this may be finally decided. This line of defence is at least not so clearly bad as to justify its excision on an interlocutory application.

The tendency of the practice at present is against any interference with the pleadings of either party except in the very plainest cases.

Rule 298 is usually confined to cases where statements are made which could not be considered at the trial and which would tend to prejudice a fair trial. See *Flynn* v. *Industrial*, 6 O. L. R. 635, 2 O. W. R. 1047, 1075. To give any effect to this Rule such as can be had under Rule 261 would justify the remark of an experienced counsel of our own day that many an action is lost or won on an interlocutory application.

In my understanding of the authorities the motion must be dismissed with costs in the cause to the defendants. The time for reply may be extended for a week. All parties no doubt are anxious to have a trial at the June Sittings at Fort Frances.

Plaintiff appealed from above order to Hon. Mr. Justice Middleton in Chambers.

R. C. H. Cassels, for the plaintiffs.

Grayson Smith, for the defendants.

HON. MR. JUSTICE MIDDLETON:—I think the conclusion arrived at by the learned Master is right. The statement of claim, it is true, puts the plaintiffs' right upon its riparian proprietorship. The real meaning of the defence is that the plaintiff company applied for and obtained the right to construct the works in question under certain statutes, and that these statutes imposed conditions which have not been complied with. Upon this it will be argued that the plaintiff company, having attorned to the jurisdiction of Parliament, and having accepted the provisions of the Acts, is

not now at liberty to repudiate the terms imposed and to construct the work without complying with the conditions.

Upon the argument before me, the plaintiffs' counsel declined to admit that no claim could be put forward under these statutes, but sought rather to take the position that he could, in this action, set up a claim for his clients as riparian proprietors, and confine the issue in this action to that single phase of his title, and that if defeated in this he would then resort to the statutes and in some other litigation it might be open to him to support his claim under them.

I do not think this is permissible. A party litigant must, I think, under our procedure, assert all his rights and every title that he may have justifying his claim. It is not open to him to try the matter piecemeal.

It may well be that the statement of defence is not altogether artistic, when it introduces allegations by the statement that "the plaintiff claims"; but this can occasion no real embarrassment, because it is quite open to the plaintiff, if so advised, to disclaim by his reply the right which is alleged.

Quite apart from this, it is clear that whether the matter set up is well founded or not, it is one which ought to be left entirely to the trial Judge. It serves as notice of the contention which is to be made by the defendants at the hearing; and it would be quite out of place to eliminate matters of this importance from the record at this stage. This is not the true function of a motion against pleadings as embarrassing.

The second ground of attack upon the pleading is the way in which the defendants set up certain matters which they rely upon as influencing any discretion which the Court may have to refuse an injunction. I think it would have been preferable if the pleader had used less ornate language; but this, I think, is not sufficient to justify a striking out of the pleading.

When one company is described as an "appendix" to another company, a surgical operation is no doubt suggested; but the pleader probably used this metaphor in some secondary sense, as, in the same paragraph, he refers to the same company as "a mere creature of" the other; and, although, when one finds a metaphor in a legal argument, one suspects a fallacy, this is for the trial Judge.

The costs may be in the cause to the defendant.

HON. MR. JUSTICE BRITTON. APRIL 30TH, 1912.

JAMIESON MEAT CO. v. STEPHENSON.

3 O. W. N. 1196.

Partnership—Action against—Failure to Establish Partnership — Assignment of Interest in Business — Attack by Creditors—Assignee Disclaimed.

Action by plaintiffs for meat supplied to defendants Spragg and Stephenson, as partners in the Savoy Cafe, Cochrane. At trial, plaintiffs were allowed to amend by claiming that an assignment of the assets of the business to Stephenson be set aside as a fraud on the creditors.

BRITTON, J., at trial, found that on evidence Stephenson was not a partner in the business, and, as the latter consented that the assignment to him should not prejudice creditors, the trial Judge ordered accordingly.

Judgment for plaintiff against defendant Spragg with costs. Action dismissed as against defendant Stephenson, with costs.

Action tried at Sudbury by HON. MR. JUSTICE BRITTON without a jury.

T. W. McGarry, K.C., for the plaintiff.

G. E. Buchanan, for the defendants.

HON. MR. JUSTICE BRITTON:—This action is by the Jamieson Meat Company against the defendants Stephenson and Spragg, for meat, supplied to the "Savoy Cafe" at Cochrane.

The plaintiffs allege, and they attempted to prove, that this cafe was being run or carried on by the defendants, as partners. Stephenson and Spragg both deny that any partnership ever existed between them in this cafe business. The plaintiffs' claim is admitted by Spragg as against the cafe, and, therefore, against Spragg, as he alone, as he contends, carried on the business. The question is entirely one of fact, and upon the evidence I must find that the defendant Stephenson was not a partner. The plaintiffs did not supply meat upon the credit of Stephenson. They did not enquire who, if any person other than Spragg, was interested in the business. At the trial one witness swore that the defendant Stephenson said he was as much interested in the business as was Spragg. This was on an occasion when Stephenson was about to take over the business, and if Stephenson did say so it was in a sense true, because Stephenson had built

the new building, afterwards occupied as a cafe, and had not been paid, and he had lent money to Spragg, and had been surety for him, and so was largely interested in Spragg's success.

Then there was the evidence of Reid, who stated that Stephenson said that he was a silent partner with Spragg, but he did not want it known. Stephenson emphatically denies this. I am of opinion that Reid is mistaken or misunderstood Stephenson. Stephenson started to erect a house 10 feet by 30 feet, more or less, for $250. Before completion, Stephenson suggested an enlargement, and Spragg agreed to it, and as to that very great additional cost, there was no bargain as to price or how it was to be paid for. As to this, Stephenson now claims to be a creditor of Spragg.

This the plaintiffs rely upon as consistent only with a partnership. I do not agree with that conclusion. It was careless and bad business on the part of Stephenson, but does not, in any way, prove a partnership. Both defendants impressed me by their manner as truthful, and I accept their evidence as true. Each denies that there had been in the past—that there was at the time of plaintiffs supplying the meat or that there was in contemplation, the relation between them of carrying on the restaurant or cafe business, in common with a view to profit.

The plaintiffs in their statement of claim, in addition to their attempt to make Stephenson liable as a partner in the business carried on by Spragg—attacked an assignment made by Spragg to Stephenson on the 18th January, 1912. This assignment purports in consideration of one dollar to assign to Stephenson all Spragg's interest in the restaurant business, known as the Savoy Cafe, and in and to all stock in trade, supplies, furniture, chattels, goods and effects contained in the building run as a restaurant, together with the good will in said business as a going concern, and all interest in said building. The real consideration for this assignment was that Stephenson agreed to pay all liabilities of the restaurant to Cunningham, Davies & Joy, and two notes in the Bank of Toronto, one for $300 and one for $100. Stephenson says when he entered into this agreement he supposed these the only liabilities of Spragg—in the business or otherwise. The plaintiffs say this assignment is void as a preference to Stephenson. If Stephenson was a partner it was not shewn how it could in any way prejudice the

creditors of the firm. No cause of action was disclosed on that branch in the plaintiffs' statement of claim, but plaintiffs asked to amend by adding as paragraph 14, the following:—

"14. The plaintiffs further say, in the alternative, that if it be held by this Honourable Court that the defendant Stephenson was not a partner of defendant Spragg in the said business known as the Savoy Cafe he was a creditor of the said defendant Spragg, and the aforesaid assignment or transfer which he took from the defendant Spragg was an unjust preference and void by reason of the provision of the aforesaid statutes." The statutes cited are ch. 147 R. S. O. ch. 334 R. S. O. Imperial Act, 13 Elizabeth, ch. 5, and Imperial Act, 27 Elizabeth ch. 27.

I allow the amendment, and the record may be amended accordingly.

The defendant Stephenson said he would not accept the interest of defendant Spragg in the property mentioned upon the terms under which it was given—and he has no desire to prejudice the creditors of Spragg—or to prejudice his own claim; so with the consent of Stephenson the judgment will be that as against the plaintiffs as creditors of Spragg the said assignment shall not be set up or in any way relied on by Stephenson or stand in the way of plaintiffs as execution creditors of Spragg—in the recovery of the amount of their execution, but the said defendant Stephenson is not to be prejudiced as to any claim he may have against defendant Spragg or as to any securities he may hold—otherwise than the said assignment.

Judgment will be as endorsed on record. Thirty days' stay.

HON. SIR JOHN BOYD, C. APRIL 29TH, 1912.

RE GIBSON.

3 O. W. N. 1183.

Lunatic—Sale of Lunatic's Lands—Mortgage for Part Payment—To Accountant of S. C. Jud.—Payment into Court.

BOYD, C., *held*, that, according to the practice, proceedings in lunacy are within the scope of Con. Rule 66, and all mortgages in part performance for the purchase of lunatic's estates are to be made to the Accountant of the Supreme Court, and all moneys receivable thereunder paid into Court.

An application by the committee for an order for sale of land of lunatic and to take back a mortgage to committee in part payment.

W. Greene, for the applicant.

HON. SIR JOHN BOYD, C.:—Proceedings in lunacy are matters dealt with by the Court and usually by orders made by a single Judge. They are within the scope of Con. Rule 66, which requires that all securities taken under an order or judgment of the Court shall be taken in the name of the Accountant of the Court, unless otherwise ordered. This is the policy or practice of the Court with reference to sales of lands of the lunatic, where mortgages are taken to secure part of the purchase money. The principal moneys of the mortgage will be paid into Court to the credit of the estate, as well as all moneys which are payments for interest, to be accumulated, unless these periodical payments are required for the maintenance of the lunatic, in which case proper directions are to be given in the order sanctioning the sale and the mortgage. In this case, I understand, the estate is otherwise ample for maintenance, and the interest may be paid into Court. It is, nevertheless, the duty of the committee to look after the mortgage investment as if the mortgage had been taken to and in the name of the committee.

COURT OF APPEAL.

APRIL 29TH, 1912.

REX v. SCOTT.

3 O. W. N. 1167.

Criminal Law—Abortion—Supplying Drug or other Noxious Thing—Criminal Code, s. 305—Evidence—Motion for Leave to Appeal—To Court of Appeal—From Conviction of County Court.

COURT OF APPEAL *held*, that supplying "gelsemium" popularly known as yellow jasmine, for the purposes of procuring an abortion, is a "drug or other noxious thing" within the Criminal Code, s. 305.

Motion by the defendant by way of appeal from the refusal of the Chairman of the Wentworth Sessions of the

Peace to state a case for the opinion of the Court of Appeal, for leave to appeal from the conviction of defendant, and for a direction to said chairman to state a case.

The defendant was convicted under sec. 305 of the Criminal Code, which enacts, "Every one is guilty of an indictable offence and liable to two years' imprisonment, who unlawfully supplies or procures any drug or other noxious thing . . . knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, *whether she is or is not with child.*"*

Defendant desired to have stated the question, whether there was any reasonable evidence that the substance supplied by the defendant was a "drug or other noxious thing."

The motion was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

J. L. Counsell, for the defendant.

E. Bayly, K.C., for the Crown.

HON. SIR CHARLES MOSS, C.J.O.:—Upon this application the law under the Criminal Code and the Imperial Act was discussed, and the English decisions referred to at some length by Mr. Counsell.

We have since had an opportunity of reading the transcript of evidence and the chairman's charge, and of considering the cases cited and others. Our conclusion is that no useful purpose would be served by directing that a case be stated upon the point raised. Having regard to the evidence and the charge of the learned chairman, we see no reason for thinking that the conviction was wrong, or that there are sufficient grounds for putting the matter in train for further discussion.

The application must be refused.

HON. MR. JUSTICE MEREDITH:—In the Imperial enactment the words are "any poison or other noxious thing": under the enactment in force here—see the Criminal Code, sec. 305, and also sec. 303—the words now are "any drug

*Sections 304 and 305 as they read are an absurdity. They ought to read as in the English Act, "woman being with child."—Ed.

or other noxious thing," though originally they were, as in the Imperial enactment, " any poison or other noxious thing": and the change from the word poison to the word drug was not made for the purpose of narrowing the effect of the enactment; it may have been for the purpose of enlarging it in consequence of the cases in England upon which this appeal against the refusal of the chairman of the Wentworth General Sessions, to state a case for the opinion of this Court, is based.

Those cases decided that when the thing administered or supplied was not noxious in small quantities, in order to make a case against the accused it was necessary to prove that it was administered, or supplied to be taken, in quantities enough to make it noxious. So, too, it had been held under the enactment in force here before the change I have mentioned: see *Regina* v. *Stitt,* 30 U. C. C. P. 30. In no case of which I am aware, has any such ruling been applied to a substance which in itself is a poison, even though some of the most deadly poisons are commonly administered, in infinitesimal doses, for the healing of disease, or otherwise benefiting those in ill-health. To the contrary is the opinion expressed by Field, J., in the case of *Regina* v. *Cramp,* 5 Q. B. D. 307, in these words: " If the thing administered is a recognized poison, the offence may be committed though the quantity given is so small as to be incapable of doing harm," and this agrees with the views of that eminent lawyer, Dr. Graves, which will be found expressed in a foot-note at p. 131 of Russell on Crimes, 1st Canadian Edition.

In my opinion, the requirements of the enactment in question are satisfied if the substance administered or supplied be a drug; if not a drug it must, of course, be proved to be a noxious thing, and, in my opinion, noxious in the quantity administered or to be taken.

In this case there was reasonable evidence that the substance in question was not only a drug—a drug commonly called yellow jasmine; technically gelsemium—but also a poison; in its alkaloid—which was found in the analysis—a very powerful poison, and a recognized poison prescribed in several diseases, one of which is dysmenorrhœa; and also that it was a noxious substance; and so this motion for leave to appeal fails, being based entirely upon the contention that there was no reasonable evidence that the substance, as supplied, was a " drug or other noxious thing."

HON. MR. JUSTICE BRITTON. MAY 4TH, 1912.

MORAN v. BURROUGHS.

3 O. W. N. 1214.

Negligence—Father Permitting Infant Son to use Fire-arm—Criminal Code s. 119—Liability of Father for Resulting Damage.

By s. 119 of the Criminal Code it is an offence to sell or give an infant under 16 years of age a fire-arm. Defendant father permitted his son, aged 12 years, to have a rifle and ammunition, who, in playing therewith, accidentally put out the eye of a playmate. In an action for damages,

BRITTON, J., *held*, that the action of the father was gross negligence and entered judgment for plaintiff for $300 and costs on High Court scale, on the findings of the jury.

See *Fowell* v. *Grafton* (1910), 17 O. W. R. 949; 2 O. W. N. 460; 22 O. L. R. 550.

An action brought by James Moran, and by his son John Adam Moran to recover damages resulting as it was alleged, from negligence on the part of defendant in permitting his infant son, a boy of about 12 years of age to have in his possession a rifle and ammunition therefor upon the streets of Smiths Falls.

The plaintiff John Adam Moran was also an infant of about the same age as the son of defendant. While the son of defendant was using the rifle to shoot at a mark and permitting the infant plaintiff and other boys to shoot with the same rifle—the infant plaintiff John Adam Moran was shot, causing him to lose completely his left eye.

The action was tried at Perth with a jury.

J. A. Hutcheson, K.C., for the plaintiffs.

H. A. Lavell, for the defendant.

HON. MR. JUSTICE BRITTON:—I asked the jury to answer certain questions, which they did, finding negligence on the part of the defendant which negligence occasioned the accident and injury to the infant plaintiff, and the jury assessed the damages at $300.

I put the further questions: "Was the boy plaintiff guilty of contributory negligence—that is to say—could he by the exercise of reasonable care have avoided the accident? —and if so, what was the negligence of the boy plaintiff which you find?" The jury answered that the infant plaintiff could by the exercise of reasonable care have avoided

the accident—that he should have walked behind instead of in front. That answer can only mean that the boy plaintiff, at the time the firing was going on, walked in front of the firing line. There was no evidence that the gun was intentionally fired at the time of the accident. Upon the undisputed evidence the gun was accidentally discharged when being held by the son of the defendant, and while a struggle was going on for the possession of the gun, between the son of defendant, and another boy—not the plaintiff.

If there was any evidence of contributory negligence which should have been submitted to the jury—the defendant is entitled to the benefit of the jury's finding. I am of opinion that there was no evidence that would disentitle the plaintiffs to recover merely by reason of contributory negligence. The presumption should stand that this infant plaintiff is not responsible for negligence. To disentitle the infant plaintiff to recover it would require to be shewn that the injury was occasioned altogether by his own so-called negligence.

The jury assessed the damages at $300—quite too small an amount if plaintiff is entitled to recover at all. Upon the facts any solicitor advising that there was liability would think the case a proper one for the High Court. It is a case in which in the exercise of my discretion I should give the plaintiffs costs on the High Court scale. Judgment for the plaintiffs for $300 damages with costs—and no set-off of costs.

Twenty days' stay.

HON. MR. JUSTICE SUTHERLAND. MAY 6TH, 1912.

LEADLAY v. LEADLAY.

3 O. W. N. 1218.

Estates — Distribution of Estate — Will—Loss on Realization of Security — Apportionments between Capital and Income — Account.

Action by executors and certain beneficiaries under will of Edward Leadlay for a declaration as to the proportion in which certain moneys payable to the estate on account of the redemption of a certain mortgage should be divided between capital and income; by which fund a loss on such mortgage security should be borne, and if by both in what proportion; and finally for an order that the legal costs incurred in the action in which the executors opposed the redemption should be payable out of capital.

SUTHERLAND, J., *held*, that the moneys received by the executors as redemption moneys should simply be treated as such, and the loss suffered by the estate, including therein any legal expenses incurred, should be apportioned between capital and income upon the principle laid down in *Re Cameron*, 2 O. L. R. 756.

