# THE
# ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO, FROM SEPTEMBER,
1910, TO SEPTEMBER, 1911.

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The
# Ontario Weekly Notes

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## COURT OF APPEAL.

SEPTEMBER 22ND, 1910.

### SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLAY.

*Mortgage—Interest post Diem—Compound Interest—Account—Rests—Construction of Provisions of Mortgage Deed—Items of Mortgage Account — Surcharge — Special Allowances — Costs.*

Appeal by the plaintiffs and cross-appeal by the defendants the Leadlays from the order of TEETZEL, J., 1 O. W. N. 228, pronounced upon an appeal from a report of the Master in Ordinary.

The plaintiffs' appeal was in respect of three items upon which the Master, in taking the accounts between the parties, determined in the plaintiffs' favour, but was overruled by TEETZEL, J.

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

J. L. Whiting, K.C., and A. B. Cunningham, for the plaintiffs.

G. Kappele, K.C., and C. Kappele, for the defendants the Leadlays.

A. W. Anglin, K.C., for the defendant J. T. Moore.

A. J. Russell Snow, K.C., for the defendant Annie Moore.

MOSS, C.J.O.:—The first objection is that the learned Judge erred in allowing to the defendants the Leadlays compound interest upon arrears of interest accruing after the maturity of the mortgage in question in this action. It is not contended that the principal moneys do not bear interest at the rate of 6¼ per cent. as well after as before the maturity of the mortgage. It is con-

tended that they do. We have not to deal with the question dealt with in the majority of the cases to which we were referred as to the rate of interest to be paid, whether by way of damages or in accordance with the contract between the parties, upon any part of the principal moneys secured by the mortgage that remains unpaid after the expiration of the time fixed for payment by the instrument, but with another question, viz., whether, after that date, the mortgagees are entitled to compound interest upon the arrears of principal and interest, and for that purpose to make half-yearly rests in the account. The answer to this question depends upon the contract which the parties have entered into, to be ascertained by construing the language of the provisions for payment in such fair and proper manner as to give effect, if possible, to the intention of the parties.

Upon this inquiry the cases cited afford little or no assistance, save in so far as they recognise or enunciate general principles of construction. We must gather from the language employed the intention and agreement of the parties.

Reading the provisions for payment, it appears somewhat singular that, if the parties did not intend to extend the obligation of compound interest beyond the period during which the principal moneys were not repayable, they should have resorted to so many words which seem to accord with the contrary intention.

As regards the principal money, the contract is to repay it on or before the 1st day of May, 1898. The effect of this is that there could be no default in payment, and therefore no arrears of principal until the 1st May, 1898. It is clear that, apart from the subsequent provisions accelerating payment of the principal by reason of default in payment of interest, no action to recover the principal sum could be maintained before that day. Nevertheless, the agreement with regard to compounding and rests provides that interest in arrear and other enumerated sums shall bear interest at the rate of 6¼ per cent. and be compounded—not merely throughout the period during which the principal is not payable, but—"half-yearly, a rest being made on the said first days of November and May in each year until all arrears of principal and interest and such other sums are paid."

Principal in arrear means principal unpaid after the 1st May, 1898. And by the terms of the contract the interest and other sums also in arrear are to be compounded each half-year while the arrears continue. There does not appear to be any good reason why the words "in arrear" should be restricted to the interest accruing before maturity of the mortgage, or why it should

be so divorced from premiums of insurance and other sums paid, such as taxes, etc., which evidently would have to be continued to be made after maturity, as well as before, if there was default after maturity.

The agreement for payment of compound interest and the creation of rests for the purpose is plainly carried beyond the day fixed for payment of the moneys secured by the mortgage, thus shewing that the parties contemplated payment in that manner not merely ad diem but post diem.

Following upon these provisions comes the next paragraph, making it clear that the rate of interest upon the principal moneys unpaid is to be 6¼ per cent. until the principal and interest and compounded moneys are fully paid and satisfied, and this is to be the case whether the principal moneys are paid before, at, or after the time limited for payment thereof.

All this seems unnecessary and out of place if the intention was to confine the compounding and rests to the period when there could be no arrears of principal.

The provisions in these respects are not at all the same as in the cases relied upon by the plaintiffs. Some of these are explained by Lord Davey in . . . Economic Life Assurance Co. v. Usborne, [1902] A. C. 147.

Upon a full consideration of all the provisions of the mortgage in question here, I am of opinion, borrowing the language of Lord Davey . . . at p. 154, that the mortgage is in such form that the property mortgaged cannot be taken out of the hands of the mortgagees without payment of the principal and all interest. And I have no hesitation in agreeing with Teetzel, J., in his conclusion that the Master should have allowed interest compounded half-yearly both before and after maturity of the mortgage.

The remaining grounds of the plaintiffs' appeal are in respect of two items of a surcharge against the mortgagees' account propounded by the plaintiffs. In presenting and seeking to establish them, the plaintiffs are subject to the ordinary rule of evidence that the onus probandi lies upon the parties surcharging. They are bound to establish their claim beyond reasonable doubt. The lapse of time from the dates of the dealings and transactions on which the claim to obtain credit for these sums is founded should not be turned to the prejudice of the mortgagees, who are in no way responsible for the delay. And if, owing to it, there is uncertainty, vagueness, and insufficiency in the proof, the plaintiffs, and not the mortgagees, should bear the consequences.

With regard to the item of $4,600, the plaintiffs claim to have established that in October, 1893, a few months after the making of the mortgage, there was a dealing or transaction between John T. Moore, the plaintiffs' managing director, acting on his own behalf, and the plaintiffs represented by him, and Edward Leadlay, one of the mortgagees, whereby the latter assumed an indebtedness of $4,600 owing by Moore to the plaintiffs, and agreed with the plaintiffs to pay it, and that this sum should be credited on the mortgage. It is not pretended that Thomas Hook, the other mortgagee, had any part in the alleged transaction or that he was consulted in regard to it, or that he assented to any proposal to credit the sum in question upon the mortgage. There is no evidence that E. Leadlay ever expressly agreed that the $4,600 should be credited upon the mortgage, and, so far as Hook is concerned, there was no authority from him to do so. The plaintiffs rest almost entirely upon the evidence of J. T. Moore.

. . .

Taking the testimony as offered at the trial and as further developed before the Master, and viewing it as a whole, it seems to me that, so far from shewing that the item should have been allowed, it shews good grounds for disallowing it. . . .

The Master did not state his reasons for charging this sum against the mortgagees; Moore's statements are not sufficient to outweigh the other circumstances; and the proper conclusion should have been that the plaintiffs failed to establish the item.

. . .

