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CARTWRIGHT, MASTER. OCTOBER 22ND, 1906.

CHAMBERS.

ANDERSON v. NOBELS EXPLOSIVE CO.

Writ of Summons — Service out of Jurisdiction — Cause of Action—Rule 162 (e)—Tort Committed in Ontario—Injury to Plaintiff by Defective Fuse Supplied to his Employers by Defendants in Foreign Country.

Motion by defendants to set aside an order obtained by plaintiff allowing service upon the defendants at Glasgow, Scotland, of the writ of summons and statement of claim, and to set aside the writ and the statement of claim and the service thereof effected upon defendants.

W. H. Blake, K.C., for defendants.

T. N. Phelan, for plaintiff.

THE MASTER:—The statement of claim alleges: (1) that plaintiff is a labourer, and resides at Byng Inlet, in the province of Ontario, and that defendants carry on business and have their head office at Glasgow, in Scotland; (2) that plaintiff in February last was employed by the James Bay Railway Company in blasting in Ontario, and that the fuse used was manufactured and sold by defendants; (3) that while plaintiff was so engaged there was a premature explosion, through the fuse being defective, which severely injured plaintiff, causing him to lose one of his eyes; (4) that defendants were negligent in allowing the fuse to be manufactured and sold in a defective condition, the negligence being that there was a space left in the fuse in which

there was no powder, and consequently the fuse, which was trimmed to burn a foot a minute, caused the explosion prematurely; and (5) plaintiff claimed $5,000 damages. . . .

It was admitted that if the order can be sustained, it must be under the last clause of Rule 162 (e), which allows service to be made on a foreign defendant when the action is founded on a tort committed within this province. There is no such provision in the corresponding English Rule, nor, so far as I am aware, is there any similar procedure in the United States.

The question, therefore, to be decided, is important and not free from difficulty. Apparently now for the first time the point arises in our Courts, does the statement of claim disclose any tort committed by defendants in Ontario?

Mr. Phelan, with much ingenuity and vigour, contended that this action would lie. He conceded that a tort was "the infringement of some absolute right to which another is entitled:" Underhill on Torts, Canadian ed., p. 7; Addison on Torts, 7th Eng. ed., p. 1. He then argued that such a right was always localized, whether such right exists in respect of a man's property or of his character; and that in respect of his bodily welfare it necessarily went with him, and so that wherever he was injured, there a tort was committed, if such injury was the result of the wrongful act of another. And in this case he submitted that plaintiff having been, as alleged, seriously injured by the defective fuse of defendants' manufacture, there had been a tort committed by them within Ontario which enabled him to bring this action. . . .

[Reference to Thomas v. Winchester, 6 N. Y. 397; Pollock on Torts, 6th ed., p. 487 n., 488; Dixon v. Bell, 5 M. & S. 198; Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337; Francis v. Cockrell, L. R. 5 Q. B. 184, 501; Earl v. Lubbock, [1904] 1 K. B. 253, 74 L. J. N. S. K. B. 121; Heaven v. Pender, 11 Q. B. D. 503, 517; Winterbottom v. Wright, 10 M. & W. 109, 62 R. R. 534.]

There is no doubt that the statement of claim alleges an injury suffered by plaintiff in Ontario. But before he can sustain an action for a tort committed by defendants in Ontario, he must shew that defendants owed him as a duty, which they did not fulfil, to send out only perfect fuses, and that as a result of this he was injured. As I under-

stand the cases, no such duty exists, and therefore the order should not have been made, and must now be set aside and the action dismissed, and with costs if defendants think it worth while to ask for them.

MABEE, J. OCTOBER 22ND, 1906.

CHAMBERS.

REX v. TORONTO R. W. CO.

Criminal Law—Indictment of Electric Railway Company—Nuisance—Endangering Safety of Public—Removal from Sessions into High Court—Difficult Questions of Law—Delay of Trial.

Motion by defendants to remove an indictment of defendants for a nuisance from the York General Sessions into the High Court.

H. H. Dewart, K.C., and D. L. McCarthy, for defendants.

H. L. Drayton, for the Crown.

MABEE, J.:—The affidavit upon which the motion is made sets forth that nice and intricate questions of law will arise upon the trial; and, from the discussion of the case before me, it was apparent, I think, that such will be the case. It is not needful that those questions be anticipated or any expression of opinion made with reference to them; it is sufficient that the Court is satisfied that they exist: Short and Mellor's Practice, p. 96.

In the car fender case, Rex v. Toronto R. W. Co., 4 O. W. R. 277, the Court made an order similar to that asked here.

No reason was suggested by counsel for the Crown why the case should not be tried in the High Court; it can be tried at the Assizes some two months earlier than at the Sessions, and, if the alleged nuisance endangers public safety, as is alleged, it is desirable that there should be no delay in having the facts investigated.

The order may go as asked for the removal of the proceedings into the High Court.

MABEE, J. OCTOBER 22ND, 1906.

WEEKLY COURT.

RE FARRELL.

Will — Construction — Residuary Clause — Enumeration of Articles—Ejusdem Generis Rule—Construction to Include Subject of Lapsed Devise.

Motion by the executors of the will of Denis Farrell, deceased, for order declaring construction of will.

A. H. Clarke, K.C., for applicants.

F. W. Harcourt, for infants.

MABEE, J.:—One clause of the will of the testator is as follows: "I give, devise and bequeath all my real and personal estate,. . . . in the manner following, etc. One of the clauses which followed provided that a sister should have certain lands owned by the testator, which devise has lapsed.

The last clause is as follows: "All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles, and implements, I give and bequeath to my brother Andrew," etc.; and the Court is asked to say whether Andrew is entitled under the residuary clause to the lapsed devise.

Timewell v. Perkins, 2 Atk. 102, is an authority that general words will be cut down to articles ejusdem generis, not merely where the general words follow the articles, but when they precede it, provided it appears clearly that the enumeration of the articles is intended to be explanatory of the general words, and not merely to shew the extent of the gift. . . .

[Reference to Gower v. Davis, 29 Beav. 222; Mason v. Ogden, [1903] A. C. 1; King v. George, 4 Ch. D. 435, 5 Ch. D. 627.]