Reference to Master in Ordinary to make apportionment. Costs to all parties out of estate.

By indenture dated 5th July, 1893, the Saskatchewan Land and Homestead Company mortgaged land now situate in Alberta and Saskatchewan to Edward Leadlay and Thomas Hook to secure payment of $100,000 and interest as in the mortgage provided.

The respective amounts of principal moneys contributed by each was not disclosed.

By a postponement agreement dated 27th November, 1895, they agreed that certain other indebtedness of said company should have priority over said mortgage indebtedness.

Leadlay died on 17th September, 1899. Nothing had been paid on the mortgage till then and the amount due for principal and interest was $148,109.52, which was capital of the estate.

Leadlay had made a will dated 22nd May, 1897, whereof he appointed his widow, Mary I. Leadlay, and his son, Percy Leadlay, executors and trustees. Letters probate were granted to them on 23rd December, 1899. Under the terms of said will the executors were directed to pay to the widow out of the income of the estate an annuity of $10,000 during the term of her natural life, or so long as she remained a widow, and in the event of her marrying again to cut it down to $5,000. They were also directed to divide annually the surplus income of the estate after payment of said

annuity among his children and grandchildren in stated proportions. The will contained a further clause authorising the executors and trustees to sell and convert into money such real and personal estate as in their discretion they might deem best in the interest of the estate and for the purpose of carrying out the provisions of the will, and to invest the money thus arising or in any way in their possession in or upon public funds or securities or other real and valuable securities and to vary the investments from time to time for any other of like nature as in their discretion should seem best. By the executors it was apparently not deemed advisable and it was perhaps not possible to promptly realise upon said security. The course accordngly decided upon in the interest of the estate and followed was to protect and nurse the said security along so as to ultimately realise the most out of it. After the death of the testator the executors bought out the interest of Hook in said mortgage for $9,347, and also procured a release of the equity of redemption in the mortgaged lands from the company, paying therefor $44,638 represented in the statement of claim as the amount of the indebtedness of the company which had priority over the mortgage indebtedness under said postponement agreement.

On 3rd November, 1900, the executors entered into an agreement with one John T. Moore who had been an official of the company, by which it was provided that after the claims of the estate against the mortgaged lands were paid in full the balance derived from the sale thereof should be divided equally between the estate and Moore.

A subsequent agreement was made between the same parties dated 13th February, 1902, which provided that in case the estate should receive from Moore $125,000 and interest as therein provided in addition to moneys already received he should be entitled to any surplus on the sale of the lands. About June, 1903, the Saskatchewan Land and Homestead Company brought an action against the executors and said Moore and Annie A. Moore, to whom he had assigned his interest in the agreements, to have the release of the equity of redemption in said lands and the two agreements set aside.

On 27th June, 1905, the trial Judge dismissed the action. An appeal was taken to a Divisional Court and from it to the Court of Appeal, which delivered final judgment on the

23rd September, 1907. By it a decree was made allowing the company to redeem upon payment to the executors of the estate of the full amount secured by said mortgage and interest, the full amount paid for the release of the equity of redemption and interest, together with all proper allowances for taxes and other expenditures including payments and expenses made or incurred in and about the care and sales of the mortgaged lands and premises, etc.

Certain of the mortgaged lands had been sold through the instrumentality of Moore and expenses incurred in connection therewith. The said judgment for redemption is said in the statement of claim to have been "without prejudice to the rights and remedies, if any, as between" the Moores and the executors.

A reference under said judgment was directed to the Master-in-Ordinary to ascertain the sum required to be paid on redemption. The Master having made his report the company on or about the 30th January, 1911, in pursuance thereof paid into Court the sum of $167,864.47, the amount of redemption moneys found due by said report as increased by a subsequent order. While the appeals were pending from the judgment of the trial Judge in said action, a writ was issued on or about the 31st January, 1906, by Annie A. Moore against the plaintiffs the executors for specific performance of said agreements and another action was commenced by the executors against John T. Moore and Annie A. Moore for an account of their dealings with the mortgage property. Neither of such last mentioned actions went to trial and both were pending when the Court of Appeal delivered its judgment for redemption.

While the reference to the Master was pending, the plaintiffs, the executors, entered into a further agreement with John T. Moore and Annie A. Moore, dated 30th September, 1909, wherein it was provided that all matters in dispute should be settled and it was agreed that if the company should redeem and pay over to the plaintiffs, the executors, the amount finally due the latter would retain and accept out of such amount so paid for redemption the sum of $130,000 together with such further sums as should have been paid out by the plaintiffs, the executors, since the 1st January, 1907, for taxes and certain other sums for interest, etc., and that the balance, if any, should be paid over to Annie A. Moore. The following paragraphs were taken from the statement of claim:—

"16. The total monies received by the said Annie A. Moore and John T. Moore from or on account of the sales of the said mortgaged lands as shewn by the accounts and books filed on the said reference before the Master-in-Ordinary, was the sum of $184,552.77, and the total amount expended by or allowed to the said John T. Moore for commission or salary or otherwise upon the taking of the accounts on said reference was the sum of $39,403.99.

"17. The monies paid or accounted for to the said plaintiffs Mary I. Leadlay and Percy Leadlay, as such executors, by the said John T. Moore and Annie A. Moore in respect of said mortgaged lands and sales thereof made under the terms of the said two agreements of the 3rd November, 1900, and the 13th February, 1902, was the sum of $92,131.95, of which amount the sum of $19,708.87 was paid to the said plaintiffs, Mary I. Leadlay and Percy Leadlay, prior to the second agreement of the 13th February, 1902, coming into effect, and the balance of $72,423.08 was paid by the said Annie A. Moore and John T. Moore to the said plaintiffs Mary I. Leadlay and Percy Leadlay under the terms of the second agreement of the 13th February, 1902, which latter amount was made up of $60,000 principal and the sum of $12,423.08 interest, up to the 1st day of January, 1905, paid under the terms of the said agreements of the 3rd November, 1900, and the 13th February, 1902, and which payment of $60,000 deducted from the said sum of $125,000 left a balance of $65,000 still due for principal under the terms of the said two agreements of the 3rd November, 1900, and the 13th February, 1902.

"18. Deducting the said sum of $92,131.95 being the monies paid by the said John T. Moore and Annie A. Moore to the said plaintiffs Mary I. Leadlay and Percy Leadlay as well as the said sum of $39,403.99, being the amount otherwise accounted for by or allowed to the said John T. Moore and Anna A. Moore on the said reference from the said sum of $184,552.77, being the total received from the said sales by the said John T. Moore and Annie A. Moore, leaves a balance of $53,016.83 in the hands of the said John T. Moore and Annie A. Moore, all of which balance so remaining in the hands of the said John T. Moore and Annie A. Moore, said plaintiffs Mary I. Leadlay and Percy Leadlay as such executors necessarily gave credit for on said reference."

After receiving the redemption moneys and making all proper deductions therefrom there remained in the hands of the executors a surplus of $5,520.60, which, under the terms of the agreement of settlement dated 30th September, 1909, they paid to Annie A. Moore.

The said John T. Moore and Annie A. Moore had been allowed to otherwise retain in their hands, under the terms of the said agreements, moneys collected on the sales of certain of the mortgaged lands amounting to $53,016.83, and which added to the said sum of $5,520.60 made a total of $58,537.43, which, according to paragraph 22 of the statement of claim had been "paid to or received by the said John T. Moore and Annie A. Moore out of the proceeds of the sales of the said mortgaged lands and out of the amount paid or which would otherwise have been paid by the said company on redeeming said mortgaged lands to the said plaintiffs, Mary I Leadlay and Percy Leadlay."

In this action the plaintiffs were the said Mary I. Leadlay and Percy Leadlay, executrix and executor respectively under the said will of Edward Leadlay, deceased, and the said Percy Leadlay, also in his own right, and Gertrude Beemer and Annie Gertrude Parry as beneficiaries under the said will and interested in the matters in question, herein, and the defendants are the other beneficiaries under said will.

The defendant, Edward Leadlay, in his statement of defence, admitted the allegations contained in the plaintiffs' statement of claim. The defendants, William Edward Ogden, Mary Alberta Ogden, Albert Uzziel Ogden and Isaac Leadlay Ogden stated in their statement of defence that they were unaware of the facts concerning the allegations contained in the statement of claim, and all of said defendants and infants submit their rights to the decision and determination of the Court.

The matter came on to be heard on a motion for judgment upon the pleadings filed and for the declarations or findings of relief asked for in the statement of claim.

The plaintiffs ask in the action for a declaration as to what portion of the said moneys received by the executors was principal or capital moneys, and what portion was income or revenue moneys, and as to whether the said agreements govern the method in which the executors were to apply the mortgage moneys under the terms of the will, and if so, then for a declaration that the balance arrived at by

deducting the sum of $65,000 (being the balance due under said two agreements of the 3rd November, 1900, and 13th February, 1902), together with any other capital expenditures made under the terms of the said two agreements together with interest thereon at 4% per annum in accordance with the terms of the said two agreements up to the 1st December, 1907, from said sum of $130,000, be treated as an increase of principal moneys under the said two agreements of the 3rd November, 1900, and the 13th February, 1902, brought about by reason of the terms of the said agreement of settlement of the 30th September, 1909."

It is also asked, in case the three agreements were held not to govern the method in which the said moneys were to be applied, that there be a declaration "as to whether or not the said moneys were to be treated and applied as if the said three agreements had not been entered into and exactly as if there had been nothing but a simple redemption of the said mortgaged lands, and in such a case whether or not the said sum of $58,537.43 retained by or paid to the said Annie A. Moore and John T. Moore under the terms of the said settlement agreement of the 30th September, 1909, was chargeable to or was to be borne by capital moneys or by revenue moneys of the said estate derived from or under the said mortgage security or by both, and if the latter, in what proportions."

And finally, "for a declaration that all the legal charges and expenses of every description of the said plaintiffs of Mary I. Leadlay and Percy Leadlay as such executors in connection with the said action of the Saskatchewan Land and Homestead Company against the said Mary I. Leadlay, Percy Leadlay, John T. Moore and Annie A. Moore, and of the action of the said Annie A. Moore against the said plaintiffs Mary I. Leadlay and Percy Leadlay, and that the said action of the plaintiffs Mary I. Leadlay and Percy Leadlay against the said John T. Moore and Annie A. Moore, and of and in connection with the said settlement agreement of 30th September, 1909, and of and in connection with the present action, as well as legal costs and expenses which might be allowed to any of the other parties to this action were chargeable to and were to be paid by the said plaintiffs Mary I. Leadlay and Percy Leadlay out of the capital moneys of the said estate.

C. Kappele, for the plaintiff.

W. D. McPherson, K.C., for the defendants Ogden other than Charles E. Ogden.

R. G. Smythe, for the defendant Edward Leadlay.

E. C. Cattanach, for the infant plaintiffs.

HON. MR. JUSTICE SUTHERLAND:—It is clear from the will that after payment of the annuity to the widow, the surplus income of the estate was intended to be divided annually among the children and grandchildren as set out in paragraph 7 thereof.

The judgment of the Court of Appeal was for redemption, and in pursuance thereof the Master found as follows:—

"(1) Balance of principal money due on the said mortgage, and of the moneys paid by the said defendants Leadlay under and upon the postponement agreement, and for the release of the equity of redemption, and of all proper allowances for taxes and other expenditures, including payments and expenses made or incurred in or about the care and sales of the mortgaged lands (the defendants Leadlay having accounted for lands sold as by said certificate is provided), and of all other principal moneys, which the said defendants are entitled to recover under the said certificate of the Court of Appeal, together with interest thereon respectively at 6¼ per cent. per annum," etc.

The moneys received by the executors must be treated, I think, simply as received on a redemption of mortgaged lands.

The agreements referred to were, no doubt, entered into in good faith by the executors and in the interests of the estate. They are not questioned in this action by any of the parties, yet I do not see how they can be held to affect in any way the disposition of the moneys of the estate when they have come into the hands of the executors. It is conceded by every one that a considerable loss on the said security has occurred, and the question to be determined is how and by what portions of the estate this is to be borne.

It is a case in which neither the capital nor the income should bear the entire loss. *In re Moore* (1885), 54 L. J. Ch. 432; *Re Atkinson* (1904), 2 Chy. 160. There will be a direction that the amounts advanced from time to time by the executors with 5 per cent. interest on the balances from time to time due, with annual rests form a charge upon the money received by the executors, and that the net balance

then remaining be apportioned between capital and income upon the principle laid down in *Re Cameron*, 2 O. L. R. 756. The amount allowed for interest on the advances made by the estate will be income as well as the amount allowed on the apportionment. Reference also to in *Re Earl of Chesterfield Trust*, Law Reports (1882), 24 Chy. Div. 643; *In re Hangler, Frowde* v. *Hangler*, Law Reports (1893), 1 Chy. Div. 586. There will be a reference to the Master-in-Ordinary to take the account as indicated. The legal charges and expenses incurred by the executors previous to this action will be taken into account in determining the amount of the loss to be apportioned, and before such apportionment is made. The costs of all parties to this action will be out of the estate, those of the executors as between solicitor and client.

DIVISIONAL COURT.

MAY 6TH, 1912.

FOXWELL v. KENNEDY ET AL.

3 O. W. N. 1225.

Executors and Administrators—Sale of Lands by—Action to Enforce Specific Performance — Appeal — Notice — Amendment—Con. Rules 312, 789.

Action by plaintiff, sole executor of the will of David Kennedy, for certain declarations and for specific performance of an agreement to sell certain lands to defendants, Suydam Realty Co. Defendants other than last named attacked by counterclaim plaintiff's title as executor and registered owner of lands and claimed sale to be at gross under-valuation. Defendant Suydam Realty Co. expressed its willingness to carry out sale.

MEREDITH, C.J.C.P., *held*, that proposed sale was at fair price, order specific performance and dismissed counterclaim with costs.

DIVISIONAL COURT dismissed appeal with costs.

Per RIDDELL, J.:—An amendment of motion or appeal to Divisional Court is not allowed in every case under Con. Rules 312, 789, and while it is as of course in the ordinary case, it will not be made simply because a mistake has been made, and still less where no mistake has been made, but it is supposed that an opportunity will be afforded to hang an argument upon a different peg if the amendment were made.

An appeal by Robert Kennedy, a defendant by counterclaim, from a judgment of HON. SIR WM. MEREDITH, C.J. C.P., in favour of James H. Kennedy, the counterclaiming defendant.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

F. R. MacKelcan, for Robert Kennedy, the appellant.

W. M. Douglas, K.C., for the Suydam Realty Company, defendants by counterclaim.

E. D. Armour, K.C., and A. D. Armour, for James H. Kennedy, plaintiff by counterclaim.

HON. MR. JUSTICE RIDDELL:—In this action a counterclaim was served; this counterclaim was tried before the Chief Justice of the Common Pleas at Toronto non-jury sittings in December, 1911, and judgment given endorsed on the record, 30th January, 1912.

Robert Kennedy, one of the defendants by counterclaim, appeals.

In the counterclaim, James H. Kennedy is plaintiff, Gertrude Maud Foxwell, Madeline Kennedy, Robert Kennedy, David Kennedy and the Suydam Realty Company, are defendants. The claim sets out that J. H. K. is sole executor of the will of the late David Kennedy; that by the will J. H. K. was devised a residue of the estate of D. K., consisting largely of unimproved lands, with power to sell, etc.; that he was thereafter entered in the Land Titles Office as absolute owner in fee simple of all the lands of the estate, being all the lands sold to the Suydam Company and others; that he, in September, 1910, contracted to sell certain lands, fully described, to the Suydam Company; that they accepted title November 1st, 1910, and asked for a short delay, which was granted; that before the sale could be completed, and on the 12th November, Madeline Kennedy registered a caution, which was set aside 2nd December, 1910, at a cost to the plaintiff; that on the 12th November, 1910, Robt. Kennedy filed a caution, which was removed 9th December, at a cost to the plaintiff; that G. M. Foxwell registered a caution, 8th December, which still stands; the succession duty amounts to $1,976.79, and the plaintiff has no funds to pay it; he claims interest from the Suydam Company for the delay, and if not, then from those who prevented the sale going through; he claims an order against the Suydam Company to complete the sale and pay the balance of the purchase money; he says that D. K. claims that he, the executor, has no right to sell the land and claims a lien thereon for

an annuity left him by the said will, but that he, while admitting D. K.'s right to the annuity, claims the right to sell the land for the purposes of the estate, including paying D. K.'s annuity.

R. K. denies that the plaintiff is executor, and claims that he has no right to sell the land, says he registered the caution to protect his own rights and that the plaintiff has used the cash of the estate to pay his own solicitor and to pay legacies when he should have paid the succession duties.

To this there is a reply setting up an adjudication that R. K. had no interest in the land and an order vesting the lands on the plaintiff.

Madeline Kennedy denies the devise to the plaintiff; that the entry of the plaintiff in the L. T. O. was by mistake and inadvertence; that the sale to the Suydam Company is void; that she is entitled to a share in the proceeds of the sale of the land and registered the caution to prevent a sale at a gross undervalue.

Upon this the plaintiff joins issue. D. K. claims that the lands belong to him and the other heirs at law of D. K. deceased; that the sale is at a gross undervalue; that he has an annuity charged upon the lands and the lands cannot be sold without his consent. He also sets up that the counterclaim should not be tried until the will be construed. Upon this the plaintiff joins issue.

The Suydam Company say that the plaintiff represented himself to be the owner in fee simple of the land, that they did not accept title; that they are ready and willing to complete the purchase and are not in default, but by reason of the delay, they have been put to heavy loss.