The appeal in respect of the remaining item of $3,279.22 fails, upon the short ground on which it was dealt with by Teetzel, J. While it is true that Leadlay and Hood released the lands from the mortgage and received Moore's note for $3,279.22, they did so at the request and presumably for the benefit of the plaintiffs, who were apparently very desirous of procuring the release to be made. The plaintiffs cannot complain of the release. They can only rest upon the fact of alleged payment of $3,279.22 by receipt of Moore's note. But the mortgagees did not agree to accept the note as cash, and it is plain that there was no payment for which credit can be given, unless the note was actually paid—and it was not. . . .

In my opinion, all the grounds of the plaintiffs' appeal fail, and it should be dismissed.

The cross-appeal of the mortgagee-defendants was in respect of several items as to which Teetzel, J., affirmed the Master's re-

port. Upon the argument three of these items were withdrawn. . . .

There remain to be considered the items numbered 1, 2, 5, and 6 in the reasons for the cross-appeal.

The first two relate to sums of $800 and $441 respectively, which were allowed by the Master against the mortgagees. Both are in respect of sales of portions of the mortgaged properties, contracts for which were made by the plaintiffs before the arrangement for the release of the equity of redemption. As part of the arrangement, the contracts were assigned to the mortgagees. These contracts were afterwards cancelled, and the lands contracted to be purchased were resumed by the mortgagees and subsequently sold for a price less than the original contracts called for. Upon taking the accounts, the Master charged the mortgagees with the differences, and Teetzel, J., affirming his ruling. . . . Upon consideration of the circumstances and of the scope of the reference with regard to the mortgaged properties, I am unable to say that the Master erred. . . .

As to the other items, one in respect of the allowance made for livery services and the other in respect of remuneration or compensation to J. T. Moore for services as agent in and about the management and disposition of the lands after February, 1902, the Master had before him the whole evidence, oral and documentary, bearing upon every matter relating to the whole business, conduct, and management of J. T. Moore in respect of the lands and of the benefits derived therefrom, and from the expenditures made in the course of such conduct and management.

While the special nature of the case and the circumstances under which the plaintiffs were permitted to redeem, render it one in which it was proper that the allowances should not be strictly confined to the usual limits of an ordinary mortgage account, it is not possible to say that the allowances made are not adequate or fair. In endeavouring to arrive at what would be fair, under all the circumstances, neither the Master nor any one else could find any definite guide or apply any definite measure. He had to arrive as probably a jury would at an estimate of what was fair and right, and that is all any one could do.

The cross-appeal fails in respect of all four items, and must be dismissed.

The plaintiffs must pay the costs of their appeal, and the mortgagees those of their cross-appeal. Probably there will be no increase of these costs either way by reason of the items which were withdrawn.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the appeal of the plaintiffs should be allowed, and the cross-appeal of the mortgagees dismissed.

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## HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 10TH, 1910.

### REX v. COOTE.

*Liquor License Act—Conviction for Second Offence in Absence of Defendant—Inquiry as to First Offence—Construction of sec. 101—Directory or Imperative—Criminal Code, secs. 718, 721.*

Motion to discharge the defendant from custody, upon the return to a habeas corpus and certiorari in aid.

J. Haverson, K.C., for the defendant.

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

MIDDLETON, J.:—The only question argued was the power of the magistrate to proceed with the trial of the defendant, who was charged with an offence against the Liquor License Act as a second offence, in his absence.

The Criminal Code provides (sec. 718) that, when the defendant has been duly summoned, if he fail to appear, the magistrate may either proceed with the trial ex parte or may issue his warrant and adjourn the trial until the defendant is apprehended.

Section 721 provides that, if the defendant is personally present, he shall be asked to plead.

These sections are made applicable to offences against Ontario Statutes, by R. S. O. 1897 ch. 90, sec. 2 (now 10 Edw. VII. ch. 37, sec. 4), "unless otherwise provided." These words add nothing to the general rule which makes all general provisions subject to the requirements of any particular Act.

The Liquor License Act, in dealing with cases where a previous conviction for an offence against that Act is charged, provides (sec. 101) that the magistrate shall first inquire into the subsequent offence, and, upon finding the defendant guilty, the defendant shall be asked whether he was previously convicted as

alleged, and, if an affirmative answer is given, he may be convicted accordingly; if not admitted, the magistrate is then to try the question concerning the previous conviction.

It is contended that the provisions of this section are imperative, and not merely directory, and shew that the trial for a second offence cannot proceed unless the defendant is actually present, either in obedience to a summons or by virtue of a warrant.

That the provisions of the section requiring the trial of the subsequent offence to precede the inquiry as to the former conviction are imperative and not directory, has been determined in Rex v. Nurse, 7 O. L. R. 418, which overrules an earlier case of Regina v. Brown, 16 O. R. 41, in which Armour, C.J., had held the provisions to be directory only. This case accepts the reasoning of the Court in Nova Scotia in Rex v. Salter, 20 N. S. R. 206, which determined that the provisions of the clause relating to the asking of the accused whether he admitted or denied the previous conviction were imperative.

I can see no ground for distinguishing between the different provisions of this section, and holding some to be imperative and others directory, and, even if I am not technically bound by the decisions, I have no hesitation in accepting them.

The Nova Scotia case is upon the precise question now before me, and determines that the magistrate has no power to convict of a second offence without bringing the defendant before him, so that the course pointed out by the section in question can be strictly followed.

The view of the majority of the Court in Ex p. Grover, 23 N. B. R. 38, 24 N. B. R. 57, does not commend itself to me. I cannot see why the bringing of the accused before the magistrate on a warrant before proceeding with the trial should be regarded as a "defeating of the ends of justice," or as practically preventing the making of a conviction for a second offence.

On the other hand, to read into sec. 101 of the Liquor License Act the words found in sec. 721 of the Criminal Code, "If the defendant is personally present at the hearing," would be legislation rather than interpretation.

There does not seem to be any good reason for the requirements of sec. 101, but this is a matter for the legislature, and not for the Courts.

With regret, as there seems no doubt of the defendant's guilt, his discharge must be ordered.

No costs.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 16TH, 1910.

## BARNES v. CARTER.

*Libel—Pleading—Statement of Claim—Motion to Strike out as Disclosing no Reasonable Cause of Action—Con. Rule 261—Innuendo—Imputation of Bastardy—Improbable Inference—Question for Jury — Attacking Defendant's Legitimacy — Striking out Part of Pleading.*

Motion by the defendant, under Con. Rule 261, for an order dismissing the action or striking out the statement of claim, upon the ground that the action was frivolous and vexatious and the statement of claim disclosed no reasonable cause of action.

G. T. Blackstock, K.C., for the defendant.

A. G. F. Lawrence, for the plaintiff.

MIDDLETON, J.:—The plaintiff is half-sister of the defendant, a child of the same mother by her first husband.

The defendant's father died in August, 1908, and in a local paper on the 25th of that month an obituary notice appeared, in which it is stated that "soon after attaining his majority Mr. Carter married Miss Hester Dove, daughter of John Dove, a pioneer of —— county." The defendant is alleged to be responsible for the publication of this obituary notice .