These cases follow the old case of Bridges v. Bridges, 8 Viner's Abr. 295.

Whether Timewell v. Perkins may be regarded as overruled or not, it certainly has not been followed in many of the later cases: Theobald, 5th ed., p. 205.

I think in the present case this will may be construed to prevent an intestacy as to the lapsed devise, and that the lands given to the deceased sister pass to Andrew.

The cases upon this question are numerous, and among others cited upon the argument were the following, some of them bearing also upon the use of the word "estate" and the words "give and bequeath" instead of the word "devise:" Crombie v. Cooper, 22 Gr. 267, 24 Gr. 470; McCabe v. McCabe, 22 U. C. R. 378; Stein v. Ruthdon, 37 L. J. Ch. 369; Patterson v. Hoddert, 17 Beav. 210; Hamilton v. Hodson, 6 Moo. P. C. 76; Re Kendall, 14 Beav. 608.

The costs of all parties should be paid out of the estate; those of the executors will be solicitor and client costs.

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TEETZEL, J. OCTOBER 22ND, 1906.

WEEKLY COURT.

DAVIES v. SOVEREIGN BANK AND CITY OF TORONTO.

Discovery — Examination of Officer of Defendant Municipal Corporation — Alderman of City—Rule 439 (a) 1 — Construction of—"Officer or Servant"—Legislative Functions.

Motion by plaintiff to commit John Noble, an alderman of the city of Toronto, who refused to be sworn on an appointment taken out by plaintiff for his examination for discovery as an officer or servant of the corporation, under Rule 439a (1).

F. Arnoldi, K.C., for plaintiff.

F. R. Mackelcan, for defendants the city corporation and for John Noble.

TEETZEL, J.:—The motion involves the question whether a member of the municipal council other than the mayor or other head of the corporation is examinable under this Rule, which reads: "439a (1). In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in

question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial."

The prior Rule made provision for the examination of "one of the officers" of the corporation, and though many decisions arose on the question whether certain persons were officers or merely servants of corporations, the question of the right to examine a member of a municipal council as an officer of a corporation never seems to have received judicial consideration.

The Rule received very liberal interpretation, and many persons who were alleged to be servants only were held to be examinable as officers.

The object of the Rule being to discover the truth in relation to the matters in question, the trend of the decisions was that the examination ought to be of such officers as are best able to give information respecting such matters, and it frequently occurring that an employee occupying no official position in the popular sense knew much more about the important facts of the case than any officer, the Rule was amended to embrace "any officer or servant."

While aldermen, as members of the municipal council, are in one sense officers of the corporation, I do not think the framers of the Rule intended to include them in the expression "officer or servant of such corporation." They are merely legislative officers of the corporation, and with the exception of the mayor or other head (who is by sec. 279 of the Municipal Act declared to be the "chief executive officer of the corporation") no individual executive or ministerial duties are imposed upon them. They are not employed by, nor are they in any way under the control of, the corporation while in office. They have no authority to act for the corporation, except in conjunction with other persons constituting a quorum.

The Municipal Act itself draws a sharp distinction between members of council and officers of the corporation.

. . .

[Reference to secs. 6, 315, 326, 327, 328, and also to Parts II. and V., of the Municipal Act.]

From the association in the Rule of the words "officer or servant," I think the inference is against the word "officer" being intended to extend to persons who are merely legislative officers, and that the true intention was to embrace as officers of a municipal corporation only persons who are such in the usual sense of that word, namely, persons under the control of the corporation and intrusted or employed to administer its affairs, or persons whose duty it is to execute the will of its legislative body.

The rule of construction applicable is that when two or more words of analogous meaning are coupled together they are understood to be used in their cognate sense, express the same relations, and give colour and expression to each other: see Maxwell on Statutes, 4th ed., p. 491. Or, as stated by Lord Bacon, "the coupling of words together shews that they are to be understood in the same sense:" 4 Bacon's Works, p. 26.

Motion dismissed with costs.

ANGLIN, J. OCTOBER 23RD, 1906.

CHAMBERS.

PEPPER v. OTTAWA TYPOGRAPHICAL UNION NO. 102.

Writ of Summons—Service on President of Trade Union—Effect of Registration of Union under Ontario Insurance Act—Body Corporate—Party to Action.

Appeal by defendants from order of Master in Chambers, ante 409, dismissing their motion to set aside service of a copy of the writ of summons on their president for them.

J. G. O'Donoghue, for appellants.

J. R. Code, for plaintiff.

ANGLIN, J., dismissed the appeal with costs.

ANGLIN, J. OCTOBER 23RD, 1906.

CHAMBERS.

MITCHELL v. HAGERSVILLE CONTRACTING CO.

Venue — Change — Preponderance of Convenience — Witnesses—Expense—Other Considerations.

Appeal by defendants from order of Master in Chambers, ante 410, dismissing their motion to change the venue from Welland to Cayuga.

C. J. Holman, K.C., for defendants.

R. McKay, for plaintiff.

ANGLIN, J., dismissed the appeal with costs to plaintiff in the cause.

BRITTON, J. OCTOBER 23RD, 1906.

TRIAL.

WILSON v. BEDSON.

Executors and Administrators — Action by Physician against Executrix of Deceased Patient—Remuneration for Professional Services — Account — Evidence — Corroboration — Costs.

Action against the executrix of the will of Sarah White, deceased, to recover the value of professional services rendered by plaintiff to deceased.

J. A. Ferguson, for plaintiff.

Z. Gallagher, for defendant.

BRITTON, J.:—Plaintiff was for a long time the family physician of Sarah White and of her husband.

The present action is for the balance of an account for services from 3rd December, 1898. The account as rendered is a large one, as plaintiff continued to attend Mrs.