Upon this the plaintiff joins issue. All parties were represented by counsel at the trial before the C. J. C. P.

Evidence was adduced, shewing the facts as to title, cautions, etc., and also the value of the lands.

After reserving judgment the learned trial Judge made the following indorsement upon the record (we are informed that the learned C. J. made certain findings of fact at the time of the trial, but that for some reason the reporter did not take them down): "Upon my findings of fact, I direct that judgment be entered on the counterclaim as follows:

"1. Declaring that the sale by the plaintiff to the Suydam Realty Co., Ltd., is not an improvident one or made at an undervalue.

"2. For specific performance by the last named defendants of the agreement in the counterclaim mentioned.

"3. Ordering the defendants by counterclaim other than the defendants the Suydam Realty Co., Ltd., to pay to the plaintiff by counterclaim the costs of the counterclaim forthwith after taxation.

"4. And making no order as to costs between the plaintiff by counterclaim and the defendants the Suydam Realty Co., Ltd."

Robert Kennedy (and he only) appeals.

The notice alleges as grounds:

1. That the judgment was contrary to evidence.

2. That no notice of trial was given him and so he was taken by surprise and failed to have his witnesses present.

3. That the plaintiff and the Suydam Realty Co. are conspiring to defraud him and the other parties.

4. That the C. J. reserved judgment till an action now pending was tried, but that counsel for the plaintiff and the Suydam Realty Co., Ltd., attended the C. J. and made allegations (what we are not told) and by consequence of these allegations the C. J. gave judgment.

5. That such delivery of judgment was irregular.

6. That the plaintiff and the Suydam Co. are conniving so that the said company can acquire the lands.

I think, perhaps, a more extraordinary notice of motion never was filed (the present counsel is not responsible for it).

Upon the motion coming on for argument, no attempt was made to support the motion on the grounds set out in the notice, nor was leave asked to amend the notice.

C. R. 789 provides: "Every notice of motion or appeal to a Divisional Court shall set out the grounds of the motion or appeal." The Court may, at any time, amend any defect or error in any proceeding, and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute . . ." C. R. 312.

An amendment is not allowed in every case—and while it is as of course in the ordinary course, it will not be made simply because a mistake has been made—and still less where no mistake has been made; but it is supposed that an opportunity will be afforded to hang an argument upon a different peg if the amendment be made.

From the notorious course of litigation in connection with this land, which is rapidly becoming and has indeed already

become a scandal, it is perfectly plain that a number of the descendents of David Kennedy are acting together and in concert harmoniously to a common end, i.e., to embarrass the executor in his administration of the estate. And nothing we could do by allowing or directing an amendment to the present notice of motion and giving judgment upon the new points, would be at all of advantage in putting an end to the litigation.

I, therefore, think we should simply dispose of the appeal upon the grounds set out in the notice of motion, and that the appeal should be dismissed with costs.

I have seen no reason to change the view formed during the argument, that, even if an amendment were allowed, the appeal could not succeed.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — I agree in dismissing the appeal with costs.

HON. MR. JUSTICE BRITTON:—I cannot usefully add anything to what my brother Riddell has written, I agree in the result—that the appeal should be dismissed with costs.

HON. MR. JUSTICE RIDDELL. MAY 6TH, 1912.

MORGAN v. MORGAN.

3 O. W. N. 1220.

Husband and Wife—Alimony—Settlement of Former Action—Agreement—Conveyance of Land and Chattels—Effect on New Action—Reference—Quantum of Alimony.

Action for alimony. Defence was an agreement made in pursuance of a settlement of a previous action for alimony under which plaintiff agreed to resume cohabitation upon defendant undertaking to treat her in a proper manner and conveying to her an undivided half interest in certain lands and chattels, which latter clause was carried out. Defendant's subsequent conduct was admittedly such as to justify action.

RIDDELL, J. *held*, that previous agreement was no bar to present action.

Gandy v. *Gandy*, 7 P. D. 168, distinguished.

That in considering the amount of the alimony regard must be had not only to the station in life of parties but also to the nature and amount of property of which each is possessed.

Judgment for plaintiff with reference and with costs.

Action for alimony tried at London non-jury sittings.

T. G. Meredith, K.C., for the plaintiff.

J. M. McEvoy, for the defendant.

HON. MR. JUSTICE RIDDELL:—The parties intermarried in 1875: in 1894, the plaintiff brought an action for alimony, which was settled by a written agreement. This provides that the plaintiff will "withdraw or settle" the action and return to the defendant's home on condition that he agree to support her properly and treat her in a fit and proper manner, pay all the costs of the action and also convey to her an undivided one-half interest in certain land mentioned. It was further agreed that in case she should be compelled to leave his home "for such just cause as would entitle her to obtain alimony" from him "for her support and maintenance while living separate and apart from him" she should "be entitled to obtain the custody and possession of all the infant children of the . . . parties."

A deed was made reciting the pending action "and whereas the said party of the second part has agreed with the said party of the first part to withdraw and settle the said suit or action in consideration of the said party of the first part conveying to her an undivided one-half interest in the lands hereinafter mentioned."

At the same time a bill of sale was made by the defendant to the plaintiff of an undivided half interest in certain chattels—this bill of sale has recitals similar to those in the deed —although nothing is said in the written agreement as to the chattels—the bill of sale was not recorded, it contains, indeed, on its face a stipulation that it is not to be recorded.

The defendant has remained in possession of the land and taken all the rents and profits, also of the chattels.

The plaintiff went back to live with the defendant; but he broke out again—his conduct is admittedly such as justify the plaintiff leaving him—it is of a disgusting character and I do not enlarge upon it.

An action for alimony was again brought—and came on for trial at the non-jury Court at London.

The defence is based upon the agreement whereby the former action was to be withdrawn or settled.

Most of the argument was founded upon the hypothesis that the agreement was a sort of an arrangement for the wife's future support and maintenance by means of the lands and chattels conveyed to her. But that is not the case at all. There was an action pending—the defendant desired that it should be settled and offered pecuniary inducements to the plaintiff in that view. The land and chattel interests

were conveyed to her as part consideration of her settling the action and returning to the home of the plaintiff.

This is wholly different from a provision for maintenance in a separation deed such as that in question in *Gandy* v. *Gandy* (1882), 7 P. D. 168 (in which, moreover, there was a covenant not to sue for more) or that in *Attwood* v. *Attwood* (1893), 15 P. R. 425, and the like cases.

The effect of the arrangement, agreement, deed, etc., between the parties was simply that the plaintiff withdrew her action, went back to live with the defendant as his wife and he made an express covenant to do what the law held him bound to do, i.e., "to support and maintain" her "as his wife and to treat her in a fit and proper manner as a wife should be treated." She became the owner of certain real and personal property, and in view of the anticipated possibility of her being compelled to leave his home for such just cause as would entitle her to obtain alimony from him, for her support and maintenance, she was to have the children.

There is no provision here for future support and maintenance beyond that which is contained in his promise already implied by law—there is no suggestion that land or chattels, or both, are to be for maintenance, etc., no covenant not to sue for alimony, and it is clearly contemplated that she may receive alimony in case of future misconduct compelling her to leave his house.

The agreement then is not a bar to the action. But it is not wholly without effect. In considering the amount of alimony to be awarded, regard must be had not only to the station in life and position of the parties, but also to the amount and nature of the property of which each is possessed. In England, a rule which is often followed—and, speaking generally, considered as a reasonable one—is to allot to the wife an annual payment equivalent to one-third the joint income. This will not, as a rule, be satisfactory in Ontario. In England, in most instances, those ordered to pay alimony are in circumstances of greater affluence than those in Ontario—and the relative amount supposed to be necessary for the support of a man and of a woman widely differ in the two countries. The Court, nevertheless, in proceeding upon the sound principle of looking to what is just and reasonable, does not neglect to take into consideration the amount, yearly value, etc., of the property of both husband and wife.

In fixing the alimony some attention will be paid to the fact that she has a half interest in the land and chattels. In the present action, of course, no order can be made (except on consent) that the husband is to pay to the wife half the rental of the property, and half the value of the chattels; but he must understand that at any time an action may be brought by the wife for a declaration of her rights and appropriate relief. I do not give any specific direction to the Master what effect to give to the condition of ownership and control of land and chattels; he will, however, in making his report, give reasons for his decision.

There will be a reference to the Master at London to determine the amount of alimony to which the plaintiff is entitled, looking to what is just and reasonable under all the circumstances—the defendant will pay the costs of action and reference.

It may, perhaps, be assented to by all parties that the alimony be fixed at $300 per annum, the defendant also to pay to the plaintiff one-half the rent of the farm—I suggest this amount, and if all parties agree, the judgment may go accordingly.

The defendant has bettered his condition substantially since the agreement; but that fact does not influence me.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MAY 6TH, 1912.

HOOVER v. NUNN.

3 O. W. N. 1223.

Cancellation of Instruments — Deed by Lunatic — Onus of Proving Execution During Lucid Interval.

FALCONBRIDGE, C.J.K.B., *held*, that where the grantor under a deed is shewn to have been afflicted with a continuous type of insanity for some time prior to the date of the deed the onus is on those upholding the deed to prove its execution during a lucid interval.

Atty.-Gen. v. *Parnther*, 3 Brown Ch. 441, and other cases referred to.

That the mere existence of an ordinary affidavit of execution made by a reputable solicitor is no evidence of sanity.

Action by the administrator of the estate of the late Mary Augusta Hoover, to set aside a conveyance of land made by the deceased in 1870 and to vacate the registry thereof.

McGregor Young, K.C., and J. A. Murphy, for the plaintiff.

T. A. Snider, K.C., and S. E. Lindsey, for the defendants.

Hon. Sir Glenholme Falconbridge, C.J.K.B.:—I have delayed giving judgment for a long time in this case in consequence of efforts to settle reported to have been in progress between the parties.

Mary Augusta Hoover was born in 1845 or 1846. By patent from the Crown, dated 17th of November, 1851, she became owner of the north half of lot 3 in the fourth concession of Rainham. A deed dated the 6th day of April, 1870, and registered 18th March, 1875, was executed by her purporting to convey to her mother, Jane Walker, the said lands. Jane Walker by her will, bearing date the 2nd of March, 1875, professed to devise the said lands, some of the defendants being beneficiaries under this will. Mrs. Walker died on the 21st of March, 1887. Mary Augusta Hoover died on the 1st of November, 1908, in the asylum at Hamilton, and letters of administration of her estate were granted to the plaintiff, who is the eldest surviving uncle of the said Mary Augusta Hoover. The plaintiff brings this action charging that she was of unsound mind, and incapable of making a valid contract from 1869 to the time of her death, and claiming vacation of the registration of the deed to Jane Walker, and the vesting of the title of said lot in the plaintiff as administrator.

Very clear evidence is given by Dr. T. T. S. Harrison, and others, of a condition of insanity existing from about 16th of November, 1869. Several cousins place it as far back as November, 1868, and the plaintiff from about the same time.

I find, on a review of the whole testimony, that Mary Augusta's insanity was not merely temporary, at least up to the date of the execution of the impeached deed; and, therefore, the burden is upon the defendants to shew that this deed was executed during a lucid interval: *The Attorney-General* v. *Parnther*, 3 Brown Chancery, 441; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, at p. 570; *Russell* v. *Lefrancois*, 8 S. C. R. 335.

The question would be as stated by Pope, "Law of Lunacy, 2nd ed.," p. 262: "Was the alleged lunatic at the date

in question capable of understanding the nature of the act she was performing."

There is no direct evidence of any lucid interval. The plaintiff accompanied her mother (the grantee) not to Cayuga, their own county town, but to Goderich, a remote part of the province, and there the deed was drawn in the office of a reputable firm of solicitors, both of whom are dead. One of them was the witness to the deed and made the affidavit of execution.

I am asked on the authority of Pope, p. 411; *Towart* v. *Sellers*, 5 Dow. P. C. R. 245, to hold that this is equivalent to the witness to the deed standing in the box and swearing that when she executed the deed she was sane. I decline so to hold. I know with what falsity, in my own experience, decent solicitors and solicitors' clerks have acted as witnesses to deeds and sworn that they "knew the said party," upon the faith of a mere introduction by an apparently respectable person. I also disregard the formal statements in the discharges from the asylum. They are in printed forms, and I do not think they are borne out by the material which should interpret them. Therefore, I find that Mary Augusta Hoover never had a lucid interval from 1st January, 1869, up to the end of her days—to the extent of being able to understand the nature of the execution of the deed. Mrs. Walker was, therefore, in possession of the lands under a void deed made by a lunatic; so that she was a trustee for her daughter, and the Statute of Limitations did not run against the lunatic or her representatives.

In 1887, after the death of the mother, the Inspector of Asylums, Prisons, etc., entered into possession, taking out letters of administration of the will of Jane Walker, and he made five leases as administrator of the will annexed, and the consent of the Attorney-General for the time being was obtained, indicating to me that the Inspector was acting *qua* Inspector, and not as administrator. This would, I take it, in any event be a possession by Mary Augusta Hoover before the expiry of the twenty years.

I give judgment setting aside the deed, and further as prayed in the statement of claim. The defendant Nunn was authorized by the Court to defend the action on behalf of, and for the benefit of, all the beneficiaries under the will of Jane Walker, and, therefore, he should have his costs as between attorney and client out of the estate. He should not

use this provision as ammunition further to attack this small estate. There is not much margin in it after debts due or paid by the plaintiff to the asylum are deducted, and if defendant should appeal, the Court above may consider all the circumstances in dealing with the question of costs.

MASTER IN CHAMBERS. MAY 6TH, 1912.

MACMAHON v. RAILWAY PASSENGERS ASSCE. CO. (No. 1.)

3 O. W. N. 1238.

Evidence—Foreign Commission — Motion for Anticipated—Application Premature—No Precedent for.

Motion by plaintiff for order that any commission to Europe for evidence to be taken by defendants be executed between certain dates when he would be present to instruct counsel.

MASTER IN CHAMBERS, *held*, motion premature and no precedent for same. Motion dismissed, costs to defendants in any event.

An action brought to recover on a policy on the life of the assured who died abroad very shortly after the issue of the policy.

The plaintiff was the sole executor of the deceased. The action is now at issue and he is on his way to Europe and expects to be at the place where the assured died for a month or six weeks, from 20th May, inst. He states that defendants will probably ask for a commission to take evidence as to the death of the assured at the place where it occurred. If so he wished to be present to instruct counsel, and moved "for an order that if any commission is applied for and issued to take evidence, the said commission be executed at some time between the 20th May and 30th June, 1912."

H. E. Rose, K.C., for the plaintiff's motion.

Shirley Denison, K.C., for the defendants, contra.

CARTWRIGHT, K.C., MASTER:—No precedent for such an order was cited nor have I found any. The motion seems premature, and to suggest a term that may be considered if defendants apply for such commission, on the argument their counsel was not prepared to say how this would be.

The motion must be dismissed with costs to the defendants in any event.

MASTER IN CHAMBERS. MAY 6TH, 1912.

MACMAHON v. RAILWAY PASSENGERS ASSCE. CO. (No. 2.)

3 O. W. N. 1239.

Motion by defendants for an order that plaintiff do attend a further examination for discovery and answer certain questions relating to his mother's marriage certificate and produce the same and for a further affidavit on production. The action was on a policy of insurance on the life of the plaintiff's mother, and one of the issues raised was as to her correct age, on which her marriage certificate might have thrown some light. The plaintiff on his examination refused to answer if such a document existed on the ground that an attempt was being made to cross-examine him on his affidavit on production.

MASTER IN CHAMBERS *held*, that as it had not been shewn that the certificate was in existence, the motion for a further affidavit was premature.

That plaintiff should answer the question as to the existence of the certificate.

Standard v. *Seybold*, 1 O. W. R. 650, discussed.

In this action on a life policy, one of the defences is that the age of the assured was incorrectly given. On examination of plaintiff for discovery he was interrogated on this point and was asked to produce the marriage certificate of his mother, the assured; no such document was mentioned in plaintiff's affidavit on production, and his counsel objected to these questions as being an attempt to cross-examine on the affidavit on production. The plaintiff did not say whether he had it or not. But stated that he was informed the marriage took place at Belleville, Ont., in what year he could not say. (This would seem to imply that the certificate was not in his possession.) He stated facts as to his own birth and that of his older brother which would agree with 1864 as the date of the marriage. He further stated that he had no record of his mother's age, and that all his enquiries on the point had been fruitless. He was then asked again as to the marriage certificate and the objection of his counsel was again made and sustained by the examiner (questions 23 and 24).

The defendants now move for an order to have the questions, and that plaintiff produce the marriage certificate therein referred to, and to make a further affidavit on production.

Shirley Denison, K.C., for the defendants' motion.

H. E. Rose, K.C., for the plaintiff, contra.

CARTWRIGHT, K. C., MASTER:—It is to be observed that the plaintiff has never admitted that he had at any time any marriage certificate of his parents. It is, therefore, clear that the motion, so far as it asks for a further affidavit, is made too soon.

The first point to be decided now is whether the plaintiff should state: (1) whether he had such certificate (as question 9), though this is not material as (at question 22), he was again asked if he had the certificate, and at once answered, and without objection by his council, "No, I have not."

He was then asked (question 23).

"Is it in your solicitor's possession?"

This was not answered, and he was then asked (question 24): "Have you seen a marriage certificate." This he declined to answer on the advice of counsel, and the objection was sustained by the examiner. Counsel for plaintiff relied on the decision of the Divisional Court in *Standard* v. *Seybold,* 1 O. W. R. 650, and especially on the words (p. 651), "the opposite party may not indirectly by means of an examination for discovery, do that which he may not do directly; cross-examine upon an affidavit on production."