The plaintiff in this action (commenced 16th May, 1910) claims damages for libel. She is nowhere mentioned in the article in question, but presents her case thus: "At the time of Carter's marriage, my mother had been already married to M., her first husband. I was issue of this marriage. By describing my mother as an unmarried woman at that date, it is implied that I am her illegitimate child."

Under the Rule in question I am strictly confined to the pleadings, and cannot go beyond the allegations in the statement of claim, nor can I upon this motion determine a question of law proper to be raised by the course pointed out in Rule 259. I can only stay when from the statement of claim itself the action is "so clearly frivolous that to put it forward would be an abuse of the process of the Court:" Young v. Holloway, [1895] P. 87, 90.

In an action for libel, "if the words are capable of the meaning ascribed to them, however improbable it may appear that such

was the meaning conveyed, it must be left to the jury to say whether or no they were in fact so understood:" Odgers, 4th ed., p. 111.

Possibly, in the light of surrounding circumstances, the plaintiff may shew enough to satisfy a jury that the words were published with the intention of asserting, and of being understood to assert, that the marriage of Hester Dove with the plaintiff's father was no marriage. I cannot, by a summary order such as that now sought, prevent her attempting to do so.

This does not completely dispose of this motion. Under cover of the assertion of her own legitimacy and the supposed attack upon it, the plaintiff seeks to carry the war into Africa and attacks the defendant's legitimacy. She says: "The marriage with your father was no marriage, as my father was yet alive and deserted by my mother."

This cannot be permitted, and under Rule 298 the 3rd paragraph, all of the 4th paragraph after "William Carter," and the 5th paragraph, must be struck out, and the word "one" substituted for "the said" before "William Carter" in the 4th paragraph. If necessary, the notice of motion may be amended to ask this.

Whether the facts suggested can be given in evidence at the trial, either in aid of the innuendo or to shew malice and so increase the damages, is not for me to determine, and to some extent will depend upon the course taken by the defendant in pleading.

Costs in the cause.

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MIDDLETON, J.

SEPTEMBER 16TH, 1910.

## NATURAL RESOURCES SECURITY CO. v. "SATURDAY NIGHT" LIMITED.

*Interim Injunction—Libel—Restraining Publication—Particular Libels—Remedy Restricted—Nature of Defamatory Writing.*

Motion by the plaintiffs for an interim injunction to restrain the defendants from "continuing the publication in the Toronto 'Saturday Night' of articles libellous of the plaintiffs."

Glyn Osler, for the plaintiffs.

G. M. Clark, for the defendants.

MIDDLETON, J.:—This motion is misconceived and too wide. The Court cannot by interim injunction restrain the publication of libels generally. The most that can properly be asked in any case is an injunction restraining the further publication of particular libels.

On wider grounds the motion fails entirely.

Until recently the jurisdiction to grant an interim injunction to restrain libels was doubted. The Court of Chancery had no such power, as it had no jurisdiction over the subject-matter, and the common law Courts, if they had the power to grant on interim injunction, which seems doubtful, never exercised it. Since the Judicature Act the jurisdiction has been affirmed in a series of cases of high authority. The same cases have, however, strictly defined the exceptional cases in which such relief should be granted; and this case is clearly outside the class in which this very unusual relief is appropriate.

On the material, I cannot find that this is a case in which "any jury would say that the matter complained of is libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable." This is the test prescribed by Coulson v. Coulson (1887), 3 Times L. R. 846, and adopted by Bonnard v. Perryman, [1891] 2 Ch. 269; Monson v. Tussauds Limited, [1894] 1 Q. B. 671. The context shews that this means that the Court must be clearly satisfied that the defence of justification must fail, not merely that the article is defamatory, if untrue.

Motion dismissed with costs to the defendants in any event.

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BOYD, C. SEPTEMBER 16TH, 1910.

## WALLACE v. HANDLEY.

*Charge on Land—Claim by Husband Against Heir of Deceased Wife—Payments for Funeral Expenses and Taxes—Recoupment out of Proceeds of Land in Foreign Country Sold by Heir—Equitable Relief—Statute of Limitations.*

An action to recover the value of a lot of land in the state of New York taken possession of and sold by the defendant, in the circumstances stated in the judgment.

W. D. Swayzie, for the plaintiff.

R. Bradford, for the defendant.

BOYD, C.:—The plaintiff's claim in substance calls upon the defendant to answer for the value of a lot of land in Buffalo, which stood in the name of the plaintiff's wife, but was really held by her as trustee for her husband. She died intestate and childless in April, 1903, and in ordinary course of distribution by New York law the lot would pass to her legal heirs—in this case her father, the defendant. The father in fact recognised the claim of the plaintiff, his daughter's husband, and signed a quit-claim deed in his favour. But, for want of proper formalities, it was not registrable, and was lost. Later on the defendant refused to sign another quit-claim deed, on the ground that he had been deceived as to his interest in the land. It becomes of little importance to decide who is right and who is wrong on this aspect of the case, but I have little doubt that the defendant well knew that the plaintiff claimed the land because his money had gone to pay all the purchase-money. I held at the trial that the land could not be followed, but that there might be a claim by the plaintiff on the proceeds of the land. The lot was taken possession of by the defendant as an inheritance from his daughter, and sold, according to the evidence of his son, Richard Handley, for $150. A witness called for the plaintiff, who proved American law, spoke of the lot as being assessed for $250 or so in 1903, and said it was worth, in his opinion, about $275 or $300. It was unimproved, and, considering the circumstances of the title, it is not unfair, I think, to hold that $150 represents its value as assets in the hands of the defendant.

Now, the plaintiff, relying on getting this land, allowed the sisters of his wife to take her personal belongings, he having the first right to administer his wife's estate. Relying on this, he expended moneys such as I think he is entitled to be recouped out of the real assets come to the hands of the defendant: In re McMyn (1886), 33 Ch. D. 575. He paid for funeral expenses and headstone $112, and paid taxes on the lot after the wife's death to the extent of $62.78. These claims, amounting together to $174.78, are not barred by any statute—the writ being issued in February, 1909.

The upshot of the whole is, that the defendant should answer the outlay of the plaintiff in respect of the taxes and funeral expenses to the extent of what he received, $150. This relief is without costs, as it is quite different from the claim made on the record; but it is, in my opinion, the equitable adjustment of the matters really in difference.

Various questions of law were raised on the pleadings, but I do not apprehend any legal difficulty as to jurisdiction or procedure in reaching the result thus attained.

Judgment has been delayed in the hope that the parties would have settled, after what was said at the close of the trial.

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MIDDLETON, J., IN CHAMBERS. SEPTEMBER 19TH, 1910.