White down to the date of her death, viz., 23rd July, 1903. Apparently Mrs. White was fond of money and slow pay. She thought a good deal of plaintiff, and often when not seriously ill desired his attendance, even when a physician could do little or nothing for her. She was a woman of strong will, and insisted upon having medical attendance. Plaintiff gave up his time and was obedient to her call, so he has the right to be paid what is reasonable for his time and attendance. It is often more difficult to deal with imaginary ills and nervous trouble than with wounds or fractures or diseases of bodily organs. Plaintiff gave a very clear statement of what services he rendered, and, although he has not been as careful in his book-keeping as perhaps he will be in future, he has established an indebtedness, and there has been ample corroboration in general support of plaintiff's own evidence. This corroboration is given by defendant herself and by witnesses. I have looked at the books of plaintiff to which he referred to refresh his memory, and at certain entries on which defendant relies in opposition to certain charges. Wherever entries either as to visits or amount charged have not supported items in the accounts rendered, I have disallowed the charges. Plaintiff apparently quite assented to this being done. Apart from certain entries and from a general feature of the last account, to which I will refer later, the only difficulty in the case was that presented by the evidence of Mary Anderson. She seemed most positive that there is error in the accounts to a considerable amount, and particularly as to the alleged attendances in April, 1901, and in April, 1903. This witness is a very intelligent woman, and is possessed of a good memory, but, unless she is a person of an altogether phenomenal memory, it is impossible that she should be able now, as a mere matter of memory, without having made any note of plaintiff's visits, to tell the days and number of plaintiff's visits in certain months of the years 1901 and 1903. That, however, is quite different from some important general evidence which she gave, and which, to some extent, I accept. The greatest conflict is as to April, 1903. Plaintiff charges for 48 visits in that month. The witness says plaintiff did not make one visit in that month. Plaintiff cannot be mistaken as to all those visits; the witness may be mistaken. There is nothing to warrant the conclusion that there is any wilful misrepresentation on this point.

I find that there was an indebtedness to plaintiff on 1st January, 1901, of $234, not $254, for which amount the note was given. The difference is by the omission of plaintiff to credit $20 paid on 21st October, 1899.

The accounts then to 1st January, 1900, would stand as follows:

Account rendered from 3rd Dec., 1898, to 30th April, 1899	$146
Account rendered from 30th April, 1899, to 5th Sept., 1899	57
Account rendered from 1st Nov., 1899, to 16th Oct., 1900	111
	$314
Less paid: 5th Sept., 1899 $30	
21st Oct., 1899 20	
16th Oct., 1900 30	
	80
	$234

Note should have been for $234.

I find the account for services in February and March, 1901, amounting to $31, proved. This I call account No. 1.

The account rendered from 1st April, 1901, to 7th January, 1902, amounted to $147, from which I deduct $18 not proved, and allow $129. This account I call No. 2.

The account from 4th March, 1903, to 23rd July, 1903, inclusive, as rendered, amounted to $395. From this I think there should be deducted $174, leaving $221, which amount should be allowed.

I arrive at my conclusion in reference to this deduction, by reason of what is found in the entries in plaintiff's books, and upon the evidence of Miss Anderson, and further because I am of opinion that in the case of a patient in the so-long continued condition of the deceased, Sarah White, the estate ought not, unless upon more evidence than was before me, to be liable for such a large number of visits from 1st May to 23rd July at the maximum charge. No injustice will be done to plaintiff by this deduction. I am fully confirmed in my opinion by the careful estimate of the witness Mary Anderson, made evidence by plaintiff's putting

it in on the trial, in which she states that plaintiff should deduct $250 from his account of $543. My deductions from the $543 amount to only $192. . . .

Plaintiff must get costs.

This is a case which, under the circumstances, defendant, representing the estate, was quite right in defending. She was not in a position to know what amount to pay into Court. Without having any jurisdiction, I can only express the opinion that she should be entitled to charge the costs, not only what she must pay plaintiff, but her costs of defence, against the estate of Sarah White.

Judgment for plaintiff against defendant as executrix, and payable out of the estate, for $448.62 with costs.

CARTWRIGHT, MASTER. OCTOBER 25TH, 1906.

CHAMBERS.

SHEARD v. MENGE.

Dismissal of Action—Want of Prosecution—Cause of Action—Abatement—No Question but that of Costs Remaining.

Motion by defendant to dismiss action for want of prosecution.

J. P. Eastwood, for defendant.

E. W. J. Owens, for plaintiff.

THE MASTER:—This action is for an injunction and damages in respect of injuries alleged to have been caused to plaintiff's land by a drain, for which defendant was alleged to be responsible.

It came on for trial on 17th and 18th September, 1901, before the Chancellor. Judgment was reserved, and on 25th October, 1901, he directed plaintiff to amend so as to have all owners interested in the drain in question brought before the Court, and reserved "costs already incurred to be disposed of by the trial Judge."

Since that time nothing has been done. In the meantime plaintiff has parted with his interest in his land, and defendant has lost his land by foreclosure.

On 25th May, 1906, defendant served notice of this motion . . . It was argued on 7th June . . . . Judgment was reserved to enable the parties to apply to the Chancellor for a disposition of the costs of the action, which it is admitted is now useless, there being nothing but these costs to be dealt with. The parties accordingly appeared before him a day or two ago, when the Chancellor thought it better that this motion should first be disposed of.

It was suggested at this stage that the action has abated, and therefore no order can be made. This, however, does not seem to me to be correct. The action is for wrongs alleged to have been committed (as they necessarily must have been, if committed at all) before its commencement. Both plaintiff and defendant are still alive; and the fact that both have ceased to be interested in the lands in question does not, in my understanding of the term, cause an abatement. The parties are both amenable to the jurisdiction of the Court, and the question still remains undecided whether plaintiff had any cause of action against defendant. Neither the rights nor liabilities of either party arising from the alleged wrongful acts of defendant would pass to their successors in title by transmission of interest in the land. If this could be done it would open a new and easy way for either party to escape from the burden of a possible heavy litigation.

In . . . Holdsworth v. Gaunt, ante 428, a similar motion was made under facts not widely different. And I think that the order that was made there is the one that should be made in this case, which seems to be ruled by Hunter v. Town of Strathroy, 18 P. R. 127, the latest decision I have been able to find bearing on the point.

Unless the parties can settle the matter otherwise, plaintiff must undertake peremptorily, and without looking for any further indulgence, to proceed with the action with all possible diligence, and in default the action must be dismissed with costs, except those of the trial of September, 1901, which will be dealt with by the Chancellor.