But this must be read with what precedes. The case is not found in the O. L. R. and the facts are not given in detail. It would seem, however, that the defendant was asked on discovery if he had executed a certain document referred to as exhibit 6. There the judgment proceeds: "So far from there being any admission by the defendant that he had ever had in his possession or then had such a document according to his recollection as then stated he never signed any such document." The next paragraph recognizes admissions that he had other documents as a ground for a further affidavit, and in my reading of this case it only says that the usual rule as to when a further affidavit can be required is to be strictly followed.

But not so as to debar the examining party from doing what was done in that case. Had the defendant admitted that he had executed exhibit 6 or had had it in his possession at any time, he might have been required to make a further affidavit. I was always under the impression that an examination for discovery was a very usual way to obtain a further affidavit. The insufficiency of the previous affidavit is

then brought to light—arising very often from oversight or forgetfulness of the deponent or from a misapprehension of himself or his solicitor as to the relevancy of documents other than those produced.

The counsel for defendants stated that he was willing to accept the statement of plaintiff's solicitors as to whether there was a marriage certificate in existence and if plaintiff had seen it or had had it in his possession.

This he is entitled to on the ground that the true age of the assured is in issue and the production of the certificate might enable defendants to obtain conclusive evidence on this point. (See *Attorney-General* v. *Gaskill*, 20 Ch. D. 528, cited in Bray, p. 112.) This is more important as plaintiff admits that a month before her death his mother said (question 199 et seq.): "I am about sixty-four." One of the conditions of the policy is that the assured was, on 11th April, 1911, not sixty-two.

If the solicitors cannot give this information there must be further examination before trial. Success having been divided, the costs of this motion will be in the cause.

HON. MR. JUSTICE MIDDLETON. MAY 7TH, 1912.

RE MATTHEW GUY CARRIAGE & AUTOMOBILE CO.

3 O. W. N. 1233; O. L. R. .

Company—Management—Directors—Payment for Services as Workmen and Clerks—Companies Act, 7 Edw. VII. c. 34, s. 88.

MASTER IN ORDINARY ordered that certain directors of the company in liquidation repay the company certain sums paid them for services rendered without the statutory by-law having been passed.

MIDDLETON, J., *held*, that the sums that had been paid those directors were reasonable wages for manual and clerical services performed by them as workmen and employees of the company.

Allowed appeal with costs.

Birney v. *Toronto Milk Co.*, 5 O. L. R. 1.

Benor v. *Canadian Mail Order*, 10 O. W. R. 1091, and *Morlock* v. *Cline*, 23 O. L. R. 165, distinguished.

An appeal by the directors of the company, in liquidation, from an order of the Master in Ordinary, dated 1st April, 1912, upon the return of a misfeasance summons, whereby he directed the directors to severally repay certain sums received by them from the company in remuneration for services rendered.

F. S. Mearns, for certain directors.

W. S. McBrayne, for other directors.

G. H. Kilmer, K.C., for the liquidator.

HON. MR. JUSTICE MIDDLETON:—After most careful consideration I am unable to agree with the learned Master. I adhere to the views expressed in *Eastmure's Case,* 1 O .W. N. 863, as to the wide effect to be given to sec. 88 of the Companies Act, 7 Edw. VII. ch. 34; but I think this case entirely differs from any of the reported decisions and falls quite outside the section.

The company was incorporated for the purpose, *inter alia,* of manufacturing automobiles. F. M. Guy was a practical mechanic, and worked at manual labour in the company's shop, receiving a weekly wage of fifteen dollars. Daniels also worked, first in the factory and afterwards as a stenographer in the office, receiving the ordinary wage paid to those in like employment. Walter was employed as a painter and varnisher in the factory. Armstrong was the company's bookkeeper. All of these men had been employed by Matthew Guy, the original owner of the business, before it was taken over by the incorporated company; and a formidable contention is made on behalf of these directors that it was part of the original understanding upon the transfer of the business that the company should assume the existing contracts with employees; but I prefer not to base my judgment upon this aspect of the case.

The section of the statutes provides: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting." There is much to be said in favour of the contention put forward by the appellants, that this section relates to the payment of the president or director for his services rendered in his official capacity, and that it was not intended to deal with payments made to him for services rendered in any other capacity. This seems to have been the view entertained by Mr. Justice Meredith in *Mackenzie* v. *Maple Mountain Mining Company,* 20 O. L. R. 615, where he says:

"The purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction."

But I think that the Courts have adopted a wider view of the statute, and that it must be taken to apply to all cases in which a by-law is necessary for the payment, and to cover the remuneration of all officers of the company whose appointment should properly be made by by-law. *Birney* v. *Toronto Milk Company*, 1902, 5 O. L. R. 1, is now recognized as conclusive authority for this position. The claim there was upon an executory contract by which the plaintiff was employed as the manager of the company. The holding is that the plaintiff could not recover because no by-law for his payment had been passed and no contract was made under the corporate seal.

It was pointed out that the appointment of a manager was an entirely different thing from the appointment of mere servants or casual or temporary hiring; the latter contracts not necessitating either a by-law or a contract under seal. It is with reference to such an appointment that Mr. Justice Street used the words relied upon by the liquidator:

"In my opinion we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves, whether in the case of fees for attendance at Board meetings or for the purpose of any other services for the company. It is not conceivable that the Legislature intended to forbid the directors from voting small sums to themselves for their attendance at Board meetings without obtaining the consent of the shareholders and at the same time to allow them to vote large sums to themselves for doing other work without reference to all the shareholders. The interpretation contended for by the plaintiff would in effect render the section nugatory; for nothing would be easier than to evade it. I think the section should be given a broad and wholesome interpretation, and that it should be held wide enough to prevent a president and Board of Directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company, without the authority of a general meeting of the shareholders."

I have neither the right nor the inclination to narrow this statement of the law, when rightly understood; but, bearing in mind that it was spoken of an employment for which a by-law is necessary, and that the section itself does not prohibit the remuneration of a director, but merely renders invalid any by-law, I do not think that there is any warrant

for extending the principle to cases in which the director has acted as a mere workman or clerk, and has been remunerated at a rate not exceeding the real value of the services rendered, at the ordinary market price.

I think that the principle applicable is analogous to that applied to *ultra vires* contracts where the company has received the benefit. It cannot retain the benefit without paying a fair price. If the effect of the statute is somewhat larger than I have indicated, and renders invalid the contract of hiring, then the directors have, as servants of the company, in the discharge of the manual and clerical services which they have respectively rendered to the company, a right to receive a *quantum meruit* for those services. It is not suggested that they have received more than this. Therefore, they have not been guilty of misfeasance.

I do not find anything in the decided cases opposed to this view. In *Eastmure's Case,* repayment was ordered of salary received by Eastmure as president, and I refused to recognize any claim based upon a *quantum meruit,* because when services have been rendered and accepted, by a director, no promise to pay can be inferred; his services, in the absence of the by-law, being deemed to be gratuitous. But here the whole circumstances shew that the wages were paid as remuneration for labour in the factory and office, and indicate that it was not intended that the labour should be gratuitously rendered.

In *Burland* v. *Earle,* 1902, A. C. at p. 101, this view appears to receive the sanction of the Privy Council. J. H. Burland had been secretary. When he became a director, and was appointed vice-president, he continued to do the same class of work that he had done as secretary. "He was allowed by the directors to continue to draw his former salary, without any observation, until the present action; and their Lordships think that the inference may fairly be drawn, from all the circumstances of the case, that he was intended to retain his salary although there was a shifting of the offices."

So here, I think, the true intendment was that upon the taking over of these carriage works by the incorporated company, the former employees were intended to continue to render similar services and to draw the same remuneration as they had theretofore received. I do not put this as being part of the bargain, but as being the result of their continuation in the employment.

Re Morlock and Cline, 23 O. L. R. 165, is very close to this case; and as I had some doubt whether it might not be regarded as determining the point in a way opposed to my present view, I availed myself of the privilege of discussing it, and *Benor* v. *The Canadian Mail Order*, 10 O. W. R. 1091, with my brother Riddell; and he tells me that in his view these cases are not opposed to the opinion which I have formed. In the *Benor Case*, a by-law was clearly necessary, and in the *Morlock Case*, the distinction between cases in which a by-law is necessary and cases of the employment of a mere servant was not suggested.

For these reasons I think the appeal succeeds, and should be allowed with costs here and below.

HON. MR. JUSTICE MIDDLETON. MAY 7TH, 1912.

BROWN v. ORDE.

3 O. W. N. 1230.

Discovery—Examination of Plaintiff—Fitness for Public Office — Questions Relating thereto Must be Answered — Action for Slander—Innuendo.

Appeal by plaintiff from order of local Judge directing him to attend and answer certain questions on his examination for discovery, relating to his private character, capacity and ability. The action was for slander, uttered by defendant in an election campaign in which plaintiff was a candidate, he having said that his appointment to the office of controller of Ottawa had been a degradation of the civic government.

MIDDLETON, J., *held*, that the plaintiff had chosen to make his fitness for the office sought an issue and could be examined upon it.

Appeal dismissed with costs.

An appeal by the plaintiff from the order of His Honour Judge MacTavish, directing the plaintiff to attend and answer certain questions which he refused to answer upon his examination for discovery.

J. King, K.C., for the plaintiff, appellant.

H. M. Mowat, K.C., for the defendant, respondent.

HON. MR. JUSTICE MIDDLETON: — The action is for slander. The plaintiff, a Controller of the City of Ottawa, complains that whereas on the 10th November, 1911, upon the death of one James Davidson, Controller, he was ap-

pointed to fill the vacancy thus created, during the election of the degradation of the civic government by the plaintiff's appointment to succeed Davidson, who stood head and shoulders above the other members. The innuendo alleges that this meant "that the plaintiff had neither the character, competency, capacity, ability, skill nor knowledge to properly perform the duties of a member of the said Board of Control, or that the plaintiff had so misconducted himself that it was a public disgrace and insult to appoint him to the office of member of the Board of Control."

Upon the examination of the plaintiff for discovery, the defendant's counsel sought to examine him touching his character, competence, capacity and ability. The plaintiff declined to answer any such questions; basing his refusal upon the ground that the words were spoken concerning the plaintiff in his official capacity and not in reference to his business capacity.

In the first place this is manifestly incorrect. The unfitness to occupy the public office, suggested by the alleged slander, arises from the general character and reputation and business standing of the plaintiff. In the second place, by his innuendo which I have quoted, the plaintiff has elected to bring his private character into the controvercy; in fact, I do not see how he could do otherwise.

Upon this appeal the ground is entirely shifted, and I confess myself utterly unable to follow the learned argument presented by the plaintiff's counsel. He discarded entirely his own pleadings, and sought to treat the defendant's plea of fair comment as an attempt to justify; and then, so regarding the plea, sought to shew that the particulars furnished were not adequate.

It appears to me that this is dealing with something in no way in issue upon this motion. I have to take the pleadings and the supplementary particulars as they stand, and merely to determine whether the questions asked are relevant to the issues so raised. I cannot treat the motion as one attacking either the pleadings or the particulars. If these are insufficient for any reason, they must be attacked directly.

I think the questions were properly asked, and that the enquiry is entirely relevant to the issues raised.

The appeal must be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. MAY 7TH, 1912.

RE RIDDELL.

3 O. W. N. 1232.

Costs — Security — Claimant of Fund in Court — Resident out of Jurisdiction—Real Actor.

MIDDLETON, J., *held*, that where a claimant, upon a fund in Court, resident out of the jurisdiction, is a real actor in the proceedings, and must give security for costs.

Boyle v. *McCabe*, 24 O. L. R. 313, 19 O. W. R. 540, 948, followed.

Judgment of Master in Chambers reversed.

An appeal by John Riddell from the refusal of the Master-in-Chambers to order the claimant, Adelia Bray, to give security for the costs of an issue with respect to certain moneys in Court.

C. A. Moss, for John Riddell.

T. N. Phelan, for Adelia Bray.

HON. MR. JUSTICE MIDDLETON:—The fund in question is the proceeds of an insurance policy upon the life of the late James Riddell. By the original policy the money was payable to the granddaughter, the claimant, Adelia Bray. Subsequently, a new apportionment was made, by which the money was directed to the claimant, John Riddell. If Adelia Bray is the granddaughter of the assured, then the later apportionment is of no effect, because she would then be within the class of preferred beneficiaries, while the brother is outside of that class.

The real issue to be tried is the fact as to the relationship between Adelia Bray and James Riddell. It is said that she is not his grandchild, but was a child, by a former marriage, of the wife of John Riddell, son of James Riddell. She is resident out of the jurisdiction.

The case is governed entirely by *Boyle* v. *McCabe*, 24 O. L. R. 313, 19 O. W. R. 449, 540, 948. It is manifest that Adelia Bray is a real actor. She is a claimant upon the fund; and to succeed she must establish that she is a grandchild. It may be that the onus will shift when the document is produced in which the testator describes her as his grandchild; but this is not the test. If the insurance company had not paid the money into Court and called upon her to prove her title, she would have had to sue. This shews that she is an

actor, within the meaning of the rule established by the case referred to.

I recognize the hardship of the practice thus established, and would have preferred the view that where the money is paid into Court and those appearing to have claims upon it are brought before the Court for the purpose of establishing their claims or being for ever barred, security for costs should not be required; because the claim is not voluntarily put forth by the claimant, and it is contrary to natural justice to call upon a claimant to establish his claim and then impose terms which it must sometimes be impossible to comply with and by reason of the failure to comply to bar the right.

This view, however, has not been adopted by decisions which are binding upon me.

The appeal will be allowed, and security ordered. Costs in the cause.

HON. MR. JUSTICE MIDDLETON. MAY 7TH, 1912.

BROOM v. TORONTO JUNCTION.

3 O. W. N. 1228.

Parties — Adding — Motion to Dismissed — Improper Joinder — Limitation of Action.

MIDDLETON, J., dismissed appeal by plaintiff from order of Master in Chambers, 21 O. W. R. 1001, refusing to add one A. J. Anderson as a party defendant, holding that it would be an improper joinder of parties as the cause of action alleged was different from the one set up against other defendants.

An appeal by the plaintiff from an order of the Master in Chambers, 21 O. W. R. 1001, refusing to add Mr. A. J. Anderson as party defendant.

The plaintiff in person.

W. A. McMaster, for A. J. Anderson.

HON. MR. JUSTICE MIDDLETON:—I think the judgment is correct, and ought to be affirmed. Mr. Anderson relies upon the Statute of Limitations. It appears to me that there is much to be said in favour of its application. Mr. Broom says that with much research he has been unable to find any cases like this, and that he thinks the statute has no application. I do not think that this question should be determined upon an interlocutory application, and that there

is sufficient reason for refusing the application when it appears that there is a substantial question as to the application of the Statutes of Limitations which might be affected by the order.

It would be quite possible to protect Mr. Anderson as to this by imposing a term that the action, as far as he is concerned, is not to be deemed to have been begun until the date of his addition as a party. But I do not think it is fair to add a party where the action has been pending so long and there have been so many interlocutory proceedings.

I find it impossible to understand and supposed cause of action; but it is clear that it differs altogether from the cause of action alleged against the other defendants, and that to add Anderson now would result in an improper joinder of parties.

Appeal dismissed with costs.

HON. MR. JUSTICE KELLY. MAY 1ST, 1912.

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTI.

3 O. W. N. 1191.

Boundary of Lots—Erection of Fence—Action to Restrain Interference with—Onus — Highway — Allowance for — Dedication —Estoppel.

Action to restrain defendants from interfering with or removing a fence alleged by plaintiffs to be the western boundary of lot 26 in the broken front concession township of Berti, of which lot they were the owners. Defendants by counterclaim asked that plaintiffs be ordered to remove the fence.

KELLY, J., *held*, that both parties had failed to prove the location of the western boundary of lot 26, and that onus was on plaintiffs.

Action dismissed with costs; no order as to counterclaim.

An action for an injunction to restrain defendants from interfering with or removing a fence claimed by plaintiff to be the western boundary of part of lot 26 in the broken front concession on Lake Erie, in township of Berti (of which part of lot plaintiff claimed to be owner), and from entering on plaintiff's land and for damages.

Defendants by their counterclaim asked that plaintiff be ordered to remove the fence in question and be restrained from encumbering or obstructing the roadway.

The part of lot 26 owned and occupied by plaintiff fronts on Lake Erie.

For at least thirty years prior to June, 1899, there was open for travel a road running southerly, between lot 26 and lot 27, from the concession road which runs easterly and westerly, to another road running easterly, known as the Haun road, and which is a considerable distance north of the north line of plaintiff's property.

On 1st June, 1899, the Crystal Beach Steamboat & Ferry Co., plaintiff's predecessors in title of that part of lot 26 so occupied by it, and a large number of other property owners and residents in that locality, presented a petition to defendants, setting forth that "a portion of the government allowance for road between lots 26 and 27 in the broken front concession, Lake Erie,, had not then been declared upon for public travel;" that the petitions believed "it to be in the public interest to have said road opened from the Haun road to the lake shore," and the petitioners asked defendants "to take the steps necessary according to law to make this road allowance a highway."

The petition was signed by the Crystal Beach Steamboat & Ferry Co. by its general manager, J. E. Rebstock, and he and the president of the company, with others, attended at the meeting of defendants and urged the granting of the petition. J. E. Rebstock was, as early as 1902, a director of plaintiff company. Plaintiff company acquired its property in June, 1902.