## *COLVILLE v. SMALL.

*Parties — Action by Assignee-trustee — Absolute Assignment — Addition of Assignors as Plaintiffs—Pleading—Champerty.*

Appeal by the plaintiff from an order of a Local Judge directing that the plaintiff's assignors be added as parties plaintiffs within thirty days, upon their consent being filed.

The order was made at the instance of the defendant, in face of the opposition of the plaintiff, who relied upon his own title, under the assignment. The assignment was absolute in form. The assignee held in trust to divide the proceeds of the litigation between himself and his assignors.

W. M. McClemont, for the plaintiff.

J. L. Counsell, for the defendant.

MIDDLETON, J.:—When an assignment is absolute in form, it is quite immaterial that the assignee holds in trust, and it is also immaterial that the assignor is himself beneficially interested in an object, or indeed in the sole object, of the trust: Comfort v. Betts, [1891] 1 Q. B. 737. . . .

[Reference to Weisener v. Brown, 76 L. T. R. 448; Fitzroy v. Cave, [1905] 2 K. B. 365; and to Mills v. Small, 14 O. L. R. 105, distinguishing it because the holding there was based on a finding of fact upon evidence at the hearing establishing to the satisfaction of the Judge that the assignment was a "sham."]

I cannot upon this motion determine the issue of fact suggested (i.e., whether the assignment in this case was a "sham.")

The plaintiff has the right to go to trial, and the learned Judge ought not to have made an order requiring the addition of the assignors as parties plaintiffs.

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

How the order would be worked out, in the event of the assignors refusing to join, is not clear, as the order imposes no interim stay, and provides no penalty if its terms are not complied with.

If the plaintiff was a nominal plaintiff and insolvent, the defendant could be protected by an order for security for costs. His counsel admits that, upon the facts of the case, he could not succeed upon such a motion.

If the defendant desires to contend that, by reason of the plaintiff having an interest given him in the proceeds of the litigation, the assignment is champertous, and the case differs from and is not governed by Fitzroy v. Cave for this reason, this defence must be raised at the hearing, and possibly ought to be pleaded.

The appeal must be allowed and the motion dismissed. Costs to the plaintiff in any event.

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MIDDLETON, J.

SEPTEMBER 19TH, 1910.

## STERLING BANK OF CANADA v. ROSS.

*Buildings—Encroachment on Highway—Legislative Sanction — 47 Vict. ch. 50 (O.)—Contract — Party Wall — Removal — Injunction.*

Motion by the plaintiffs for an interim injunction, turned, by consent, into a motion for judgment.

Irving S. Fairty, for the plaintiffs.

J. A. Macintosh, for the defendant.

MIDDLETON, J.:—Both parties ask me to assume that their rights are to be determined upon the agreement as to the wall in question contained in the sublease of the 1st April, 1872, although both the lease and the sublease have long since expired, and there is no evidence before me as to renewal.

At the date of the sublease, one Samuel Cline was the lessee of the parcel of land, 80 ft. square, at the south-east corner of Pitt and Second streets, Cornwall, for the unexpired portion of a term of 50 years from the 20th July, 1843. By a sublease, Cline, through whom the plaintiffs claim, leased the southerly 32 feet of this lot to McDonell, through whom the defendant claims. McDonell, in this lease, agreed to construct upon the land leased to him a wall extending from Pitt street easterly upon the north limit of the demised land, which Cline was to be at liberty to use

as a partition wall for any building he might erect upon the land retained by him, and, for that purpose, to insert beams, joists, &c., therein. Both buildings were erected as contemplated, and no difficulty seems to have arisen till the present time.

In April, 1910, the defendant's building was destroyed by fire; the wall in question, however, remained intact.

Some time after the making of the sublease and the erection of the buildings, a survey was made of the town, and it was found that the buildings upon Pitt street, including those upon the land in question, encroached 20 inches upon the highway. Some question being raised as to the accuracy of this survey, application was made to the legislature for an Act validating it, and by 47 Vict. ch. 50 the survey was confirmed, subject to the provision that when any building had been erected encroaching upon the highway as shewn upon the plan "it shall not be incumbent upon the owner or occupant . . of the building to remove the same off such street until the rebuilding of such . . building or the repair to the extent of 50 per cent. of the then cash value thereof." The future occupation of the portion of the street was not to be deemed to create or confer any estate therein.

The occupation of a portion of the municipal highway by an encroaching building does not confer any title to the land so encroached upon: City of Toronto v. Lorsch, 24 O. R. 227, on demurrer; and the possession sanctioned by this Act has been defined in Williams v. Town of Cornwall, 32 O. R. 255, as a legislative legalising of that which would otherwise be an indictable nuisance.

Although Cline and McDonell were then acting in good faith, and, for all I know, in accordance with their real rights, the statute confirming the survey compels me to find that, as to the 20 inches between what they assumed to be the east boundary of Pitt street and the boundary conventionally established by the statute of 1884, both parties were trespassers upon municipal property.

The defendant's building, having been destroyed, is now being rebuilt, and the town council requires, as is admittedly its right and duty, that the new building shall conform to the statutory street line. The defendant desires to remove the 20 inches of wall standing upon the highway in front of her premises so as to enable the front of her new building to extend across the full width of the lot. She offers, as a matter of grace, to contribute towards the cost of constructing a new wall upon the portion of the street yet in the plaintiffs' possession under the statutory license, but denies the plaintiffs' right to maintain this 20 inches of existing wall.

There is no dispute between the parties as to the wall east of the street line. It is admitted that this is still a party wall, subject to the agreement in the sublease.

The plaintiffs' motion for an interim injunction has been, by consent, turned into a motion for judgment.

The defendant contends:—

(1) That, her building having been destroyed, she is now bound to remove this wall—the statutory license of occupation being at an end.

(2) That the agreement between the parties relating to the wall—being an agreement with respect to a trespass—is illegal and void.

(3) That the plaintiffs cannot complain because their own building has been repaired to such an extent as to terminate the statutory license to occupy the highway.

In my view, the effect of the statute was to operate as a legislative sanction to the buildings erected at the date of the Act in question remaining upon the street, and that the wall in question was a party wall and constituted an integral part of each building, and may be maintained so long as either building is entitled to remain upon the strip of land in question.

The plaintiffs and defendant, as successors of Cline and McDonell respectively, are bound by the terms of the agreement, and neither is at liberty to set up as against the other that the wall in fact trespasses upon the highway.

If such facts exist as to have brought the plaintiffs' license to occupy to an end, the building has become a nuisance, and may be abated as a nuisance, or the municipality may maintain ejectment: City of Toronto v. Lorsch, supra; but the defendant has no right herself to destroy the wall.

The plaintiffs are entitled to the injunction and to costs, which I fix at $80.

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MIDDLETON, J., IN CHAMBERS. SEPTEMBER 20TH, 1910.