Plaintiff must elect within a week whether he will proceed or have his action dismissed with costs as above. If he chooses the first alternative, the costs of this motion will be in the cause only. There is no proof here of any

such steps having been taken here by defendant to have the matter closed as were shewn to have been taken in Holdsworth v. Gaunt, supra.

ANGLIN, J. OCTOBER 25TH, 1906.

WEEKLY COURT.

RE KERR AND TOWN OF THORNBURY.

Municipal Corporations—By-law for Raising Money to Construct Sidewalks—Submission to Electors—Failure to Comply with sec. 342 of Municipal Act—Appointment of Scrutineers—Date of Issue of Debentures—Date of Payment—Quashing By-law—Costs.

Motion by William Kerr to quash a by-law of the town of Thornbury authorizing the raising by way of loan of the sum of $5,000 to construct cement sidewalks in the town, on the ground that the by-law (which required the assent of the electors) was not legally and properly submitted to the electors and was not approved by them, and on other grounds.

J. S. Lundy, for the applicant.

T. H. Dyre, Thornbury, for the town corporation.

ANGLIN, J.:—I reserved judgment over night for the purpose of ascertaining accurately from the members of the Divisional Court, or one of them, which disposed of the case of Re Bell and Township of Elma this week, what was the exact ground of decision in that case. I have ascertained from the Chief Justice of the King's Bench that the ground of decision was that the provisions of sec. 341 of the Municipal Act are imperative, and that an omission in a by-law, to which that section applies, to fix a time and place for the appointment of persons to attend the various polling places and at the final summing up of the votes by the clerk, is fatal.

In this case that provision was complied with, but, although the by-law fixed the time and place, the officer to whom that duty was intrusted, the mayor of Thornbury, neglected and failed to attend, and consequently the provisions of sec. 342 were not complied with.

If failure to comply with the provisions of sec. 341 would be fatal, then I think failure to comply with the provisions of sec. 342 must also be fatal. It prevents persons attending as scrutineers for the polling and the final counting up. On this ground, therefore, I think the by-law must be quashed.

There is also another objection which was taken. The by-law provides a date for the issue of the debentures, and provides for payment of the last of these debentures at a date more than 20 years after their issue. That objection is fatal. That objection was not taken upon the notice, and if the by-law had been quashed upon that ground only, I would not have given costs; but the first objection was taken, and is sufficient. The other objections taken are not allowed.

The costs will be limited to the objections which have been taken successfully, and the costs of affidavits supporting objections which have not been given effect to will not be allowed.

ANGLIN, J. OCTOBER 25TH, 1906.

WEEKLY COURT.

MUNRO v. SMITH.

MACKIE v. SMITH.

RICHARDSON v. SMITH.

Mines and Minerals—Ontario Mines Act, 1906—Claims for Mining Locations—Duty of Mining Recorder to Record—Applications for Mandamus—Ministerial Act—Result of Failure to Record—Rights of Applicants—Previous Adverse Claims Undisposed of—Bar to Recording Fresh Claims—Affidavit—Form—Appeal to Mining Commissioner—Judicial Functions of Recorder—Concurrent Jurisdiction of Mining Commissioner to Grant Mandamus—Powers of High Court—Merits—Discretion—Intituling Proceedings in Court—Costs.

Motion by plaintiffs for orders of mandamus requiring the mining recorder of the Temiskaming mining division,

defendant George T. Smith, to accept and record the claims of plaintiffs for mining locations.

J. Bicknell, K.C., for plaintiffs.

G. T. Blackstock, K.C., for defendants the Temiskaming Mining Co.

J. A. Macintosh, for defendant Ganz.

W. D. McPherson, for defendant Smith.

Grayson Smith, for defendant Cartwright.

ANGLIN, J.:—The first question to be considered is, whether the duty of recording is judicial or ministerial. If the duty be judicial, the remedy of mandamus would probably not lie. The duty is, in my opinion, purely ministerial.

Section 51 of the Mines Act of Ontario, 1906, provides for the appointment of this officer in these terms: " . . . who shall be an officer of the Bureau of Mines to receive and record applications for mining lands in the respective divisions, and to carry out the provisions of this Act as prescribed."

Section 58 requires the mining recorder " to forthwith enter in the proper book in his office the particulars of every application for a claim presented by a licensee, and to file such application, sketch, or plan in his office."

Section 59 requires an applicant, when seeking to record a claim, to produce his license, and requires the mining recorder to indorse upon such license a note of the record made.

There is nothing in these sections requiring anything like the exercise of judicial functions. The recorder has to be satisfied, as every ministerial officer has to be satisfied, that everything has been done which is prescribed as pre-requisite to recording, and upon that being done he discharges his functions, in the ordinary course, much as a registrar of deeds does.

But it is urged on behalf of the respondents upon these applications that, though the duties be ministerial, mandamus should not be granted.

In the first place it is argued that no harm will result from the failure to record; that no right is acquired by a

person making application; and, consequently, that he has no status to ask that any right should be given effect to.

As to no harm resulting from the failure to record, sec. 156, it seems to me, affords a complete answer. The failure to record within 15 days after staking out may have and probably would have the effect of depriving a person who has staked out, if his staking out is upon a first discovery, and is otherwise valid, of the rights which, in other circumstances, such staking out would have conferred upon him.

It is true that no right, that is, no interest, in the land is acquired by the application to record a claim; but it does not by any means follow that the applicant has not rights which are affected by refusal to record the claim, if the claim be a valid one. He has, I think, such rights, and I think these rights are injuriously affected. . . . or may be so affected.

Then it is said that, upon the proper construction of the statute, only one mining claim can be of record at a time, and that until the first mining claim recorded is disposed of, no other claim may be recorded in respect of the same portion of territory.

This argument depends upon sec. 157 of the statute, which requires the applicant for record to make an affidavit stating, amongst other things, that the "deponent has no knowledge and has never heard of any adverse claim by reason of prior discovery or otherwise." This section proceeds to state that the affidavit may be made upon form No. 14. Glancing at form No. 14, it seems clear that the section cannot have been intended to have put upon it the construction which its very terms might warrant, because clause 2 of form No. 14 reads as follows: "That I have no knowledge of and have never heard of any adverse claim to the said mining claim, except as follows." Now, if there can be any exception, and if the form contemplated that there may be an exception, it seems to follow that sec. 157 cannot have been intended, if form No. 14 is to be looked at in connection with the construction of it, to debar every bona fide claimant who has any knowledge of any adverse claim, valid or invalid, recorded or unrecorded, staked out or not staked out.