On September 9th, 1899, defendants passed a by-law declaring open for public travel "the government allowance for road from the road known as the Haun road south between lots 26 and 27 B.F, L.E. to the shore of Lake Erie" The land which was so opened for roadway at or adjoining plaintiff's land was 25 feet on each side of a fence then existing, which was thought by some to be the boundary line between lots 26 and 27, and which was the dividing line between the property then occupied by plaintiff's predecessors in title (the Crystal Beach Steamboat & Ferry Co.) and the property to the west thereof. This was the line which plaintiff claimed was the westerly boundary of its property.

Defendants when opening the road did not employ a surveyor to fix its location.

Soon after the passing of the by-law, work was commenced to put the roadway in condition for traffic by cutting through

a hill near the lake, and filling in the marshy part of the road north of the hill, and work in the way of improvement and repair to the roadway had been done by defendants year after year since that time.

In 1903 defendants constructed a sewer leading from a point in the new road north of the north limit of plaintiff's property through the road as so opened to the lake, the north end of the sewer commencing in the east ditch of the roadway and bearing somewhat to the west as it proceeds to the south, so that the northerly portion of it is to the east of the centre line of the road, as so laid out, and the southerly portion of it is to the west of that line.

In 1905, the sewer having been damaged, defendants repaired it.

The road has continued as a public travelled road from the time it was opened, and the traffic upon it has been partly on the land east of the line fence erected by plaintiff and partly to the west of it. The width of the old road north of the Haun road varied from 36 feet to 40 feet, while the part opened in 1899 had a width of 50 feet from a short distance south of the Haun road to the lake.

In 1911 plaintiff, claiming that the west boundary of lot 26 extended to the centre of the road as opened, erected a fence along the boundary so claimed, and defendants removed it. Plaintiffs then brought this action, which was tried by Hon. Mr. Justice Kelly, without a jury, on 18th and 19th March, 1912, at Welland.

W. M. German, K.C., and H. R. Norwood, for the plaintiffs.

E. S. Armour, K.C., and G. H. Pettit, for the defendant and township.

HON. MR. JUSTICE KELLY:—Looking at the language of the petition and of the by-law which followed it, the petitioners and defendants seem to have believed that there existed an unopened allowance for road to the lake between lots 26 and 27; and defendants also believed that the fence between the lands occupied by the Crystal Beach Steamboat & Ferry Co. and the property to the west thereof was the centre line of this unopened allowance for road. It has not been made clear, however, that an allowance for road did exist between these lots, and there is also

grave doubt as to the true location of the west boundary of lot 26.

The evidence of George Ross, O.L.S., who was called by plaintiff at the trial to prove the line of this west boundary, failed in fixing its location or in establishing that an allowance for road had existed between lots 26 and 27.

Having been asked, about three years ago, by plaintiff to mark out the northerly boundary of its property, he says he also marked the north-westerly corner of it in the centre line of the 50 feet roadway but he admits that he took as his guiding point the location of a tree pointed out to him about 20 years previously by some person who had heard from De Cew, a former surveyor, that the tree was in the west boundary of lot 26. He did not, however, examine the patent to ascertain the width of the lot, and says that without having done so it is impossible to say what the width of the lot ought to be; that he found no old monuments, that he had doubts whether there was a road allowance between lots 26 and 27 or not, that the location of the side-roads or where they ought to be has always been a disputed matter, that he did not know the distance between the tree in question and the limit between lots 25 and 26, although he did give the distance from the tree to the sideline between lots 24 and 25, and that the road running southerly from the concession road to the Haun road was accepted as the sideline between lots 26 and 27.

If, on the other hand, there did not exist an allowance for road, the road opened in 1899 to the lake must have been taken from lot 26 or lot 27, or partly from one and partly from the other; but plaintiff, on whom rests the burden of proving that the line where it erected the fence on the roadway is the west limit of its property, has failed to shew where the westerly boundary of lot 26 lies, or that it falls within the boundaries of the land laid out in the roadway. Especially has it failed to shew that the fence which is erected, and which was removed by defendants, was the westerly boundary of lot 26. Even had plaintiff established that line, there would still have to be considered the circumstances of the plaintiff's predecessors in title having petitioned to have the road north of the Haun road opened to the lake shore, and whether their action and the action of defendants in opening the road constituted a dedication of the road.

There was no complaint or objection on the part of the plaintiff or its predecessors, except some objection to the location of the sewer made to the contractors who were engaged in its construction but this objection was not made to the defendants, and did not come to their knowledge. I do not, however, rest my judgment on this question of dedication.

Since plaintiff has not established that the line of the fence it erected is the west limit of its property, or of lot 26, and has not proven that any part of the road opened is on its land, it is not entitled to succeed, and I dismiss its action with costs.

In the absence of some positive evidence shewing whether there existed an allowance for road between lots 26 and 27 and fixing the westerly boundary line of lot 26, I make no order on the claim made in the statement of defence that plaintiff be ordered to remove the fence and be restrained from encumbering or obstructing the road.

MASTER IN CHAMBERS. APRIL 6TH, 1912.

HON. MR. JUSTICE MIDDLETON. MAY 7TH, 1912.

HAWES, GIBSON & CO. v. HAWES.

3 O. W. N. 1078, 1229.

MASTER IN CHAMBERS allowed plaintiff to issue a commission to take evidence.

MIDDLETON, J., allowed plaintiff to elect whether to furnish security for the costs of the commission, or to have the order for the commission vacated, and the necessity for same passed upon by the trial Judge and if found necessary judgment to stand over until same was had.

Order accordingly.

An application was made for a commission in this case before, and it was refused by the Divisional Court, 20 O. W. R. 517; 3 O. W. N. 312, the majority of the Judges thinking that it had not been shewn to be necessary for the purposes of the record as it then stood. Since then the pleadings were amended by both parties, and plaintiffs again moved for the issue of a commission to take evidence in Edmonton, Alta.

The facts of this case appear in 19 O. W. R. 634.

H. D. Gamble, K.C., for the plaintiff.

F. R. MacKelcan, for the defendant.

CARTWRIGHT, K.C. MASTER (6th April, 1912):—In view of the pleadings as they now appear it would seem that the plaintiffs may have a commission to Edmonton if they so desire.

The statement of defence should be amended as proposed and the proposed reply should be delivered. The question is then fairly raised whether the agreement relied on by the defendant was made under such circumstances as will render it invalid. It will be for plaintiffs to consider if this can be shewn without the evidence of James Hawes, with whom it was apparently made on behalf of the partnership.

The costs of the motion and commission will be reserved for the taxing officer unless disposed of by the trial Judge.

Defendant appealed to Hon. Mr. Justice Middleton in Chambers.

F. R. MacKelcan, for the defendants, appellants.
H. D. Gamble, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE MIDDLETON (7th May, 1912):—I have considered the record with much care, and have consulted one of the Judges sitting in the Divisional Court which heard the former application. I cannot satisfy myself that the commission is really necessary; but at the same time it is impossible to say with certainty that some necessity may not be revealed when the case actually comes to trial. I have, therefore, concluded to give to the plaintiffs their election between two courses; and in doing so I am much influenced by the fact that action is in the name of an insolvent firm, being brought under the authority of the receiver at the instance of one or more creditors, against the wishes of another creditor or other creditors.

Under these circumstances the plaintiffs may have the commission if they give security in the sum of two hundred dollars by bond or cash deposit of that amount, for the costs of the commission; the question of the necessity of the commission being reserved to the trial. Or, if the plaintiff so elects, the order for commission will be vacated, and the motion will stand until after the facts are developed at the hearing, when, if the trial Judge finds that it is necessary to have a commission the plaintiff is to be at liberty to have the evidence sought taken under a commission, and the defendant must assent to the case then standing over for judgment until the evidence is received.

The precise terms of this alternative may be as finally settled in the case of *Stavert* v. *Barton*, where a similar order was made.

MASTER IN CHAMBERS. MAY 8TH, 1912.

ROGERS v. WOOD.

3 O. W. N. 1241.

Judgment—Summary—Con. Rule 603—Action against Directors of Company for Wages—Ont. Companies Act, 7 Edw. VII. c. 34, s. 94.

Motion for judgment under C. R. 603 against defendants, directors of the Porcupine Coronation Gold Mines, in respect of claims for wages incurred while they were occupying the position of directors and for which judgment by default had been obtained against the company and a return of *nulla bona* made by the sheriff.

MASTER IN CHAMBERS, *held*, that a default judgment was not binding on defendants so as to preclude an enquiry into the *bona fides* of the claim.

Lee v. *Friedman*, 20 O. L. R. 49, 14 O. W. R. 457, followed.

Motion dismissed; costs in cause.

Motion by the plaintiff for summary judgment under Consolidated Rule 603, as against all the defendants except Bennett.

Irving S. Fairty, for the plaintiff's motion.

Charles Henderson, J. M. Ferguson, and W. H. Price, for the respondents.

CARTWRIGHT, K.C., MASTER:—This action is similar to that of *Lee* v. *Friedman*, 20 O. L. R. 49, 14 O. W. R. 457, 1139. This is the latest reported decision on the effect of 7 Edw. VII. (Ont.), ch. 34, sec. 94. The judgment of the Divisional Court makes it plain that the action is maintainable in its present form and that *Herman* v. *Wilson* (1900), 32 O. R. 60, was decided on the pleadings and is not applicable to the present action.

This, however, is not decisive of the present motive, to which two objections can be taken.

First, the only affidavit in support of the motion is made by a member of the firm of solicitors who are agents for the plaintiff's solicitor. This recites the proceedings leading up to the present action and alleges that he has knowledge of the matter in question, and that the defendants were and still are indebted to the plaintiff as claimed.

Although this is stated in this positive way it may be fairly assumed that the deponent as to this last fact is not speaking of his own knowledge. This would ordinarily be known only to the plaintiff or his solicitor—but not to that solicitor's agent. For the reason given in *Great West Life* v. *Shields*, 1 O. W. N. 393—more fully reported in 15 O. W. R. 166—I think the motion should not be granted.

It also is, at least, doubtful if Rule 603 can be applied in cases of this kind.

Here the judgment against the company was by default and is not binding on these defendants. This is stated by Britton, J., in *Lee* v. *Friedman, supra,* at p. 55, where he says: "It was argued that the defendants could not go behind the judgment against the company to see whether the claim was really for labourers' wages, if on the face of the proceedings it appeared to be such a claim. I do not agree with that. The defendants being virtually guarantors would seem entitled to take that position. So far as I can ascertain or recollect these actions have always gone to trial, as for instance *George* v. *Strong*, 15 O. W. R. 99, as well as the *Lee Case.*

I have no trace of any motion such as the present in such actions. Here, too, there is a questioi as to the position of the plaintiff himself. His claim is for $300 out of the total $826.40. It is alleged that he was neither "a labourer, servant, nor apprentice, but on the contrary occupied the position of foreman or contractor."

This cannot be disposed of on affidavit evidence. The motion will be dismissed with costs in the cause, but the trial should be expedited in every way so that it may be held before vacation.

HON. MR. JUSTICE RIDDELL IN CHRS. APRIL 16TH, 1912.

REX EX REL. MORTON v. ROBERTS.

REX EX REL. MORTON v. RYMAL.

3 O. W. N. 1089; O. L. R. .

Elections—Municipal—Candidates Elected by Acclamation—Property Qualification—Sale of by Candidates—Right to Hold Office — Mortgages taken as Part Payment.

Motion by relator by way of *quo warranto* against defendants elected by acclamation at municipal elections of 1912 of township of Barton as councillor and deputy reeve respectively.

Both defendants were admittedly qualified at the time of election, and both had subsequently conveyed away the lands on which they qualified, Roberts before taking the declaration of qualification. Rymal thereafter, both taking first mortgages in part payment of the purchase moneys, Roberts for $4,100, Rymal for $4,500. The declarations taken by both were defective inasmuch as the word "and" was omitted from between the words "have" and "had" in the third line of the form in sec. 311 of the Consolidated Municipal Act, 1903. Both defendants had taken their seats as councillor and deputy reeve respectively.

MONCK, Co.C.J., *held*, that defendants had lost their right to hold their seats by ceasing to hold the necessary property qualification, which he held was a continuing requirement during their term of office. On appeal

RIDDELL, J., *held*, that the taking of a proper declaration was a condition precedent to the legal taking of office, and that the notice of motion could be amended to set up this omission on the part of defendants.

That the declarations taken by defendants were insufficient, having dealt only with qualification at time of election and not covering qualification at date of declaration.

That defendants right to hold seats could be attacked in present action.

R. ex rel. Grayson v. *Bell*, 1 U. C. L. J. N. S. 130, and *R. ex rel. Halsted* v. *Ferris*, 6 U. C. L. J. N. S. 266, distinguished.

That the Court can allow declarations to be made after *quo warranto* proceedings taken and is not forced to declare seats vacant. *R. ex rel. Clancey* v. *St. Jean*, 46 U. C. R. 77, followed.

That mortgagee can qualify on legal estate if of sufficient value. *Semble*, that it is unnecessary that property qualifications should continue after making of declaration by elected.

Defendants allowed to file new declarations within 10 days, if filed no costs of motion nor appeal, if not filed, appeal dismissed with costs.

Review of authorities and statutes.

Appeals by the defendants from orders of HIS HONOUR JUDGE MONCK of Wentworth County Court, declaring that defendants had lost the right to hold their seats as councillor and deputy reeve respectively for the township of Barton, having become disqualified since their election.

Appeal was heard by HON. MR. JUSTICE RIDDELL in Chambers.

J. G. Farmer, K.C., for the defendant Roberts.

A. M. Lewis, for the defendant Rymal.

W. A. H. Duff, for the relator.

HON. MR. JUSTICE RIDDELL:—At the recent municipal election in the township of Barton a number of nominations were made which would apparently necessitate a taking of votes, but at the proper time a sufficient number of those nominated resigned (Consolidated Municipal Act, 1903, sec. 129 (2) (3)) to enable the clerk, sec. 129 (4), to declare the remaining candidates duly elected. Accordingly Roberts was declared elected councillor and Rymal deputy reeve.

Roberts had been assessed as a freeholder on a certain lot and was admittedly "qualified" at the time of the election. He, however, by deed dated January 5th, registered January 6th, conveyed the land by deed absolute to one MacDonald, having on January 1st taken a mortgage for $4,100. Notwithstanding this transfer, he made a declaration of qualification purporting to be in pursuance of sec. 311 of the Act and amending statutes, on the 8th January, and upon that day took his seat as councillor and still continues to hold it.

The declaration omitted the word "and" between the words "have" and "had" in the third line of the form in the statute, sec. 311.

Upon motion before His Honour Judge Monck, that learned Judge made an order declaring "that the said Walter Roberts hath lost his right to hold his seat as a councillor of the township of Barton, and has become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified and not being otherwise qualified or possessing the necessary qualification required by the Consolidated Municipal Act, 1903, and amendments thereto and said seat is vacant."

Rymal had also been assessed for certain property and admittedly was duly "qualified" at the time of the election; but he also conveyed his property by deed of date December 28th, affidavit of execution January 6th, registered January 23rd, on which day the transaction was completed by Rymal taking a mortgage for $4,500 for part of the purchase-money and handing over the deed.

The learned Judge says of this transaction: "Rymal also disposed of his only qualifying property, but this occurred after he took the oath of qualification and after he took his

seat." This finding of fact is not complained of, but is assented to by all parties. Rymal made on the 8th January, a declaration in the same defective form as that made by Roberts, and took his seat as deputy reeve and still claims it. A motion before Judge Monck resulted in a similar order—each respondent was ordered to pay costs.

Both Roberts and Rymal now appeal.

The learned Judge proceeded on the ground that the property qualification of a member of a municipal council was a continuing qualification; and that once the property qualification originally necessary was lost, the incumbent of the office became *ipso facto* disqualified.

In the view I take of the case I do not think I need pass upon that question—it is, however, to be observed that from the very earliest times the qualification has been expressed to be that entitling a person to be elected.

The first General Act (1838), 1 Vict. ch. 21, providing for the election of certain officers, clerk, assessor, collector, etc., has no qualification for the officer to be elected although it has for the voter, secs. 2, 4.

The Municipal Act of 1841, 4 & 5 Vict. ch. 10, sec. 11, provides that "every person to be elected a member of a district council . . . shall be seized and possessed," etc.

Baldwin's Act, 12 Vict. ch. 81, secs. 22, 57, 65, 83, contains the same language—the Act of 1858, 22 Vict. (stat. 1) ch. 99, which is the same as (1859) C. S. U. C., ch. 54, sec. 70 also; and the terminology appears in the various amendments and renactments down to the present Act of 1903, sec. 76. Sometimes indeed the provision is negative as at present and sometimes positive as was the original form—but whether it be "no person but" or "every person who," it is always "to be elected."

Language quite different was used almost from the first in respect of certain cases. It is true that in the Act, 4 & 5 Vict. ch. 10, it was provided (sec. 12), that "No person . . . in Holy orders or . . . minister . . . of any religious sect . . . nor any Judge . . . shall be qualified to be elected a councillor . . . " but the language was soon changed. In the Act of 1849, by sec. 132, it was enacted "that no Judge . . . and no person having . . . any . . . interest . . . in any contract with . . . the township . . . shall be qualified to be or be elected . . . councillor. . . ." And in

Baldwin's Act, C. S. U. C., ch. 54, sec. 73, it is provided that such persons shall not be qualified "to be a member of the council of the corporation." The same language continues down to the present Act, sec. 80 (1). And in like manner the Act of 1849, sec. 112, provides that if any member of a municipal council "be declared a bankrupt . . . or shall compound by deed with his creditors then . . . such person shall . . . immediately become disqualified and shall cease to be a member of such municipal council . . . and the vacancy thereby created . . . filled as in the case of the natural death of such member . . ." In the C. S. U. C., ch. 54, sec. 121, the occasions for the seat becoming vacant are increased in number introducing amongst others "assigns his property for the benefit of his creditors"—and so it has continued to the present time Consolidated Municipal Act (1903), sec. 207, appearing in substantially the same words in the nine or ten reenactments and amendments.