## JACKSON v. HUGHES.

*Costs—Scale of—Action in High Court—Several Defendants—Amount Recovered against one within Competence of County Court—Larger Amount Recovered against the other without Costs—"Order to the Contrary"—Con. Rule 1132.*

Appeal by the defendants J. E. Hughes & Co. and Percy Hughes from the taxation of the plaintiffs' costs by the senior taxing officer at Toronto.

J. T. White, for the appellants.

F. Arnoldi, K.C., for the plaintiffs.

MIDDLETON, J.:—By the judgment in this action the plaintiffs recover against the defendants Hughes $198.15 "and the costs of this action," save as increased by the issue between the plaintiffs and the defendants T. Lindsay Limited, and as to this issue no costs are given. The plaintiffs also recover $440.67 against the defendants T. Lindsay Limited, without costs. The causes of action with respect to which these two judgments are recovered are quite distinct.

Upon taxation the plaintiffs claimed, and have been allowed by the taxing officer, costs upon the High Court scale.

The defendants Hughes contend that the plaintiffs are entitled to costs upon the County Court scale only with a set-off.

The plaintiffs' right to costs must be determined by the judgment actually obtained in the action (Solomon v. Mulliner, [1901] 1 K. B. 76), and it is beside the question to suggest that, because the defendant Percy Hughes caused the litigation with the defendants T. Lindsay Limited, by his misconduct or mistake, he might well be visited with the whole costs of the litigation. The trial Judge has pronounced judgment against him for $198.15, "with costs of this action," save as to the issue with T. Lindsay Limited, and the rights of the parties must be determined by the effect of these words and the appropriate Rules. The Rule governing is Con. Rule 1132, which provides that when an action of the proper competence of the County Court is brought in the High Court, "and the Judge makes no order to the contrary," costs shall be taxed as the defendants now contend.

To succeed, the defendants must establish two propositions: (a) that the action is within the proper competence of the County Court; (b) that the Judge has made "no order to the contrary."

Manifestly, the plaintiffs could have recovered their claim for $198.15 against the defendants Hughes in the County Court, and, unless the further claim and recovery against T. Lindsay Limited can be considered as making a difference, the action ought, so far as the defendants Hughes are concerned, to have been brought in that Court.

So far as I can see, the joining of these claims in the one action cannot be justified under the Rules, but that question was not raised at the trial, and is not now material.

Assuming then, in the plaintiffs' favour, that the defendants and the claims were properly joined, Duxbury v. Barlow, [1901]

2 K. B. 23, a decision of the Court of Appeal, upon a Rule that cannot be distinguished from that now in question, is decisive in the defendants' favour, and determines that (in the absence of an order to the contrary) the rights and liabilities of each defendant depend upon the amount of the plaintiffs' recovery against him.

Then is there "an order to the contrary?" I think not.

To fully appreciate these words, reference must be had to the Rule as it stood in the Consolidated Rules of 1887. As Rule 1172 of that consolidation, it applied only to jury trials "when the Judge makes no order respecting costs." If any order whatever was made respecting costs, then the Rule had no application, and the rights of the parties were governed by the order as to costs alone.

The Rule in its present form is made applicable to all actions, no matter how tried, and requires an express direction from the Judge to prevent the statutory penalty imposed upon the choice of the more expensive forum from attaching. No doubt, the judgment here contains an "order as to costs," which would have taken the case out of the earlier Rule, but it does not contain any such "order to the contrary" as is now necessary. Under the Rule as it now stands, the onus is upon the plaintiff if he desires to avoid the consequences of his mistaken choice of forum, to make an application to the trial Judge for the necessary order, and mere general words used in a judgment, and not referring to the scale of costs, are not sufficient. I had the opportunity of mentioning the matter to the learned trial Judge, and he tells me that he did not intend to give any direction which would prevent Rule 1132 applying. No application for any such direction was made, and, had it been made, it would have been refused.

The appeal must be allowed and the bill be referred back to the taxing officer to tax as directed by Rule 1132, where the action is one within the proper competence of the County Court.

The appellants are entitled to the costs of this appeal and of the former taxation.

DIVISIONAL COURT. SEPTEMBER 20TH, 1910.

## *LONGDON v. BILSKY.

*Malicious Prosecution—Reasonable and Probable Cause—Solicitor's Advice—Nonsuit.*

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., withdrawing the case from the jury, and dismissing the action with costs.

The action was for malicious prosecution. The plaintiff was an accountant. The defendant was managing-director of the Nova Scotia Silver Cobalt Mining Co. In October, 1908, the defendant engaged the plaintiff as bookkeeper, and he lived in the boarding-house at the mines until the following April. The Nova Scotia company worked the Peterson Lake mine under lease, with a common directorate and management, paying a royalty on the gross amount mined. Some of the shareholders of the Peterson Lake company became dissatisfied, and a meeting was called to inquire into the management—it being charged that the Peterson Lake company were not getting justice. The plaintiff wrote and made a statutory declaration, containing the following statement: "With regard to the disposition of the ore on the Nova Scotia lease from Peterson Lake, there is no means of checking the same, either on surface or below, and the head ore-sorter, who superintends the bagging of ore, takes his instructions from the managing-director, and only a certain portion is credited to Peterson Lake, and nearly all the leaf silver which comes from Peterson Lake is bagged and shipped as Nova Scotia ore. The above can be verified by Mr. R. F. Taylor, who was formerly superintendent of the Nova Scotia mine, and who is now with the Kerr Lake mine, and also by Mr. James Carr, who is head ore-sorter at the Nova Scotia mine."

The managing-director referred to was the defendant, and, upon seeing this statement, he consulted his solicitor. The solicitor, before advising as to the propriety of laying an information against the defendant for perjury, obtained the declarations of Taylor and Carr, the two men referred to by the plaintiff. They contradicted the statements which the plaintiff said they would verify. The defendant, upon the solicitor's advice, laid a charge of perjury against the plaintiff; the plaintiff was acquitted; and brought this action.

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

The trial Judge was at first inclined to leave the case to the jury "to determine whether all the facts had been fully laid before the solicitor, or whether there was a want of good faith in the matter;" but later came to the conclusion that he "would not be justified in doing that, because the evidence is all one way."

The appeal was heard by CLUTE, SUTHERLAND, and MIDDLETON, JJ.

R. S. Robertson, for the plaintiff, contended that the defendant did not act in good faith; that the alleged facts upon which he sought to obtain the solicitor's advice as to taking proceedings were false, to his knowledge; that the plaintiff's declaration was in fact true, and the defendant knew it was true at the time he laid the information, and so it was a mere pretence to lay the matter before the solicitor.

I. F. Hellmuth, K.C., for the defendant, asserted that all the facts were fully laid before the solicitor; that the complaint was laid on his advice; and that there was such reasonable and probable cause for laying the complaint as justified the trial Judge in withdrawing the case from the jury.