It seems to me that the true construction of sec. 157 is that the applicant is required to make disclosure of any

adverse claim, especially of any such claim unrecorded, so that the recorder may have knowledge thereof and give notice to persons having such adverse claims, under sec. 158, since he gives effect to the application in 60 days if no adverse claim or dispute note is lodged: sec. 58.

Were the contention that no claim can be recorded while a prior recorded claim is awaiting disposition, sound, a first discoverer who had duly staked out his claim, but delayed a few days in recording it, might find himself cut out by some unscrupulous adventurer whose conscience did not balk at a cast iron affidavit in the very terms of sec. 157, and who had thus succeeded in recording a claim. The real discoverer would thus find himself precluded from recording his claim, though the 15 days had not expired, and, unless the fraudulent claim of the adventurer should be disposed of with a diligence scarcely to be expected, would lose the benefit of his staking, because unable to record his claim within the 15 days prescribed by sec. 156.

To state this possible case seems to me sufficient to make it clear beyond all doubt that such was not the intention of the legislature, and that such cannot be the nullifying effect of sec. 157 upon the explicit language of sec. 58. Were it so, this Act would be a formidable weapon in the hands of fraudulent and dishonest prospectors.

From secs. 60 and 62 it seems to me quite apparent that the judicial functions of the mining recorder only commence after a claim has been recorded, in respect of that claim, and that they do not commence until record has been made. Until that time the mining recorder is not required to deal with a claim in any judicial capacity, but merely as a ministerial officer who is compelled to record it, under the sweeping terms of sec. 58, which seem to admit of no exception.

From the judicial functions which he discharges, under the jurisdiction conferred by secs. 52 and 60, provision is made for appeal to the mining commissioner; and, it seems to me, that right of appeal is clearly limited to decisions in the discharge of those judicial functions, and does not at all apply to a refusal on the part of the mining recorder to record a claim, of which no record is made, and for appeal from which no machinery seems to be provided.

Then it was also argued that mandamus should not be granted because power is conferred by this very Act (sec.

9 (f)) upon the mining commissioner, who is by sec. 8 of this statute made an officer of the High Court, to grant mandamus and injunction in all proceedings where the same are, or are deemed by him to be, requisite for the granting of relief in any matter in which jurisdiction is given by this Mines Act.

It may be and probably is the case that concurrent jurisdiction is conferred by this Act upon the mining commissioner, but it is very obvious that such an application to the mining commissioner would afford no relief in this case, because it is stated on behalf of the mining recorder that the reason he had refused to record these claims was that he had been instructed by the mining commissioner that, in his opinion, these claims should not be recorded until the claims were disposed of. It therefore appears to be as much the refusal of the mining commissioner as that of the mining recorder. Therefore, to ask the applicants to apply to the mining commissioner would appear to be to ask him to appeal from the mining commissioner to the mining commissioner himself.

It by no means follows that the ordinary jurisdiction of the Courts to grant mandamus is ousted. I do not read that section as at all meaning that a person having rights entitling him to injunction or mandamus, by reason of the failure of some officer to comply with the provisions of the Act, must resort to the mining commissioner for relief. He may come to the Court, and, if he makes out a proper case, have that relief granted. Here he has made out such a case.

I do not say anything about the merits. There is a great deal upon the merits which might lead one to refuse the application, if discretion might be exercised. I speak now more particularly of the case of Munro. All these matters can be disposed of by the mining recorder when he deals with the claims when they are recorded, and when the mining recorder may deal with them, as he must, judicially.

Upon the face of the proceedings I find that they have been intituled "Pursuant to the Mines Act, 1906," as well as in the High Court of Justice. Such a caption on proceedings in this Court is wholly unwarranted. The Act provides that those words shall be placed at the head of all documents brought before the mining commissioner.

Before any order is issued upon the present applications, I must require the solicitors for the applicants in the various actions to amend their proceedings by removing these words, not only from the writs of summons but from all affidavits in these matters, which are on file in this Court. Upon that being done, orders of mandamus may issue in each of these cases—not prerogative writs, but orders in these actions.

As to costs, in the case of the recorder, who says he has acted under what may be regarded as instructions from his superior officer, I am not disposed to award costs against him. This is the first time the question has come up; but I see no reason why the adverse applicants, who have taken upon themselves the burden of opposing these applications—very unnecessarily, as they might have allowed the official to justify himself—should not be called upon to pay the plaintiffs' costs.

The order, therefore, will be for the payment of the costs in each of these cases by the opposing claimants. . .

OCTOBER 24TH, 1906.

DIVISIONAL COURT.

BURKE v. TOWNSHIP OF TILBURY NORTH.

Municipal Corporations—Drainage—Deposit of Earth on Plaintiff's Land—Claim for Compensation—Remedy—Action—Forum—Drainage Referee.

Appeal by defendant corporation from judgment of CLUTE, J., dated 15th May, 1906, awarding plaintiff $10 and costs.

The plaintiff was the owner of a part of lot 18 in the 1st concession of the township of Tilbury North, in the county of Essex. In June, 1904, the corporation contracted with one Roszel to construct a ditch or drain on the highway adjoining plaintiff's land. During operations Roszel, notwithstanding plaintiff's protest, dumped a large quantity of earth and mud on the boundary of plaintiff's land in such

a manner that plaintiff was unable to drain her property. The action was brought for damages sustained by reason thereof.

A. H. Clarke, K.C., for defendant corporation.

C. A. Moss, for defendant Roszel.

H. H. Bicknell, Hamilton, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.), was delivered by

MABEE, J.:—Plaintiff's lands are assessed for the work that was being done in repairing the drain; in other words, she was a party to the by-law that was passed by the council for providing the funds for these repairs. The specifications prepared by the engineer provided that the earth excavated from the drain should be thrown upon the highway to the north of the drain. The contractor wished liberty to deposit some of this earth at certain cuts upon the adjacent lands to the south of the drain, and a number of owners gave their consent to his doing so. It is said that plaintiff's agent also consented to the earth being deposited upon plaintiff's lands; his authority to give such assent is denied; be that as it may, the whole of what is alleged as the trespass in this case is the action of the contractor in varying from the written specifications at certain portions of the work, and depositing the excavated earth upon the south instead of the north bank of the drain, such variation not being objected to by the other landowners interested, and the contractor supposing that plaintiff had, through her agent, given her consent.