The difference in the terminology affords a very cogent argument against the view that the Legislature intended the sale of the qualifying property to operate as an act *ipso facto* disqualifying the member at all events after proper declaration of qualification made—had that been the intention it is difficult to see why the provision that an assignment for the benefit of his creditors is made specifically a ground of disqualification without the addition "a sale or assignment of qualifying property."

So in the Act of 12 Vict. ch. 81, sec. 110, it is provided that the absence of the head of the council vacates the seat.

On the other hand a consideration of the form of the oath or declaration affords a strong argument that the ownership of the property qualification must continue—at all events until the oath or declaration was made. And this will appear during the consideration of the forms laid down which I shall speak of in another point of view. For I do not intend to decide these cases upon the ground taken by the County Judge.

From a very early period it has been a statutory requirement that a councillor, etc., should make a declaration (or take an oath). The Act of 1838, provides for a promissory oath, and it was to be made (secs. 9, 36), within 20 days of being notified of election upon penalty of a fine of £5. But the Act of 1841 contained a provision "that no person

elected a councillor . . . shall be capable of acting as such until he shall have taken and subscribed" the statutory oath—and he was given (sec. 16) 10 days after notice of his election to take this oath otherwise he was deemed to have refused the office and was liable to fine—his office was deemed vacant and a new election had. The oath is not only promissory (sec. 15), but also "that I am seized and possessed to my own use of lands, etc., and that such lands are within . . . and are of the real value of £300" etc., etc. The Baldwin Act, 12 Vict. provides (sec. 129), "that every person who shall be elected . . . to any office which requires a property qualification, shall before he shall enter into the duties of his office take and subscribe an oath or affirmation to the effect following that is to say:—

'I A. B. do swear . . . that I am truly and bona fide seized to my own use and benefit of such an estate (specifying it) as doth qualify me to act in the office of (naming it) . . . according to the true intent and meaning of a certain Act of Parliament, etc., etc.'" Note that on this, these earliest qualification oaths the present tense is used in speaking of the ownership and also (in 12 Vict.), that the ownership of the estate doth qualify to act in the office.

The language in 22 Vict. sec. 175, is "before he . . . enters on his duties . . . " and the declaration (a solemn declaration now being substituted for an oath), being still "I am truly and bona fide seized, etc., doth qualify me to act in the office, etc."

The statute 29-30 Vict. ch. 51, sec. 178, makes no change from the language of the Consolidated Statute—the Act of 1873, 36 Vict. ch. 48, sec. 211, brings in the form still in use "have and had to my own use and benefit . . . as proprietor . . . at the time of my election to the office of . . . doth qualify me to act . . . "—precisely the same (except that we now have modernized the "doth" into "does"), as the form in the statute of 1903, sec. 311 (the word "proprietor" being used instead of "owner"), but without the addition made by (1906), 6 Edw. VII. ch. 34, sec. 10.

The statute in my view lays down three pre-requisites to a *de jure* occupation of the office (I do not pause to enquire as to others).

1. Possession of property qualification.

2. Election by acclamation or otherwise.

3. Making the declaration prescribed.

Absence of any one of these will prevent the seat being filled *de jure*—absence of one or all will not, of course, prevent it being filled *de facto*.

"Where the statute requires a prescribed oath of office before any person elected shall act therein, a person cannot justify as such officer unless he has taken the oath in substantial, not necessarily literal compliance with the law." Dillon on Municipal Corporations, 5th edit., sec. 395, and American cases cited in Note 1. at bottom of p. 680.

In *Rex* v. *Sawyer* (1830), 10 B. & C. 486, the capital burgesses and common council of Shafton were authorised to elect one of the burgesses each year to be mayor. The charter provided that "he who . . . shall be elected . . . as mayor . . . before he be admitted to execute that office or in any way to intermeddle in the same office shall . . . take . . . all oaths by the laws . . . appointed . . . and that after such oath so taken he can and may execute the office of . . . mayor . . ." Tenterden, C.J., p. 491 "A party becomes mayor not merely by reason of his being elected but of being sworn into office." Bayley, J., pp. 491, 492: "By the clause authorising the election of a mayor the capital burgesses are to elect and nominate one of the burgesses to be mayor: and he before he executes his office, is to be sworn in. He becomes the head of the corporation not when he is elected and nominated, but when he is sworn in." It will be seen that no point is made of the clause in the charter that "after such oath so taken, he can and may execute the office of mayor" which is the only point of differentiation between the Shafton Charter and our statute in that regard.

In *The King* v. *Mayor, &c., Winchester* (1837), 7 A. & E. 215, the language of the statutes (9 Geo. 4, ch. 17, secs. 2, 4, and 5 & 6 W. 4 ch. 76, sec. 50), are a little different but not substantially so, and Lord Denman, C.J., at p. 221, clearly says that it is the making of the declaration that constitutes the acceptance of the office. See also per Littledale, J., at p 222.

In a case under our own statute under language identical with that in the present statute, Cameron, J., (after Sir Matthew Cameron, C J.), said: "I am of opinion that until a person elected a member of a municipal corporation has made the declaration of qualification prescribed by the

265th sec. of ch. 174, R. S. O. (1877) he has no right to exercise or discharge the functions pertaining to the office." *Reg. ex rel. Clancy* v. *St. Jean* (1881), 46 U. C. R. 77, at p. 81, on p. 82, the learned Judge continues: "I think there can be no doubt that this declaration is an essential prerequisite to the discharge of the duties of the office of alderman." In the case of *Reg. ex rel. Clancy* v. *Conway* (1881), 46 U. C. R. 85, at p. 86, the same learned Judge gave (in a certain event which will be considered later) leave to file an information in the nature of a quo warranto "on the ground that without making the declaration of qualification he (Conway) illegally exercises the franchises of the office." Such cases as *U. S.* v. *Bradley* (1836), 10 Peters 343, are quite different as they determine only that an appointment in the nomination of the president upon confirmation by the Senate of the United States becomes an absolute appointment vesting the office in the nominee upon appointment by the President and confirmation by the Senate although the nominee has not given the bond which a statute requires him to give for the security of the Government cf. *U. S. Bank* v. *Dandridge*, 12 Wheat. 64.

It can scarcely be seriously argued that the declaration taken is "to the effect" of the form in the statute. As we have seen the earliest form of declaration of qualification was in the oath in sec. 19 of the Act of 12 Vict. "I am truly and bona fide, &c." and this continued until the Act of 1873. Then it seems to have been considered proper to make sure that the declarant had been at the time of the election properly qualified—and not simply had the property qualification at the time of the declaration. It might happen that one not really having the property qualification would offer himself for election and if elected buy property for his qualification. But from the very first the present tense is found somewhere in the oath—and it is wholly absurd to suggest or argue that declaring "I have had property, &c.," is to the same effect as declaring "I have and had property, &c." It must be held that neither respondent is de jure a member of the council.

We have next to consider whether the present procedure is open to the relator—and two strong cases at first sight seem adverse, but I think the apparent difficulty will disappear when the course of the legislation is examined. In *Reg. ex rel. Grayson* v. *Bell* (1865), 1 U. C. L. J. N. S. 130,

it was alleged that the candidate's declaration was not proper but that it set out property of which as a matter of fact he was not the owner. Hagarty, J. (afterwards Sir John Hagarty, C.J.O.), refused a writ of summons in the nature of a quo warranto.

So, also in *Reg. ex rel. Halsted* v. *Ferris* (1870), 6 U. C. L. J. N. S. 266, Mr. Dalton, C. C. & P., refused to unseat Ferris on the ground alleged that the declaration made by him was insufficient, saying: "Nothing can be made of this objection on this application. Whatever might be the effect of the omission to describe the nature of the estate in a quo warranto at common law, it affords no ground for declaring in this statutory proceeding that the election was not legal or was not conducted according to law or that the person declared elected thereat was not duly elected."

The common law writ of quo warranto—sometimes called quo jure—was used by the King to call upon any subject who exercised office or a franchise to shew by what authority the office or franchise was enjoyed—it might also be used by the King to call upon one who held land, to shew by what title or warrant he held. The right to such a writ rested of course, upon the principles that the King has the sole power of bestowing offices and franchises and is lord paramount of all land within the kingdom. The writ which was an original writ of Chancery fell into disuse early, probably in the times of Richard II. (Coke 2 Inst. 498, &c.), and an information in the nature of a quo warranto took its place. This was much abused in Stuart times but has survived; and still may be put in action in a proper case—it lies against persons who claim any office, franchise or privilege of a public nature and not merely ministerial and held at the will and pleasure of others: *R.* v. *Darley*, 12 Cl. & F. 520.

As it was held that by the common law the King alone could have such an information against those usurping offices, &c., in municipal corporations, the Stat. 9 Anne C. 20, was passed providing for the issue of such informations at the instance of private prosecutors in such cases, and this statute became part of our law by the Provincial Act, 32 Geo. III. ch. 1.

Both in England and in Upper Canada, the practice in such cases has been simplified: the statutory provisions are in cases covered by the statutes now taken advantage of, but if there be any casus omissus, the information under

the Statute of Anne is still appealed to. In our own Courts, the most recent case I know of is *Reg. ex rel. Moore* v. *Nagle* (1894), 24 O. R. 507. *Askew* v. *Manning*, 38 U. C. R. 345, is another case.

By the Act of 12 Vict. ch. 81, sec. 146, it was provided "that at the instance of any relator having an interest as a candidate or voter in any election . . . a writ of summons in the nature of a quo warranto shall lie to try the validity of such election, which writ shall issue out of His Majesty's Court of Queen's Bench . . . upon such relator shewing upon affidavit . . . reasonable grounds for supposing that such election was not conducted according to law or that the party elected or returned thereat was not duly or legally elected or returned." Thenceforward, the writ of summons was used instead of the information in the nature of a quo warranto in cases to which it was applicable.

When the case *Reg. ex rel. Grayson* was decided (in 1865) the statute in force was the C. S. U. C. (1859) ch. 54, which provided sec. 128 (1) that: "if . . . the relator shews by affidavit to any such Judge reasonable grounds for supposing that the election was not legal or was not conducted according to law or that the person declared elected thereat was not duly elected . . . the Judge shall direct a writ of cummons in the nature of a quo warranto to be issued to try the matters contested."

The only matters which could be thus contested were sec. 127: "the right of any municipality to a reeve or deputy reeve or . . . the validity of the election or appointment of a mayor, warden, reeve, deputy reeve, alderman, councilman, councillor or police trustee."

It is in view of the provisions of the then existing statute that Hagarty, J., says: "As Bell was properly qualified and nothing is alleged against the manner of his election, I do not see how I can interfere by quo warranto because an apparent mistake (the report by a clerical error reads "no apparent mistake") has been made in the description of the nature of an estate in property. . . ."

In 1870 when *Reg. ex rel. Halsted* v. *Ferris* was decided the Act in force was 29-30 Vict. (1866) ch. 51, but the provisions for a writ of summons in the nature of a quo warranto, and the description of the matters that could be tried under such a writ are totidem verbis et literis the same as in the C. S. U. C. sec. 29-30 Vict. ch. 51, secs. 130, 131.

The Statute 36 Vict. ch. 48, secs. 131, 132 were the same, and also R. S. O. (1877), ch. 174, secs. 179, 180, which last contained the statutory enactments when the two cases of *Reg. ex rel. Clancy* v. *St. Jean* and *Reg. ex rel. Clancy* v. *Conway* (1881), 46 U. C. R. 77, 85, came on. And it was due to the limited cases for the application of the statutory procedure that in these cases an information and not a writ of summons in the nature of a quo warranto was applied for.

In 1892 the Statute 55 Vict. ch. 42, by sec. 188, a notice of motion in the nature of a quo warranto was substituted for a writ of summons, and this practice has continued to the present time: the Statute 60 Vict. ch. 15, Sch. ch. (44), struck out in the beginning all reference to the right of a municipality to a reeve or deputy reeve, and 3 Edw. VII. ch. 18, sec. 32, made a most important change. "In case the validity of the election or appointment or the right to hold the seat of a mayor, warden, reeve, alderman, county councillor or councillor is contested, &c., &c." Before that time it was only the validity of the election which could be challenged in the statutory method, thereafter the right to hold a seat could be attacked in the same way. Section 33 made a corresponding change in the material to be presented to the Judge upon application in the first instance. The consolidation of 1903, 3 Edw. VII. ch. 19, followed and it has been slightly amended by 6 Edw. VII. ch. 35, sec. 26, and 9 Edw. VII. ch. 73, sec. 5 (1).

The scope of the statutory remedy being extended to cover the case of a contest as to a deputy reeve's and a councillor's right to sit, there can be no doubt that the practice followed here is proper.

It would seem that the facts as to the transfer of the property and I suppose the form of the declaration came to the knowledge of the relator within six weeks of the application and consequently he is in time under the amendment of 1907, 7 Edw. VII. ch. 40, sec. 5.

The form of notice of motion is:—

"Take notice that by leave of His Honour Judge Monck, Junior Judge of the County Court of the county of Wentworth, a motion will be made on behalf of the above-named John E. Morton of the township of Barton in the county of Wentworth, dairyman, and an elector entitled to vote at a municipal election in the said township of Barton, before the presiding Judge in Chambers at the court house in

the city of Hamilton on the 8th day after the day of service of this notice on you (excluding the day of service) at the hour of eleven o'clock in the forenoon or so soon thereafter as the motion can be heard for an order declaring that the said Frank E. Rymal, the above-named defendant hath lost his right to hold his seat as deputy reeve of the township of Barton and has become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified and not being otherwise qualified, or possessing the necessary property qualification required by the Consolidated Municipal Act 1903, and amendments thereto."

The statute provides, sec. 221 (2) that "The relator shall in his notice of motion . . . state specifically under distinct heads, all the grounds of objection to the validity of the election complained against and in favour of the validity of the election of the relator or other person or persons where the relator claims that he or they or any of them have been duly elected on the grounds of forfeiture or disqualification as the case may be." This is from 3 Edw. VII. ch. 19, sec. 221, and makes no reference to the case where the validity of the election is not complained of and no claim is made for the election of someone else—as in the present case. Accordingly I think the notice of motion may be amended setting up the omission to make the statutory declaration. Section 226 does not apply for the same reason—or if the first part be considered applicable on the *mutatis mutandis* principle, so does the second—and I think it eminently a case where "the Judge in his discretion "should" entertain any substantial ground of objection to" the right to hold the seat.

The mere fact that a proper declaration has not been made does not in itself compel the Court to declare the seat vacant. In *Reg. ex rel. Clancy* v. *Conway* (1881) 46 U. C. R. 85, Cameron, J., gave leave to the defendant to make the same within ten days if he could and he says in the other case, 46 U. C. R., at p. 82. "As the latter (i.e., the person elected), can at any time put himself in a position to exercise the franchise of office by making a proper declaration, his omission to make the declaration would not render the office vacant." This was a case of an imperfect declaration.

The form of the declaration contemplates that the declarant shall have at the time of making the declaration the

qualification; No Court would allow a person to make a declaration which was false, and so commit an indictable offence, Code, sec. 175. And, of course, no one with any sense of self-respect would desire to make a false declaration.

From very early times the refusal to make the declaration is equivalent to a refusal of the office even if the party is incapable of making it.

Attorney-General v. *Reed* (1678), 2 Moo. 299; *Starr* v. *Mayor, etc., Exeter* (1683), 3 Lev. 116; affirming S. C. 2 Show. 158; *Rex* v. *Larwood* (1693), Carthers 306.

If the elected can now make the declaration required by sec. 311, then under *Reg. ex rel. Clancy* v. *Conway, supra,* they should be allowed to do so, and so make their occupancy of the office *de jure* as it is now *de facto.*

The position of a mortgagee is well understood, he has the legal estate in the land, holding the legal estate and the land as security for his debt. Is this legal estate sufficient?

The early statutes do not employ the terminology now in use.

In 1 Vict. ch. 21, there is no qualification prescribed; but in 4 & 5 Vict. ch. 10, sec. 10, one to be elected must "be seized and possessed to his own use in fee of lands and tenements within the district . . . of the real value of £300 currency over and above all charges and incumbrances due and payable upon or out of the same." Under 12 Vict. ch. 81, sec. 22, no one could be elected township councillor "who shall not have been entered upon the . . . as assessed for rateable real property held in his own right as proprietor or tenant, to the value of £100 . . ."

Section 57, a village councillor "who shall not be possessed to his own use, of real estate held by him in fee or freehold or for a term of 21 years or upward . . . of the assessed value of £250 . . . ," sec. 65 contains similar language as sec. 57, while sec. 83, provides for the qualification of aldermen "seized to his own use of real estate held by him in fee simple or in freehold . . . of the assessed value of £500 . . . ." In 1858 22 Vict. (statute 1), ch. 99, sec. 70, a change was made "have in their own right or in the right of their wives, as proprietors or tenants freehold or leasehold property rated . . . to at least the value . . . ."