CLUTE, J. (after setting out the facts as above):—The gravamen of the charge in the letter, as I read it, is that the head ore-sorter, who superintends the bagging of ore, takes his instructions from the managing-director, and only a certain portion of the ore is credited to the Peterson Lake company, and nearly all the leaf silver which comes from the Peterson Lake mine is bagged and shipped as Nova Scotia ore. It was, in sort, a charge of fraud, amounting to theft, against the managing-director; and the captain of the mine and the head ore-sorter are referred to as the persons who can prove it. They disprove it. They contradict the plaintiff. Their declarations are obtained before the solicitor advises. He does not then act, but places the whole case before the County Crown Attorney, who advises an information. This is the strongest kind of evidence of reasonable and probable cause, and it is uncontradicted. It is true that the plaintiff swears that the defendant gave instructions to Taylor and Carr, that he does not swear that the defendant in fact instructed them or either of them to ship the silver leaf which came from the Peterson Lake as Nova Scotia ore. The defendant's evidence is not very satisfactory, and on the first reading I was rather impressed with the view first taken by the trial Judge; but, upon a more careful perusal, I can find no evidence upon which a jury could fairly pronounce

that the defendant had a guilty knowledge of the act charged, or that there was a lack of bona fides in what he did in laying the matter before his solicitor.

I think the trial Judge was right in withdrawing the case from the jury. The appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

MIDDLETON, J., also agreed, for reasons stated in writing, in which he referred to Allen v. Flood, [1898] A. C. 1; Abrath v. North Eastern R. W. Co., 11 App. Cas. 153; Cox v. English, etc., Bank, [1905] A. C. 170; Lister v. Perryman, L. R. 4 H. L. 521; Ravenga v. Mackintosh, 2 B. & C. 693; Martin v. Hutchinson, 21 O. R. 388; Corea v. Peiris, [1909] A. C. 549; Snow v. Allen, 1 Stark. 502; 21 Am. Law Register, p. 582; 33 Am. Law Register, pp. 591, 596; 18 L. R. A. N. S. p. 1; Hicks v. Faulkner, 8 Q. B. D. 167; Stanton v. Hart, 27 Mich. 539; Broad v. Ham, 5 Bing. N. C. 722; English v. Lamb, 32 O. R. 73; Winnipeg Free Press Co. v. Nagy, 39 S. C. R. 340; Re Beddoe, Downes v. Cottam, [1903] 1 Ch. 547, 562; Brewer v. Jacobs, 22 Fed. R. 217; Stewart v. Sonneborn, 98 U. S. 187; Davis v. Hardy, 6 B. & C. 225; Ryder v. Wombwell, L. R. 4 Ex. 38; Giblin v. McMullen, L. R. 2 P. C. 317; Heddle v. National Fire Insurance Co., [1896] A. C. 372; Brown v. Hawkes, [1891] 2 Q. B. 718; Archibald v. McLaren, 21 S. C. R. 588; Hamilton v. Consineau, 19 A. R. 203; Still v. Hastings, 13 O. L. R. 322, 14 O. L. R. 638; Taylor v. Williams, 2 B. & Ad. 825, 837; St. Denis v. Shoultz, 25 A. R. 131; Watson v. Smith, 15 Times L. R. 473; Malcolm v. Perth Mutual Insurance Co., 29 O. R. 406; Fellowes v. Hutchinson, 12 U. C. R. 633; Kelly v. Midland R. W. Co., Ir. R. 7 C. L. 8; Seary v. Saxton, 28 N. S. R. 278; Ford v. Canadian Express Co., 1 O. W. N. 1117.

The conclusion which the learned Judge arrives at, after perusing all the English and Canadian and very many of the American cases, is that the opinion of counsel honestly obtained, after a full disclosure of facts known to the defendant, and honestly acted upon, constitutes reasonable and probable cause for the prosecution, and is not merely evidence either of reasonable and probable cause or in answer to the charge of malice.

The learned Chief Justice was only discharging his judicial functions when, in the absence of any contradictory evidence, he found that there was reasonable and probable cause and entered judgment for the defendant.

MEREDITH, C.J.C.P. SEPTEMBER 22ND, 1910.

## OATMAN v. GRAND TRUNK R. W. CO.

*Railway —Cattle-pass — Agreement with Land-owner — Farm Severed by Railway—Culvert—Water—Drainage — Substitution of Embankment—Easement — Prescription — Dominion Railway Act, sec. 257 — Board of Railway Commissioners—Costs.*

?The plaintiff claimed to be entitled to a cattle-pass under the line of the defendants' railway, which ran through his farm, and his action was brought to recover damages for the filling of it in and substituting for it an embankment with a pipe through it to carry away the water referred to in the judgment, and for a mandatory order requiring the defendants to restore it to its former condition.

C. Millar and J. Carruthers, for the plaintiff.

D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

MEREDITH, C.J.:—The land for the railway was purchased by the predecessors in title of the defendants the Great Western Railway Co., from a predecessor in title of the plaintiff, Thomas Bagot Ronson, and the conveyance of it, which is dated the 6th December, 1870, contains a provision in these words: "The parties of the second part (i.e., the railway company) will provide one railway crossing at grade for farming purposes over the land hereby conveyed for the use of the party of the first part." And a further provision in these words: "It is understood that the parties of the second part will not interfere with the flow of the waters of a certain drain upon the said lot across which the said railway will pass."

The railway was constructed about the year 1871, and the grade crossing mentioned in the conveyance was provided and has ever since been maintained by the railway companies and used by the owners and occupiers of the farm.

For the purposes of drainage across the railway, wooden culverts were built, leaving a space of about eight feet wide and of varying heights depending upon the grade of the railway.

An exception was made in the case of the culvert provided for Ronson's farm. Ronson arranged with the engineer of the railway company that his culvert should be built of stone, the stone being supplied and laid by Ronson, and the company paying him

what the wooden structure would have cost. This culvert was of sufficient height to permit cattle to pass through it, and it was, no doubt, in the contemplation of the engineer and Ronson that it would be used in that way, but I am unable to find that there was any agreement that Ronson should have any right to it, as a cattle-pass; the user of it, as I think, was to be by the permission of the company and during its pleasure, and it was not intended that anything that was done should interfere with the company's right to substitute for the culvert any other means of drainage which was sufficient to enable the water to flow through the drain mentioned in the conveyance.

The evidence was not at all satisfactory as to the position which the person I have spoken of as the engineer really occupied, and it is quite impossible, I think, to hold that an agreement by the railway company to maintain the culvert as a cattle-pass for the use of the owners and occupiers of the farm was made out.

Mr. Millar contended earnestly that the case came within the principle on which Mackenzie v. Grand Trunk R. W. Co., 14 O. L. R. 671, was decided, but I am unable to agree with his contention. In that case the crossing had been made when the railway was built, and had been maintained by the railway company since that time, a period of about fifty years, and there was nothing to shew how it came to be built and maintained, and what was decided was that the proper inference was, that it had its origin in an agreement between the railway company and the land-owner, and was part of the arrangement under which the railway acquired its right of way through the plaintiff's land.