A purely local work was being undertaken; the township as a whole was not interested; the only persons concerned were those within the drainage area, whose lands were being taxed for the expense; the only persons particularly interested in the earth being deposited upon the north or south bank were the owners of the immediately adjacent lands. Under these circumstances, it was quite open to the parties to vary the specifications, with the consent of those interested, and it is contended that that is all that was done. If plaintiff gave no consent, and such has been found by the trial Judge to be the fact, then the deposit of the earth upon her land gave her a claim for compensation consequent upon the construction or repair of this drain. It

is not contended that the contractor did more than spread the earth as the specifications provided, except that it was spread upon the south instead of the north side of the drain.

Section 93 of the Municipal Drainage Act (as re-enacted in 1 Edw. VII. ch. 30, sec. 4), provides that " all proceedings to determine claims . . . arising between . . . individuals and a municipality . . . or between individuals . . . in the construction, improvement, or maintenance of any drainage work . . . or consequent thereon, or by reason of negligence . . . shall hereafter be made to and shall be heard or tried by the Referee only," &c., &c. Then sub-sec. 2 provides that these proceedings shall be commenced by the service of a notice setting forth the damages or compensation, and sub-sec. 5 provides that no proceeding within the section shall be instituted otherwise than as the section provides.

The legislature has therefore taken away the ordinary remedy by writ and proceedings following thereon in the High Court, County Court, or Division Court, as the case might be, and provided a forum for adjusting such claims. Formerly, where the party had misconceived his remedy and proceeded by writ, and it was later on discovered that his claim was one for compensation under the special Act, the Court transferred his claim to the Referee, and the cases are numerous where that was done. Now, however, no power exists in the Court to make any order of transfer, and where proceedings are taken for the recovery of claims that fall within sec. 93 otherwise than as provided by that section, they fail.

Section 95 provides for the local drainage area bearing the expense of working out the provisions of the Act, and where damages and costs are payable by a municipality arising from proceedings taken under the Act, all the lands and roads assessed for the drainage work contribute pro rata towards the payment thereof.

This plaintiff has a judgment against the defendant township for a large sum for costs payable out of the township funds generally, while had the proceedings been taken as the Act provides, plaintiff would have obtained her compensation, and it and the expense attendant upon adjusting it would have been borne by the lands for the benefit of which this work was undertaken.

I think it is clear that the claim of plaintiff falls under sec. 95, and that her remedy is as that section provides, and that the action is improperly brought in the High Court. . . .

I think the appeal should be allowed with costs and the action dismissed with costs throughout.

OCTOBER 25TH, 1906.

DIVISIONAL COURT.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations — Local Option By-law — Motion to Quash — Vote of Ratepayers — Town Divided into Wards—Right of Persons Owning Property in Different Wards to Vote more than once—Confusion from Colour of Ballot Papers—Persons Voting without Right—Irregularities in Taking of Vote—Effect on Result—Municipal Act, sec. 204.

Appeal by the town corporation from the order of MABEE, J., ante 239, quashing a local option by-law of the town of Owen Sound, which had been submitted to vote on 1st January, 1906, when 1238 votes were cast in its favour and 762 against it, and it was declared carried by a majority of 476.

F. E. Hodgins, K.C., and J. W. Frost, Owen Sound, for appellants.

J. Haverson, K.C., and W. H. Wright, Owen Sound, for Sinclair.

The judgment of the Court (MULOCK, C.J., MABEE, J., CLUTE, J.), was delivered by

MULOCK, C.J.: . . . It appears that Owen Sound is divided into four wards, and that a number of ratepayers were each rated in several wards, in which they held property qualification, and it was contended in their behalf that each one of this class was en-

titled to vote in each ward in which he was so rated. This was refused them, and one question is whether such refusal can be sustained.

The Liquor License Act (R. S. O. 1897 ch. 245, sec. 141) enacts that the council may pass what is commonly known as a local option by-law, provided that "before the final passing thereof it has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act."

The only provision in the Consolidated Municipal Act, 1903, entitling a ratepayer to vote in more than one ward in respect of a by-law is contained in sec. 355. That section is as follows:—"355. Where a municipality is divided into wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law."

The petitioner contends that this section applies to voting on the local option by-law in question, but the history of the section, including its context, does not, I think, support this contention. Tracing it backwards, the reference to enactments shews that the section had its origin in the Municipal Amendment Act, 1892, sec. 17 of which enacts as follows: "The following is added to the Municipal Act as section 309a: 'Where a municipality is divided into wards, such ratepayer shall be so entitled to vote in each ward in which he has the qualification to entitle him to vote on such by-laws.'"

Sections 308-9, immediately preceding this added section, deal with by-laws creating debts payable at a future date, and declare what shall be the qualification of a ratepayer to entitle him to vote thereon. Then follows the added section, which declares that "such" ratepayer, that is, the ratepayer of the kind mentioned in sec. 308 or 309, may vote in each ward in which he has the qualification to entitle him to vote "on such by-laws," that is, on such by-laws as are referred to in secs. 308-9, and which in Re Croft and Town of Peterborough, 17 A. R. 21, were held to be limited to by-laws creating debts.

Again sec. 309a says "each ratepayer shall be so entitled to vote." The word "so" clearly refers to some preceding provision entitling a ratepayer to vote, and this is found in secs. 308-9, each declaring that "every ratepayer . . . shall be entitled to vote on any by-law requiring the assent

of the electors, who," etc. The use here of the word "so" shews that the reference is to the kind of ratepayer thus described in secs. 308-9, namely, a ratepayer who is entitled to vote on a by-law creating a debt.