By the last Act before Confederation, 29-30 Vict, ch. 51, sec. 70, another change was made "have . . . in their

own right or in the right of their wives as proprietors or tenants, a legal or equitable freehold or leasehold rated . .” There must have been some reason for introducing the expression “ legal or equitable.” In the Consolidation of 1873, 36 Vict. ch. 48, sec. 71, another change was made “ have . . . in their own right or in the right of their wives as proprietors or tenants, a legal or equitable freehold or leasehold, or partly legal and partly equitable rated . .” This language is unaltered in R. S. O. 1877, ch. 174, sec. 70; 46 Vict. ch. 18, sec. 73; but 49 Vict. ch. 37, sec. 2, changes it to “ legal or equitable freehold or leasehold or partly freehold and partly leasehold or partly legal and partly equitable ” and this reappears in 46 Vict. ch. 29, sec. 2; R. S. O. (1887), ch. 184, sec. 73; 55 Vict. ch. 42, sec. 73; the revisers, in 1897, under the powers given by 60 Vict. ch. 3, sec. 3, changed the wording into its present form, and the legislature adopted it as R. S. O. (1897), ch. 223, sec. 76; and now it appears as Co. Mun. Act (1903), 3 Edw. VII. ch. 19, sec. 76—the amendment, 6 Edw. VII. ch. 35, sec. 5, not affecting this part of the section.

I think that the Legislature must have had in view the difference between legal and equitable estates; and that the language now employed differing as it does from that formerly used must be given full effect to.

What estate then had Rymal at the time of the election, and what estate has he now?

At the time of the election it is plain that he had the legal estate, and that such legal estate was then worth not only the $4,500 for which the mortgage was subsequently taken, but also the amount of cash paid by the mortgagor as well. At the present time it is equally plain that he has the legal estate in the land—that the mortgage being in fee, this is a freehold, a “ legal freehold.” This could be mortgaged or sold at any time, and while it is indeed in equity, but a security for the debt, it is a valuable security—and worth $4,500. At the time of taking the imperfect declaration there is no question that he could have made the declaration in proper form (owning as he did the whole estate and the sale being still *in fieri*, and it not appearing that there was any enforceable contract for sale). Whether he can now make the declaration must be determined by the very words of the declaration itself. Leaving out the (for this enquiry) unimportant words it reads thus: “ I . . do solemnly declare

. . that I have and had to my own use and benefit . . . as owner at the time of my election such an estate as does qualify me to act in the office of deputy reeve for . . . and that such estate is (specifying it) and that such estate at the time of my election was of the value of at least, &c., &c." It is to be noted that the value at the time of making the declaration is not required to be set out.

At the time of the election he had a legal estate worth $4,500 and more—no equitable estate had been carved out of it—now he has the very same legal estate, but it is worth only $4,500, for an equitable estate has been created cutting down the value. I think that employing the language of sec. 76 Rymal "has, as owner a legal freehold which is assessed in his own name on the last revised assessment roll of the municipality to at least the value of $4,500."

But it is argued that mortgagees cannot be considered persons contemplated by the statute—and that they could not qualify unless they were in possession. The rule that mortgagees should not vote unless they are in possession so far as it exists at all is statutory—and an examination of the statutes rather furnishes us with an argument that mortgagees have the same rights as to voting, etc., as any other owner of a freehold, unless they are expressly excluded. The first Act is (1696), 7 & 8 Wm. III. ch. 25, which, by sec. 7, provides that "no person or persons shall be allowed to have any vote in elections of members to serve in Parliament for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but, that the mortgagor or *cestui que trust* in possession shall and may vote for the same estate, notwithstanding such mortgage or trust . . ." As it was only freeholders who were given the right to vote, it seems to me that the Parliament considered a mortgagee a freeholder, and considered that he would have the right to vote unless specially legislated against. The same provision, excluding mortgagees and trustees not in possession, appears in (1832), 2 Wm. IV. ch. 45, sec. 23 and in (1843), 6 & 7 Vict. ch. 18, sec. 74.

There are cases in which a mere trustee had been held not entitled to vote, *e.g., Jones' Case, South Grenville,* H. E. C. at p. 176; but that was because of the words "in his own right" shewing that it was a real beneficial ownership that is required.

I can find nothing in principle or authority to prevent a mortgagee who is assessed for the property qualifying on his legal estate. The same considerations apply also to Roberts. If they make a proper declaration within ten days, their appeal will be allowed; but without costs here or below. They are given an indulgence in being allowed to make now a declaration which should have been made three months ago, and without which they had no right to their seats. It would seem necessary again to call attention to the necessity of observing the plain directions of the statutes, in the forms prescribed, &c.

If the declaration be not made by either within 10 days, the appeal of that one will be dismissed with costs.

While it is, in my view, probable that there is no necessity for the relator to file an affidavit that the facts as to the defect in the declaration came to his knowledge only within 6 weeks before the notice of motion was served, he will be permitted to do so if so advised, for the greater caution in case of an appeal from this decision or in case either of the respondents fails to make the proper declaration.

MASTER IN CHAMBERS. APRIL 17TH, 1912.

HON. MR. JUSTICE MIDDLETON. MAY 3RD, 1912.

KUULA v. MOOSE MOUNTAIN LIMITED.

3 O. W. N. 1085, 1203; O. L. R.

Action — Consolidation — Common Defendant—Distinct Claims by Different Plaintiff—Action for Damages for Negligently Setting out Fire.

Application by defendants for an order consolidating four actions or staying proceedings in all but the first pending its trial and directing further that only one of the pending examinations for discovery be allowed to proceed. The actions were all brought by the same solicitor in respect of alleged negligence of defendants on 10th July, 1911, in negligently setting out a fire and allowing it to escape to the respective lands of defendants.

MASTER IN CHAMBERS dismissed the motion, costs in cause to plaintiffs, and defendants appealed.

MIDDLETON, J., dismissed appeal; costs to plaintiffs in any event. *Westbrook* v. *Australian Mail*, 23 L. J. C. P. 42, and *Williams* v. *Raleigh*, 14 P. R. 50, followed.

History of and principles governing consolidation of actions discussed.

Appeal by the defendants in these four cases from an order of the Master in Chambers, refusing to consolidate the actions or to stay proceedings in the actions other than the firstly-named action, pending the trial of that action.

It is said that on or about the 10th July, 1911, the defendant company set out a fire upon their lands, which fire spread, and destroyed the premises of the several plaintiffs in these four actions. In each action the plaintiff presents his case in alternative ways. First, he charges that the fire set out on the defendant's premises spread to his; next, he charges that the fire was set out negligently; and in the third place that by reason of the negligence the fire was permitted to spread on the defendant's premises to the plaintiff's premises.

The first plaintiff claimed $2,809.02; the second plaintiff claimed $95,000; the third plaintiff claimed $32,500, and the fourth plaintiff claimed $31,207.58. No details were given of these sums. In each case the statement of claim alleged negligence on the part of the defendant company. The plaintiffs were all represented by the same solicitors. The statement of defence in each case was a simple denial of the allegations of the statement of claim.

The defendant moved to have these actions consolidated or to stay three of them until the first action had been tried, the defendant undertaking to be bound by the result in that case.

The motion also asked that only one of the four examinations for discovery be allowed to proceed. In each case an appointment had been taken out for this purpose and of a different officer.

R. C. H. Cassels, for the defendants' motion.

H. E. Rose, K.C., for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER (17th April, 1912):—Unless the decision is one of a number of actions, such as those in question, would necessarily dispose of the essential cause of action in the others, no order could be usefully made to stay the rest. And, unless this could be done, the actions could, evidently, not be consolidated.

The present cases seem to be analogous to that of *Williams* v. *Township of Raleigh*, 14 P. R. 50. There, at p. 53, it was said: "Proof that there was the resulting injury to the lands of one plaintiff would not be proof of any evidence at all that there was the like" (or any other) "injury to the lands of any other plaintiff." These words are applicable to the present motion, and though the decision was

given before Rule 185 was amended as it now stands, yet it is not less an authority.

It is at least doubtful if these four plaintiffs could have united in one action. The only thing alleged in common is the fact that a fire or fires were negligently set out by the defendant company. This, though technically in issue, is probably not denied so far as the fact of fire being set out is concerned. But what would be sufficient proof of negligence by one plaintiff might not be so in the case of the others, much would depend upon location, direction of wind, condition of the plaintiffs' own property and other circumstances peculiar to each case. The only direction that can usefully be given now is that the actions be all set down together so that any evidence common to all (if such there be), may not be repeated as the trial Judge would no doubt direct. See *Carter* v. *Foley O'Brien*, 3 O. W. N. 888, citing the *Raleigh Case*. As to the examinations for discovery, that too was dealt with in *Carter* v. *Foley O'Brien*, though there it was the converse case of a plaintiff wishing to have one examination for discovery, to be applicable to all the three actions. There is was said: "Even if convenience indicated the propriety of the order sought, I am clear that there is no power to make it."

Neither of the reliefs asked for here could possibly have been granted if the plaintiffs had not all been represented by the same solicitors. See as to this, *Conway* v. *Guelph & Goderich Rw.*, 9 O. W. R. 369, affirmed on appeal at p. 420 —where the matter is considered generally and the difficulties that might arise if consolidation was ordered are pointed out.

For the same reasons it does not seem possible to interfere with the examinations for discovery. As the plaintiffs' solicitors are the same, it is not to be presumed that if one examination gives the necessary information, they will proceed with the others, especially as these depositions cannot be used at the trial. But even if they do, that must be left to the trial Judge or the Taxing Officer to deal with when the question of costs is raised before them or either of them. The only way that occurs to me of avoiding more than one examination is for the defendant company to made admission of such fact or facts as are common to all the cases.

In this way possibly the length of more than one examination might be considerably reduced even if proceeded

with. But apart from their own consent, there is no power to control or limit the plaintiffs' proceedings so long as they are regular.

The motion will be dismissed—costs in the cause to the plaintiffs.

Defendants appealed from above order to Hon. Mr. Justice Middleton-in-Chambers.

R. C. H. Cassels, for the defendants, appellants.

H. E. Rose, K.C., for the plaintiffs, respondents.

Hon. Mr. Justice Middleton (3rd May, 1912):—The Master, while refusing consolidation of the actions, has directed that they shall all be entered for trial at the same sittings of the Court; and at the trial the presiding Judge will, no doubt, make such arrangements as will prevent unnecessary repetition of evidence, in all the cases. But it is manifest that if each plaintiff has to establish that the fire escaped from the defendant's premises to his premises by reason of the negligence of the defendant, the issue in each case, although similar, is quite distinct.

There is much confusion upon the subject of consolidation of actions, arising mainly from a loose and inaccurate use of the word "consolidation." As said by Moulton, L.J., in *Lee* v. *Arthur*, 1909, 100 L. T. R. 61: "Consolidation is much more rarely applicable than is generally supposed, because the expression is used in cases where the word is really not appropriate at all, as in cases where the trial of one action is stayed pending the hearing of another action. In a case like that, the Court will not allow its process to be abused. That is often called consolidation, but it is not really consolidation."

It is important, in the first place, to observe that C. R. 435 is intended to deal with the consolidation of actions in the strict sense of that term. The jurisdiction to stay actions probably exists quite apart from any statutory provision, as part of the inherent power of the Court over its own process; but this power is recognized and confirmed by sec. 57, sub-sec. 9 of the Judicature Act.

Rule 435 provides that "actions may be consolidated by order of the Court or a Judge, in the manner in use in the Superior Courts of Common Law prior to the Ontario Judicature Act, 1881." The terms of this rule have given rise

to some difference of opinion. It was at one time supposed that it only permitted consolidation in the cases in which, at Common Law, consolidation would have been ordered prior to the Judicature Act. But this has been set at rest by the decision in the Court of Appeal in *Martin* v. *Martin*, 1897, 1 Q. B. 429, where this construction of the rule was rejected and it is said that the true meaning of the expression "in the manner in use," &c., is not to continue the practice in force before the Act, but "that if an order is made it should be treated in the same manner as before."

At common law, consolidation originally applied to the case where there were two actions between the same parties. There the actions were "consolidated" in the strict sense of the term; the issues raised in the two actions were directed to be set up in one action. If the plaintiff unnecessarily instituted two or more actions based upon separate claims which could conveniently be tried together, his conduct was regarded as vexatious. If good reason existed for the separate actions, e.g., if one claim was not due when the other action was brought—the Court, in the control of its own process, consolidated so as to avoid unnecessary litigation.

By Statute 19 Vict. ch. 43, sec. 76, afterwards section 75 of the Common Law Procedure Act, a husband and wife suing in respect of an injury to the wife, might join in the same suit a claim by the husband in his own right; and, if separate actions were brought, these might be consolidated. This is also true consolidation.

At common law, also, a practice had grown up, not upon any statutory power, but entirely upon the inherent jurisdiction of the Court, of staying the trial of actions pending the determination of a test action. This frequently is somewhat loosely described as "consolidation." The practice was introduced by Chief Justice Mansfield in actions brought against underwriters in insurance cases. The promises of the underwriters being separate, separate actions had to be brought, in respect of any loss, against each of the underwriters. Frequently there was only one question really to be tried, such as the fact of loss. Upon the application of the defendants in such a case, the actions would be stayed if the defendants undertook to consent to judgment in the event of the plaintiff succeeding in the test action. In the event of the plaintiff's failure he would then either abandon

the other actions or proceed with them, as he saw fit. As this relief was an indulgence to the defendants, they were compelled to consent to this somewhat one-sided bargain. See, for example, *Colledge* v. *Pike*, 1887, 56 L. T. 124.

Conversely, where a plaintiff, having brought several actions for similar causes of action, applied for a stay of proceedings to relieve him from the onus of prosecuting a number of actions in which he might be unsuccessful, a stay was ordered, upon the terms that if he failed in the action which he chose as a test action he should consent to a judgment against him in all the others.

In the Courts of Equity, consolidation in either the strict sense or the modified sense seems to have been unknown. The Court undoubtedly exercised its power to restrain abuse of its process, and it would not permit the prosecution of two suits for the same cause of action; but the reported instances differ widely from the cases at common law. If two actions were brought on behalf of an infant by different next friends, the Court stayed the proceedings in one. If two suits were brought for administration, as soon as judgment was pronounced in one the proceedings in the other were stayed; because the administration judgment was a judgment in favour of all. Where several suits were brought by different debenture holders, for the purpose of realizing their securities, one action alone was allowed to proceed. The principle in all these cases was that two suits for the same relief ought not to be allowed to proceed in the same Court concurrently. See cases collected in Daniell's Chancery Practice, 5th ed., 698.

After the Judicature Act, in *Amos* v. *Chadwick*, 1877, 4 C. D. 869, Malins, V.-C., construed the Consolidated Rule in the manner now rejected by the Court of Appeal; but, by virtue of the inherent power to prevent abuse of the process of the Court, he stayed until after the trial of the test action seventy-eight sections brought by different shareholders against the directors of a company for misrepresentation in the prospectus. The plaintiff selected failed to prosecute his action, and, not appearing at the trial, the actios was dismissed. The terms of the order for consolidation appear from the report of the case in 9 C. D. 459. It provided that the plaintiffs who had applied for consolidation should be bound by the test action, but the defendants were to be at liberty to require a separate trial. After this

abortive proceeding a motion was made for relief and for the trial of another action as a test action. Malins, V.-C., then made an order substituting another action as a test action. The defendants appealed; and the sole question upon the appeal was whether the test action had been "tried" within the meaning of the terms of the order. The Court upheld the defendants' contention.

But it is manifest that some, at any rate, of the Judges doubted whether the original order had been properly made: Brett, L.J., saying:

"It seems to me that no such order as this ought to be made unless the questions in the actions are substantially the same and the evidence would be substantially the same if they were all tried."

This view is that now adopted in the case already cited, *Lee* v. *Arthur*, where the Court of Appeal quote the judgment in the case of *Corporation of Saltash* v. *Jackman*, 1 D. & L. 851, and state that the Court "cannot compel one defendant against his wish to have his case tied up with those of the defendants in other actions."

The same reasoning shews the impossibility of compelling a plaintiff to tie up his case with those of other plaintiffs without his consent. *Westbrook* v. *Australian Mail*, 23 L. J. C. P. 42, is an illustration of this. Eight separate passengers, by the same attorney, brought separate actions for damages arising out of a breach of contract for passage whereby the plaintiffs suffered in their health. Maule, J., said: "They have suffered different grievances. Mr. Smith could not be said to have suffered in Mr. Brown's health."

Williams v. *Raleigh*, at 14 P. R. 50, affords another illustration. Several plaintiffs brought separate actions for injury to their several farms by certain drainage works; and it was held by Ferguson, J., a Judge most familiar with the common law practice, that there could not be consolidation in either the true or the modified sense of that expression.

The direction which has been given by the learned Master in Chambers, I think, satisfactorily meets the case. Manifestly damages will have to be assessed in the different cases; and, it would be most unfair to direct the trial of the individual claims to be delayed when this would delay the recovery of final judgment. The circumstances prevent the imposition of the term invariably required; a stay will

only be granted when the defendants consent to judgment, tha is, a final judgment, in the event of their failing in the test action.

The appeal will be dismissed. Costs to the plaintiff in any event.

HON. MR. JUSTICE MIDDLETON. MAY 3RD, 1912.

PEARSON v. ADAMS.

3 O. W. N. 1205.

Covenant — Building Restrictions — Construction of — Erection of Apartment House—Judicature Act, s. 81—Authority of Previous Decision.

Motion for injunction restraining defendants from erecting an apartment house upon certain lands on Maynard Place, Toronto, in alleged breach of covenant that lands "are to be used as a site for a detached brick or stone dwelling-house. Motion by consent turned into motion for judgment.

MIDDLETON, J., dismissed action with costs.

Robertson v. *Defoe*, 20 O. W. R. 712, followed with reluctance.

Motion by plaintiff for an injunction restraining defendant from erecting an apartment house upon certain lands on Maynard place, in alleged breach of the provisions of a conveyance of 18th April, 1888, which stipulated that the lands were "to be used only as a site for a detached brick or stone dwelling-house."

By consent of counsel this motion was turned into a motion for judgment.