In the case at bar, the origin of the culvert is known, and, taken in connection with the provision in the conveyance to the railway company as to the grade crossing and as to drainage, the proper conclusion is, in my opinion, that is was constructed for drainage purposes, and in order that the railway company, as it had agreed, should not interfere with the flow of the waters of the drain mentioned in the conveyance to the company.

If an agreement were to be inferred, it would be, I think, such an agreement as the Supreme Court, in Canada Southern R. W. Co. v. Erwin, 13 S. C. R. 162, held was made between the land-owner and the railway company—an agreement to maintain a cattle-pass so long as the culvert was in existence, and not preventing the company from discontinuing the use of the culvert and substituting for it an embankment with a passage-way through it for the water without providing a pass under the embankment.

The plaintiff also claims the right of passage by the culvert as an easement, by prescription, but Canadian Pacific R. W. Co. v. Guthrie, 31 S. C. R. 155, is decisive against that claim.

It was also, though but faintly, urged by Mr. Millar, that the defendants were prohibited by sec. 257 of the Railway Act of Canada from doing what they have done without the leave of the Board of Railway Commissioners for Canada; but, in my opinion, the section has no application to such a structure as the culvert in question, which is only eight or nine feet long, but in terms is confined to structures having a span or length exceeding eighteen feet.

I do not wish to be understood as meaning that, if the culvert were a structure such as those with which the section deals, the plaintiff would be entitled to recover, but as to that I express no opinion.

The action must be dismissed, but, under all the circumstances, I think I may exercise my discretion as to costs by dismissing it without costs, which I do.

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SILL v. ALEXANDER—MASTER IN CHAMBERS—SEPT 2.

*Counterclaim — Exclusion—Action for Defamation — Unconnected Counterclaim on Bills of Exchange.*]—Motion by the plaintiff in an action for defamation to strike out the defendant's counterclaim for a sum of $3,072.80 in respect of bills of exchange of which the defendant was the holder and of a loan made to the plaintiff. The Master remarks that this is the converse case to Central Bank v. Osborne, 12 P. R. 160, and a stronger case striking out the counterclaim, because here there is no connection between the claim and counterclaim. Order made striking out the counterclaim, without prejudice to a fresh action being brought, in which case judgment should not be signed in this action without the order of the Court or a Judge. Costs in the cause. J. D. Montgomery, for the plaintiff. W. B. Raymond, for the defendant.

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DURYEA v. KAUFMAN — MASTER IN CHAMBERS—SEPT. 14—MIDDLETON, J.—SEPT. 20.

*Security for Costs—Increased Security—Assets in Jurisdiction.*]—Motion by the defendants for increased security for costs, $400 having been paid into Court under præcipe orders. The Master referred to Stow v. Currie, 20 O. L. R. 353, and said that

a further sum of $1,000 would be adequate protection at present for the defendants. The plaintiff did not move against the præcipe orders on the ground that he had assets in the jurisdiction, and it would seem to be too late to rely on them as an answer to the present motion. Order requiring the plaintiff to give security in the additional sum of $1,000 within three weeks. All proceedings to be stayed meantime. Costs of motion to be costs in the cause.—Upon appeal by the plaintiff, MIDDLETON, J., said that he was unable to assent to the view of the Master that the failure of the plaintiff to move against the præcipe orders disentitled him now to set up assets in Ontario as an answer to a motion for further security. But the assets upon which reliance is placed are so involved in the present litigation that no one can say that they afford any real security. The amount seems large, but it cannot be said that the Master has erred. Great caution must be exercised in motions of this class to prevent security for costs being made a means whereby a foreign plaintiff may be denied justice in our Courts. Appeal dismissed. Costs in the cause. D. L. McCarthy, K.C., for the defendants. Irving S. Fairty, for the plaintiff.

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JACKSON v. CITY OF TORONTO—MASTER IN CHAMBERS—SEPT. 14.

*Jury Notice—Irregularity—Action for Nonrepair of Highway—Judicature Act, sec.* 104.]—Motion by the defendants to strike out the jury notice as irregular under sec. 104 of the Ontario Judicature Act. The plaintiff, by paragraph 2 of the statement of claim, alleged that there was a breach of the duty of the defendants "to properly construct, maintain, and keep in repair the public sidewalks." By paragraph 3, he said that the planks of the sidewalk which caused the plaintiff's injury "are laid latitudinally, but at the place where the accident happened certain planks are placed longitudinally and about two inches higher than the rest of the sidewalk, in such a way as to constitute a great danger to the public having occasion to use the said sidewalk." By paragraph 4, he alleged that the locality was insufficiently lighted, whereby he was prevented from seeing the obstruction, and the defendants were negligent in not providing proper light in such locality. Held, that the action was based upon nonrepair. Brown v. City of Toronto, 21 O. L. R. 230, followed. Clemens v. Town of Berlin, 7 O. L. R. 33, distinguished. The test as to the application of sec. 104 is whether or not a plaintiff can allege a cause of action not based upon nonrepair.

Order made striking out the jury notice, with costs to the defendants in any event. H. Howitt, for the defendants. E. C. Cattanach, for the plaintiff.

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ENDLEMAN v. ROTHSCHILD—MIDDLETON, J.—SEPT. 15.

*Principal and Agent—Agent's Commission on Purchase of Mine—Quantum—Evidence—Onus—Finding of Fact.*]—Action for commission upon the purchase of a mine. The contract for payment of the commission was not in writing, but it was common ground that there was some agreement, and the dispute was as to whether the 10 per cent. commission was to be computed upon the price, $3,450, at which the defendant bought the mine., or upon the price, $20,000, at which he sold. Held, that the onus was upon the plaintiff, and, weighing the evidence, he had established his case, and the finding of fact should be in his favour. Judgment for the plaintiff for $2,000 and costs of action; judgment for the defendant upon his counterclaim for $603.20 and costs fixed at $25; with a set-off pro tanto. G. E. Buchanan, for the plaintiff. R. R. McKessock, K.C., for the defendant.

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ONTARIO LIME ASSOCIATION v. GRIMWOOD—MASTER IN CHAMBERS—SEPT. 16.