Section 309a being thus by its express language made applicable only to by-laws of the kind referred to in secs. 308-9, that is, to by-laws creating debts, it is unnecessary as an aid towards ascertaining its meaning to seek for the reason for such legislation. The reason itself, however, seems quite manifest. But for the added section a qualified ratepayer was entitled to only one vote, no matter to what extent the burdens of taxation created by the by-law should fall upon him or his property. The added section, in a somewhat crude fashion doubtless, sought to correct this apparent injustice, by allowing a ratepayer a vote in each ward in which he had the required property qualification.

If sec. 390a had remained unchanged, it is clear that it would not have applied to a local option by-law, it not being a by-law creating a debt. But the language of the section was changed by the consolidation of 1897, the commissioners having struck out the word "such" before "ratepayer" and substituted therefor the word "each," and also having struck out the words "on such by-laws" and substituted therefor the words "on the by-law."

The section thus changed reads as follows:—"Where a municipality is divided into wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law;" and, so changed, it appears as sec. 355 in R. S. O. 1897, and also as sec. 355 in the Consolidated Municipal Act, 1903, which is the Act now in force.

The substitution of the words "on the by-law" for the words "on such by-law" does not, I think, remove the restriction of the original wording. "On the by-law" is not synonymous with "on a by-law" or "on any by-law," but is restrictive, confining the right so to vote to some particular by-law. What by-law? Manifestly the by-law referred to in the preceding sections for creating a debt.

The verbal changes to the section, made in the first instance by the commissioners, do not, I think, enlarge its scope. Moreover, for the reason above set forth, the words "each ratepayer shall be so entitled to vote" appear to me

to expressly confine the application of the substituted section as found in the Revised Statutes of 1897 to the class of by-law referred to in the two immediately preceding sections, that is, a by-law creating a debt. Further, in interpreting the work of the commissioners in preparing the consolidation of the statutes, it must be assumed that they did not intend to change the law. To give to sec. 355 the meaning contended for by the petitioner would be to determine that the commissioners had extended to all classes of by-laws a system of voting which until then was limited to but one class.

The legislature in passing the Consolidated Municipal Act of 1903 re-enacted without change sec. 355 of R. S. O. 1897, and therefore its meaning remained unchanged. For these reasons, I am of opinion that in voting on the by-law in question no elector was entitled to more than one vote, and the objection based on the contrary view must fail.

The following further objections in respect of the validity of the by-law are taken by the petitioner:—

(a) The clerk of the said town did not prepare nor certify to the voters' list furnished to the several deputy returning officers, as required by secs. 152 and 348 of the Consolidated Municipal Act, 1903.

(b) No copy of the defaulters' list, certified by the treasurer or collector pursuant to sec. 137 of the Consolidated Municipal Act, 1903, was delivered by the clerk to the several deputy returning officers, as required by sec. 152 of the said Act.

(c) The town clerk did not deliver or cause to be delivered to the several deputy returning officers, at the said voting or election, the certificates prescribed by sec. 156 of the Consolidated Municipal Act, 1903.

(d) The several deputy returning officers, poll clerks, and agents who attended at the taking of the poll did not take the statutory declaration of secrecy prescribed by sec. 368 of the Consolidated Municipal Act, 1903.

(e) The several deputy returning officers and poll clerks at said voting or election did not record the names of the voters, their qualifications and residence, in the manner prescribed by sec. 165 of the Consolidated Municipal Act, 1903, and did not otherwise observe the provisions of said section.

(f) The several deputy returning officers did not certify as to the number of persons who voted at the respective polling places in the manner prescribed by secs. 177 and 362 of the Consolidated Municipal Act, 1903.

(g) The several deputy returning officers, at said voting or election, did not make and subscribe the declaration required by sub-sec. 2 of sec. 177 and by sec. 362 of the Consolidated Municipal Act, 1903.

(h) Persons other than voters were allowed to enter the polling compartments or polling places and to interfere with voters in the marking of their ballots, contrary to the provisions of the said Act.

(i) The voters' lists used at said election or voting were not prepared or used in the manner prescribed by the Consolidated Municipal Act, 1903, and the Voters' Lists Act.

(j) The by-law was not published in the manner provided by sec. 338 of the Consolidated Municipal Act, 1903.

(k) The clerk of the said town did not deliver to the different deputy returning officers the directions to voters prescribed by secs. 146, 147, and 352 of the said Act.

4. That at the said voting or election a large number of persons voted upon the said by-law who were not legally entitled to vote thereon and who were disqualified from voting.

5. That the said voting or election was not regularly conducted, in that the ballots used thereat were similar in form and description to the ballots used in connection with another by-law, No. 1178, then being voted upon, whereby the voters were confused or misled.

The matters complained of in the above quoted objections lettered a, b, c, d, e, f, g, h, i, and k, have to do with the machinery in connection with an election under the Act. The formalities said to have not been complied with are not such as are required by the statute, in express words, to be observed as a condition precedent to the right to pass the by-law, but come within the curative provisions of sec. 204 of the Municipal Act.

The meaning of that section has received judicial interpretation on several occasions. . . .

[Reference to Re Huson and Township of South Norwich, 19 A. R. 350; Re Young and Township of Binbrook, 31 O. R. 108, 111; Woodward v. Sarsons, L. R. 10 C. P. 733.]

In the present case there is nothing to shew or even to suggest any intentional violation of the directions of the Act. Nor is there any reason for believing that any disregard of the statutable formalities called for by the Act affected the result. There is no evidence to shew that a single elector was prevented from recording his vote, or that the return was not made in strict accordance with the voting.

Every elector appears to have had the free and fair opportunity of voting for or against the by-law, and out of the total number of 2,000 votes cast, there was a majority of 476 in its favour. It, therefore, seems to me that the election was conducted in accordance with the principles laid down in the Act, and that the curative provisions of sec. 204 may be properly applied in respect of the matters referred to in the objections lettered a, b, d, e, f, g, h, i, k, and they are therefore overruled.

As to objection j, that the by-law was not published in the manner provided by sec. 338 of the Act, the petitioner offered no proof in support of this objection, whilst the clerk of the municipality swore that it was published as required by law. This objection, therefore, is overruled.