J. H. Cooke, for the plaintiff.

J. M. Godfrey, for the defendant.

HON. MR. JUSTICE MIDDLETON:—Apart from authority, binding upon me, I would have thought that an apartment house such as the defendant contemplates erecting could not be described as "a detached dwelling-house." I would have thought it clear that the building was, in truth, a series of separate dwellings, attached, and separated by the one main perpendicular wall and the two horizontal partitions. But this, as I understand the case of *Robertson* v. *Defoe*, 20 O. W. R. 712; 25 O. L. R. 286; 3 O. W. N. 431; is not the law here; and yielding to the authority of that case, there is no alternative save to dismiss the action with costs. I

do not think I should attempt to refine away that decision by making distinctions without any difference.

I think it better to adopt this course, and leave it to the plaintiff to take the case to a higher Court, rather than to adopt the alternative course of investigating the matter with such thoroughness as to enable me to say that I deem the decision referred to to be wrong. See sec. 81 of the Judicature Act. This relieves me from considering the other matters argued by defendant's counsel.

HON. MR. JUSTICE RIDDELL. MAY 4TH, 1912.

FIDELITY TRUST CO. v. BUCHNER.

3 O. W. N. 1208; O. L. R.

Insurance—Life—Benefit Society—Adopted Daughter—Death of — Claim by her Children—Rules of Society—Adoption Discussed.

Interpleader issue to determine the ownership of $1,500 insurance money on the life of T. R. Rhoder paid into Court by Royal Arcanum and claimed by plaintiff as administrator of Rhoder's estate or as next friend of the infant children of Lucy Hendershot and by defendant as assignee for value by endorsement on policy. Lucy Hendershot, an adopted daughter, was the original beneficiary named in the certificate and on her death in 1909 it had been assigned to defendant.

RIDDELL, J., *held*, that while under the rules of the Royal Arcanum the infant children of the beneficiary named in the policy would take the benefit thereunder, yet under the Ontario Insurance Act, R. S. O. c. 203, s. 151 (3) which was of paramount authority, the defendant was entitled.

Gillies v. *Young*, 1 O. L. R. 368, followed.

Re Davis, 18 O. L. R. 384, and in *Re Hutchinson*, 21 O. W. R. 669, as to adoption discussed and cases reviewed.

Plaintiffs given 10 days to take reference as to amount due defendant in respect of advances made deceased. If reference taken costs reserved, if not, all issues found in favour of defendant with costs.

An interpleader issue to determine the ownership of $1,500 insurance moneys payable on the life of the late T. R. Rhoder, paid into Court by the Royal Arcanum. Tried at London without a jury.

W. G. R. Bartram, for the plaintiff.

J. M. McEvoy, for the defendant.

T. R. Rhoder, a manufacturer of London, took out on 29th August, 1901, a certificate in the Royal Arcanum, whereby that organization agreed "to pay . . . to Lucy

Hendershot (adopted daughter) a sum not exceeding $1,500 in accordance with and under the laws governing said fund upon satisfactory evidence of the death of said member" . . . "providing that said member is in good standing at the time of his death, and provided, also, that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of the order."

Lucy, having been married to W. P. Hendershot, died in 1909, leaving her surviving four infant children and her husband—thereafter Rhoder made the following endorsement upon the certificate.

"The within named beneficiary, Lucy Hendershot, having died, I direct that all benefits under the within certificate be paid to Urban A. Buchner, who, for many years, has advanced money to me and kept up the premiums and who is a holder of this certificate for value.

"Witness my hand and seal this 6th day of July, 1909.

"Witness:

"Sgd. M. Isabel Blankinship. Sgd. Thomas R. Rhoder (L.S.)"

Rhoder died a widower and childless in 1911; a claim was made by Buchner that he was entitled to the amount of the insurance; a claim was, however, made on behalf of the children of the deceased "adopted daughter." The Royal Arcanum paid the money into Court; the Fidelity Trusts Co. took out letters of administration with will annexed, of the estate of the deceased Rhoder; upon application, an interpleader order was made by the Master in Chambers.

The issue came on for trial before Hon. Mr. Justice Riddell, at the non-jury sittings at London during the present week, who, after hearing the evidence, reserved judgment.

Hon. Mr. Justice Riddell:—Considerable argument was based upon the clause "*in accordance with the laws of the order*" but it is clear that these words refer simply to a certificate subsequently to be issued; and that they have no relevance in the present enquiry.

Every suggestion of amendment to the form of the issue was strenuously combatted by counsel for the plaintiff; and I must, accordingly, deal with the issue exactly as I find it.

In the issue the Fidelity Trusts Co. are plaintiffs and Buchner defendant.

The plaintiffs affirm and the defendant denies:

"1. That . . . infant children of Lucy Hendershot . . . are the designated preferred beneficiaries of their grandfather . . . T. H. Rhoder, by certificate, . . . issued by . . . the Royal Arcanum . . .

"2 That the plaintiffs, as next friend to the said infants . . . are entitled to payment out of Court of the said sum.

"3. That in the alternative . . . the plaintiffs as administrators . . . of . . . T. R. Rhoder, are entitled to the said sum, notwithstanding the endorsement dated the 6th day of July, 1909, on the said certificate in favour of the said defendant, in that the said endorsement was not read to or by the said T. R. Rhoder, and was ignored and treated as null and void by both the said T. R. Rhoder and the defendant, until the death of the said T. R. Rhoder . . . .

And the defendant affirms and the plaintiffs deny:

"1. That the said defendant is the owner of the . . . certificate, and entitled to the proceeds . . . paid into Court by virtue of the fact that the said insurance certificate is personal property reduced into possession by the defendant and owned by him as an innocent purchaser for value and by virtue of an endorsement upon the said certificate made by T. R. Rhoder to . . . Buchner for value.

"2. That the defendant is entitled to the said sum paid into Court as the proceeds of the said certificate."

The claim on behalf of the infants is based upon the rules of the Society: sec. 332, says: "In the event of the death of all the beneficiaries designated . . . before the decease of such member, if he shall have made no other or further disposition thereof, as provided in the Laws of the Order, the benefit shall be disposed of as provided in sec. 330 . . ." As sec. 326 provides that a certificate shall not be made payable to a creditor or be held or assigned in whole or in part to secure or pay any debt which may be owing by the member; and sec. 327 provides that any assignment of a benefit certificate by a member shall be void; it is argued for the plaintiffs that the member has not made a disposition "as provided by the rules of the Order" and

consequently by the provisions of sec. 332, sec. 330 applies. This is as follows: "If at the time of the death of a member . . . if any designation shall fail for illegality or otherwise, then he benefits shall be payable to the person or persons mentioned in Class First, sec. No. 324, if living in the . . . order of precedence by grades as therein mentioned, the persons living of each precedent grade taking in equal shares per capita to the exclusion of all persons living of subsequent enumerated grades, except that in the distribution among persons of grade second, the children of deceased children shall take by representation the share the parent would have received if living. . . ."

"Section 324. A benefit may be made payable to any or more persons of any of the following classes only:

"Class First.

"Grade 1st.—Member's wife.

"Grade 2nd.—Member's children and children of deceased children and member's children by legal adoption.

"Grade 3rd.—Member's grandchildren.

"(Enumerating 13 classes.)"

In either of which cases no proof of dependency of the beneficiary designated shall be required; but, in case of adoption, proof of the legal adoption of the child or the parent designated as the beneficiary, satisfactory to the supreme secretary must be furnished before the benefit certificate can be issued.

"Class Second.

(1) To the affianced wife. . . .

"(Enumerating five classes.)"

If (a) the deceased Mrs. Hendershot was the member's child "by legal adoption" within the meaning of Grade 2nd of Class First, in sec. 324; (b) the member did not make any "other or further disposition" of the certificate "as provided in the Laws of the Order," and (c) if the provisions of the Laws of the Order are to prevail, it is, to my mind, clear that the children are entitled to the money.

It is argued by the defendant that Lucy Hendershot was not a child "by legal adoption."

In *Re Davis* (1909), 18 O. L. R. 384, at pp. 386, 387, is is said, "the law of England, strictly speaking, knows nothing of adoption," "parents cannot enter into an agreement legally binding up to deprive themselves of the custody and control of their children; and if they elect to do

so, can at any moment resume their control over them." *In re Adah May Hutchinson* (1912), 21 O. W. R. 669, at p. 671, apparently doubt is cast upon these propositions; and it is suggested that the decision in *Re Davis* was as it was because the attention of the Court was not directed to the Act, 1 Geo. V. ch. 35, sec. 2 (no doubt a misprint for sec. 3) taken from R. S. O. 1897, ch. 340, sec. 2, of course, I Geo. V., had not been passed when *Re Davis* was decided; but the statute from which it was ultimately derived had been in force in England for two hundred and fifty years, and in our country since Upper Canada became a province, if not before.

Anon., 6 Gr. 632.

Davis v. *McCaffrey* (1874), 21 Gr. 554, etc. It has not given occasion for many decisions in Upper Canada; but the law is of every day application.

Our statute is derived from 12 Car. II. ch. 24, sec. 8, and carries the law no further than that statute. The effect of the statute is not (I speak with great deference), to take away any of the rights of the father, but to enable the father to take away the common law rights of others; it does not exclude the right of the father himself, but that of "all and every person or persons claiming the custody or tuition of such child or children as guardian in soccage or otherwise." And accordingly as Lord Esher says in *Reg.* v. *Barnardo* (1889), 23 Q. B. D. 305, at pp. 310, 311, "the parent of a child, whether father or mother, cannot get rid of his or her parental right irrevocably by such an agreement . . . as soon as the agreement was revoked, the authority to deal with the child would be at end."

The statute is considered in Blackstone, vol. 1, p. 362; Co. Litt. 886, and Hargraves notes; Eversley, 3rd ed., pp. 618, 619, 620, 622, 646, 743, 744; Simpson, 3rd ed., pp. 95, 105, 111, 113, 183, 184, 186, 188, 288. And I do not find any case or text in which it has been thought that the statute applied except after the death of the father.

The ordinary rule is that there cannot be a guardian in the lifetime of the father. *Ex p. Mountfort* (1808), 15 Ves, 445; *Barry* v. *Barry* (1828), 1 Molloy, 210; *Davis* v. *McCaffrey*, 21 Gr., at p. 562.

But not to press that point, a deed under the statute has been called by Lord Eldon, L.C., "only a testamentary instrument in the form of a deed." *Ex p. Earl of Ilchester*

(1803), 7 Ves. 348, at p. 367. Such a deed has been held from within a few years of the passing of the statute to be revocable even by a will.

In *Shaftesbury* v. *Hannam* (1677), 29 Car. 2, *Finch's Reports* (not Finch's Precedents), 323, the dispute was between the plaintiffs claiming under a deed poll and the defendants claiming under a subsequent will. The L. C., Lord Nottingham, held that the widow seemed to have a great probability of law on her side, and refused to disturb her in her guardianship, unless she refused to prove that she was not excluded by the terms of the statute (referring to difference of religion—now of no consequence, and happily but of interest historically). In *Lecone* v. *Sheiras* (1686), 1 Vern. 442, Lord Jeffreys, L. C., would not allow the removal of a guardian appointed by deed where the deed contained a covenant not to revoke, and the deceased parent had died in debt to the guardian so appointed.

In *Ex p. Earl of Ilchester* (1803), 7 Ves. 348, Lord Eldon, L.C., says, p. 367: "The question takes this turn, whether as it is necessary under the statute that the instrument, whether a deed, which I take to be only a testamentary instrument in the form of a deed or a will, should be executed in the presence of two witnesses . . . it is, therefore, necessary that any instrument revoking that shall be executed in the presence of two witnesses . . ." Thus making no distinction between the case of a deed and of a will, either being revocable.

I cannot find any intimation or suggestion of opinion as to the meaning and effect of the statute. See, also, Cyc. vol. 1, p. 917. The English law is substantially the same as ours and the decisions there are of authority with us; and I am unable to recant the opinion expressed in *Re Davis*, that the law of Ontario, strictly speaking, knows nothing of adoption. As the Chancellor has not decided to the contrary, I am at liberty to follow my own judgment.

It follows that in Ontario there can be no "legal adoption" in distinct and proper use of the words as there can be in many of the States of the Union, Cyc. 1, p. 918, the Royal Arcanum is an organization which covers many of the United States as well as Canada, and its rules are made of general application.

No doubt it was in view of the difficulty in framing any general rule as to "legal adoption" that the determination

of the fact of "legal adoption" was left to the Supreme Secretary (sec. 324), and the provision was made that the proof of legal adoption was to be satisfactory to the Supreme Secretary. In my view, the Supreme Secretary was made the judge as to "legal adoption," and particularly in a country where "legal adoption" has no meaning in the proper use of the words. I think his decision is final. In our province, I think that what the Supreme Secretary decides to be "legal adoption" is "legal adoption" for the purposes of the insurance, no statute or other law of the province being violated.

As the benefit certificate cannot be issued until the Supreme Secretary is satisfied, it must be taken that the Supreme Secretary has decided that Lucy Hendershot was the adopted daughter or, to use the words of the rules, the child by legal adoption of the member, *A. O. U. W.* v. *Turner* (1910), 44 S. C. R. 145.

(b) I think it equally clear that Rhoder made "no other or further disposition thereof as provided in the Laws of the Order," sec. 327, making an assignment void, and sec. 326 declaring that a certificate is not to be held or assigned to secure or pay any debt, and the provisions of sec. 333 permitting a change of beneficiary to be effected by surrender of certificate and payment of a small fee not having been taken advantage of.

(c) The defendant appeals to the Act of 1904, 4 Edw. VII. ch. 15, sec. 7, but that has no application; it only applies in the case of preferred beneficiaries; husband, wife, children, grandchildren or mother, R. S. O. (1897), ch. 203, sec. 159; and adopted children are no more "children" than are god-children, or than the "wife" in *Crosby* v. *Ball* (1902), 4 O. L. R. 496, or *Deere* v. *Beauvis*, 7 Que. P. R. 448, was a wife.

The statute to apply is R. S. O. (1897), ch. 203, sec. 151 (3). The assured may designate to . . . the beneficiary . . . and may . . . by the . . . like instrument from time to time alter . . . the benefits . . . or substitute new beneficiaries . . . (6) "and if all the beneficiaries die in the lifetime of the assured . . . the insurance money shall form part of the estate of the assured." This is applicable to the Royal Arcanum, sec. 147. The Royal Arcanum is not a society incorporated under R. S. O. (1897), ch. 211, so as to be entitled to pay the in-

surance money "to the person or persons entitled under the rules thereof," ch. 211, sec. 12. The incorporation was in Massachusetts in 1877, under the provisions of the laws then in force, substantially as in ch. 115, and ch. 106, of the Pub. Stats. 1881.

Its position is, therefore, in the view of our law, the same as that of any other insurance company, e.g., that of the Catholic Order of Foresters, in *Gillie* v. *Young* (1901), 1 O. L. R. 368. This case decides that the rules of the "Order" must give way to the provisions of the statute so far as they are inconsistent therewith. *Mingeaud* v. *Packer* (1891), 21 O. R. 267; (1892), 19 A. R. 290; *Re Harrison* (1900), 31 O. R. 314, may also be looked at.

If then the declaration endorsed on the certificate be valid, the plaintiff must fail.

The grounds of attack upon the endorsement are, it will be seen, two in number: (a) that the endorsement was not read to or by Rhoder, and (b) that it was ignored and treated as null and void by both Rhoder and the defendant until the death of Rhoder.

As to (a), there is not the slightest evidence that Rhoder did not fully understand what he was signing, he has signed his name legibly and nothing indicates illiteracy in any way; letters indeed are produced, written by him, shewing the reverse. The second ground is equally baseless; considerable testimony was given indicating that the policy was transferred rather by way of security for a loan or series of loans than the reverse, but nothing suggests, much less proves, that the transfer "was ignored" or "treated" as "null and void."

The above will dispose of the issues in the plaintiffs' claim: (1) the infants are not "the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder" for the double reason that they are not "preferred beneficiaries" at all within the meaning of the statute. T. R. Rhoder not having been their grandfather in a legal sense; and, second, he made a new beneficiary under the provisions of the law in that regard (2) "the plaintiffs as next friend to the said infant children" are not "entitled to payment out of Court of the said sum" for several reasons. Assuming (what I by no means concede) that this company can be a next friend at all, R. S. O. 1897, ch. 206, sec. 458; *Halder* v. *Hawkins*, 2 M. & K. 248 (a) the next friend is not entitled

to the infant's money. *Vano* v. *Can. Col. etc., Co.* (1910), 21 O. L. R. 144; he is brought into Court simply to protect the infant's rights and guarantee the costs.

Dyke v. *Stephenson* (1885), 30 Ch. D., at pp. 190, 191; *Smith* v. *Mason*, 17 P. R. 444; and (b) the infants are not entitled to the money in any case. (3) The plaintiffs basing their claim to the money specifically "in that the endorsement was not read, etc., and was ignored, etc.," they fail upon this issue as well.

This by no means disposes of the whole matter—the evidence convinces me that while the transfer is absolute in form, it was in fact but security for advances already made and to be made. The defendant says that he advanced more than the amount paid into Court, and I think I should not order a reference unless the plaintiffs assume the responsibility of asking for one. The cross examination of the defendant was not, apparently, directed to shewing that he had not advanced the amount he claimed.

If within ten days from this date the plaintiffs apply for an order of reference, such order may go at their peril as to costs referring it to the Master at London to determine the amount for which the certificate is security in the hands of the defendant. In that event, I shall reserve to myself the question of costs and F. D. until after the Master shall have made his report. If such an order be not taken out by the plaintiffs, I now find all the issues in favour of the defendant, direct the plaintiffs to pay all the costs over which I have control and order the payment out to the defendant of the amount paid into Court.