*Mechanics' Liens—Lis Pendens—One Claim Against Lands of Separate Owners—Sole Ownership when Contract Made.*]—Motion by the defendants to vacate the registry of a claim of lien and certificate of lis pendens. The motion was based upon Dunn v. McCallum, 14 O. L. R. 240. But, the Master points out, in this case when the contract was made between the plaintiffs and the defendant Grimwood, he was the owner of the whole of the lots covered by the lien. It was not until a later date that he parted with his interest in some of the land without any notice to the plaintiffs. The Act, in effect, puts a person entitled to a lien in the position of an incumbrancer. If what was done here could operate as a discharge, the Act would be seriously impaired, if not rendered useless. At least such a person would in every case have to register a lien at the earliest moment allowed under sec. 22, which would lead to useless expense and complication of titles. It cannot be necessary to search the registry after the contract has been made or the work begun in order to preserve the rights of those entitled to the benefit of the Act. Motion dismissed with costs (fixed at $12) to the plaintiffs in any event. R. H. Greer, for the defendants. H. H. Shaver, for the plaintiffs.

SCHULTZ v. CLEMENS—MASTER IN CHAMBERS—SEPT. 19.

*Venue—Change—Con. Rule 529 (b)—Onus.*]—Motion by the defendant to change the venue from Stratford to Berlin. It was admitted that the place of trial should be Berlin, under Con. Rule 529 (b), the cause of action having arisen and the parties residing in the county of Waterloo. The venue was laid at Stratford, because the Berlin autumn non-jury sittings were fixed for so early a date that the plaintiff could not get ready for trial. The injury to the plaintiff for which he sued occurred on the 18th April, 1910, but the action was not begun until the 9th July. The Master referred to Pollard v. Wright, 16 P. R. 505; Brown v. Hazell, 2 O. W. R. 784; and Piggott v. Bank of Hamilton, 7 O. W. R. 803; and said that the plaintiff had not made out a sufficiently strong case to retain the venue at Stratford, the onus being on the plaintiff. Order made changing the venue to Berlin; costs to the defendant in any event. D. C. Ross, for the defendant. H. E. Rose, K.C., for the plaintiff.

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RE FRASER—DIVISIONAL COURT—SEPT. 19.

*Lunatic — Application for Declaration of Lunacy — Order Directing Trial of Issue.*]—Appeal by Michael Fraser from order of SUTHERLAND, J., 1 O. W. N. 1105. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal, and reserved the costs of it to be disposed of by the Judge who shall try the issue. J. King, K.C., for the appellant. A. McLean Macdonell, K.C., for the respondent.

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MCCABE v. NATIONAL MANUFACTURING CO.—DIVISIONAL COURT—SEPT. 19.

*Master and Servant — Wages — Contract in Writing—Alleged Change in Amount—Onus—Conflicting Testimony—Counterclaim —Trover—Equitable Assignment — Acceptance of Order.*]—Appeal by the defendants and cross-appeal by the plaintiff from the judgment of RIDDELL, J., 1 O. W. N. 606. The appeal and cross-appeal were heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal and cross-appeal with costs. C. A. Moss, for the defendants. W. H. Gregory, for the plaintiff.

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EMPIRE CREAM SEPARATOR CO. v. ROSS—MASTER IN CHAMBERS—SEPT. 20.

*Venue—Change—Witnesses — Convenience.*]—Motion by the defendant to transfer the action from the County Court of York

to the County Court of Prince Edward. The action was brought upon promissory notes alleged to have been indorsed by the defendant and for the price of separators. The defence was that the defendant did not indorse the note, and that the separators bought were useless. The Master refers to and distinguishes Empire Cream Separator Co. v. Pettypiece, 13 O. W. R. 740, 902; and makes the order for transfer, following Gardiner v. Beattie, 6 O. W. R. 975, 7 O. W. R. 136, and saying that the evidence as to defects in the separators will be found at or near Picton. Costs in the cause. Featherston Aylesworth, for the defendant D. G. Galbraith, for the plaintiffs.

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RE ELLIS AND TOWN OF RENFREW—DIVISIONAL COURT—SEPT. 20.

*Municipal Corporations—Local Option By-law—Voting.*]—An appeal by A. A. Ellis from the order of RIDDELL, J., 21 O. L. R. 74, 1 O. W. N. 710, dismissing the appellant's motion to quash a local option by-law. The Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.) dismissed the appeal with costs, following the decision of a Divisional Court in Re Schumacher and Town of Chesley, 21 O. L. R. 522, 1 O. W. N. 1041. Leave to appeal to the Court of Appeal granted. W. M. Douglas, K.C., and J. E. Thompson, for the appellant. W. E. Raney, K.C., and S. T. Chown, for the respondents.

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DANCEY V. WIGHTON—MASTER IN CHAMBERS—SEPT. 21.

*Default Judgment — Motion to Set aside — Order Directing Trial of Issue—Security for Costs.*]—Motion by the defendant Dymond to set aside a default judgment signed in June, 1905. The applicant alleged that he was never served with the writ of summons, and suggested that another person, with a similar name, had been served by mistake for him. The affidavits being conflicting, the Master directs that, upon the applicant giving security for costs within two weeks, an order shall go, as in George v. Green, 13 O. L. R. 189, 14 O. L. R. 578, for the trial of an issue, in which the applicant shall be plaintiff and Dancey defendant, as to whether the applicant was served with the writ or not. In default of such security, the motion will be dismissed with costs. John MacGregor, for the applicant. M. Grant, for the plaintiff.

DANIEL v. LONDON AND WESTERN TRUSTS CO.—SUTHERLAND, J.—SEPT. 21.

*Mandamus—County Court Judge.*]—Motion by the plaintiff for a mandamus to the Judge of the County Court of Middlesex to hear and determine an application to compel the transfer of certain company shares and the payment of a dividend thereon to the plaintiff. Held, that it is not a case in which a mandamus should be granted, nor is there any other relief which the plaintiff, upon the material filed, can obtain. Application dismissed without costs and without prejudice to the applicant making any further motion she may be advised. The plaintiff appeared in person.

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BRULOTT v. GRAND TRUNK PACIFIC R. W. CO.—MASTER IN CHAMBERS—SEPT. 22.

*Venue—Change—Witnesses.*]—Motion by the defendants to change the venue from Toronto to Port Arthur. The plaintiff sued for damages for injury suffered by reason of the defendants' negligence, as alleged, at Fort William. The plaintiff had removed to Toronto when the action was brought. The Master referred to McDonald v. Dawson, 8 O. L. R. 72, and said, after referring to the number of witnesses to be called by each party, those of the defendants at Port Arthur or Fort William, and those of the plaintiff at Toronto, that it did not seem justifiable to interfere with the plaintiff's choice of a place of trial. If it should appear at the trial that the expense had been increased by a trial at Toronto, the trial Judge could adjust the costs. Motion dismissed; costs in the cause. F. McCarthy, for the defendants. T. N. Phelan, for the plaintiff.

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DYMENT v. HOWELL—DIVISIONAL COURT—SEPT. 22.

*Mortgage — Security for Maintenance — Lease of Farm.*]—Appeal by the plaintiff from the judgment of BRITTON, J., 1 O. W. N. 679. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal without costs. A. M. Lewis, for the plaintiff. W. E. S. Knowles and E. C. Cattanach, for the defendants.