As to objection No. 4, that a large number of persons voted upon the by-law who were not legally entitled to vote thereon and who were disqualified from voting, it is said 100 of such persons were allowed to vote. Conceding the full force of such an objection, it should not, I think, be allowed to defeat the by-law. For, even taking the alleged 100 illegal voters from the majority cast in favour of the by-law, there would still remain a clear majority of 376 in its favour. It may also be observed by reference to the affidavits in support of the objection that there is no evidence to prove want of qualification on the part of at least 75 of the 100. The petitioner has assumed that a person is not a qualified elector unless at the time of voting he is possessed of the identical qualification assigned to him in the voters' list or assessment roll, and he has confined his evidence to endeavouring to prove that these persons did not possess the qualifications credited to them by the assessment roll, whereas a person may be possessed of other sufficient qualification than that mentioned in the roll, and in that event would be entitled to vote, notwithstanding that he may not possess the particular qualification credited

to him. For all that appears, over 75 of the persons whose votes are objected to may be qualified voters, and the petitioner has failed to discharge the onus which was upon him to prove want of qualification, but, even if none of the whole 100 were qualified, it is not shewn that their being allowed to vote was the result of any evil intent, and the proper mode in this case of correcting such an error would be by deducting the number of illegal votes from the majority. Such a deduction would not affect the result of the election. This objection must, therefore, be overruled.

As to the last objection, No. 5, that the voting was not regularly conducted in that the ballots used thereat were similar in form and description to the ballots used in connection with another by-law then being voted upon, whereby the voters were confused or misled, it appears that at the time of the voting on the by-law in question another by-law was also being submitted to the electors, being a by-law to authorize a loan of a sum of money to a manufacturing company, and it is contended that the ballots in each case were so similar as to lead to confusion. There is nothing in the Act prescribing any duty as to the colour of ballot paper. The ballot paper for the local option by-law was scarlet, that for the other by-law pink, the difference in colour when they are side by side being most noticeable. The local option by-law has printed on its face in long primer type, the following words:—"Voting on by-law No. 1172 of the Town of Owen Sound, A by-law to prohibit the sale of liquor by retail in the municipality of the Town of Owen Sound, submitted to the council of the Town of Owen Sound, November 13th, 1905." Whilst the other ballot paper has printed on its face, also in long primer type, the following words:—"Voting on by-law No. 1178, A by-law to authorize a loan of $25,000 to the Kennan Woodenware Manufacturing Company, Limited, upon mortgage, and to authorize the issue of debentures to raise said loan, to fix the assessment for ten years, and to confirm a certain agreement between said company and the corporation. Submitted to the council of the Town of Owen Sound December 6th, 1905."

It appears to me that no person of ordinary intelligence, exercising ordinary care, could mistake one ballot paper for the other. It is the duty of the voter before marking his ballot to read it, and I am unable to understand how

the municipality could have made it easier for the voter to distinguished between the two ballots in question, and, therefore, as regards the ballot used on this occasion, I think it meets all the requirements of the Act. This objection is therefore overruled.

The Court being of opinion that the voting was conducted in accordance with the principles of the Act, and that no disregard of statutable formalities affected the result, this appeal should be allowed with costs and the original application dismissed with costs.

ANGLIN, J. OCTOBER 26TH, 1906.

CHAMBERS.

MONTGOMERY v. RYAN.

Summary Judgment—Rule 603—Suggested Defence — Bank —Account—Reference.

Appeal by defendant from order for summary judgment granted by Master in Chambers, ante 430.

W. M. Hall, for defendant.

W. N. Ferguson, for plaintiff.

ANGLIN, J., ordered that if defendant files an affidavit stating that overcharge of interest will wipe out debt, defendant shall have leave to defend in respect of part of the claim, $4,000. If affidavit not filed, judgment will stand for $8,000. Costs of motion before Master to be costs to plaintiff in the cause. Costs of appeal to be costs to defendant in the cause.

ANGLIN, J. OCTOBER 26TH, 1906.

TRIAL.

McCORMACK v. TORONTO R. W. CO.

Damages—Assignment of Claim for Damages ex Delicto—Action by Assignee—Cause of Action—Chose in Action—Invalidity of Assignment.

Plaintiff sued for personal injuries to himself sustained by his being run down by a car of defendants, and also for

the killing of the horse which he was riding, the property of his master—claiming as to the latter, under an assignment from the master made in consideration of plaintiff's releasing a claim for wages amounting to $8. The jury found defendants liable, and assessed the damages for plaintiff's personal injuries at $100 and for the killing of the horse at $125.

J. M. Godfrey, for plaintiff.

D. L. McCarthy, for defendants.

ANGLIN, J.:—The interesting question is raised by the defendants, whether the right of the master to recover damages for the killing of his horse by defendants was assignable to plaintiff.

Section 58, sub-sec. 5, of the Judicature Act is as follows:—"Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor." This statutory provision has been held to have only affected procedure and not to have enlarged the class of things lawfully assignable.

In King v. Victoria Insurance Co., [1896] A. C. 250, the Supreme Court of Queensland having held that the words "debt or other legal chose in action" include "all rights the assignment of which a court of law or equity would before the Act have considered lawful" (p. 254), Lord Hobhouse speaking for the Judicial Committee said (p. 256):—"Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term 'legal chose in action.'" See too Tolhurst v. Associated Portland Cement Co., [1902] 2 K. B. 660, 676, [1903] A. C.

414, 424; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602, at p. 629. But, while the Queensland Court expressly held that a right to recover damages for injuries to a cargo of wool sustained in a collision, was a "legal chose in action" and assignable to the plaintiff as such, the Judicial Committee "prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term. They rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured:" p. 256. The assignability they rest upon the right of subrogation, holding that the insurer being thus entitled to the remedy of the insured, the assignment in writing under the Judicature Act was effectual to enable the insurer to sue in his own name. The assignability of such a right of recovery, therefore, apart from the right of subrogation, rests entirely upon the authority of the Supreme Court of Queensland and not at all upon that of the Privy Council. But see Prittie v. Connecticut Fire Insurance Co., 23 A. R. 499, 453, per Osler, J.A.

In Laidlaw v. O'Connor, 23 O. R. 696, Armour, C.J., regarding a claim by a client against a firm of solicitors for negligence in directing the distribution of certain moneys, as arising out of tort, held it not assignable. In the Divisional Court, while this judgment was affirmed on the ground of absence of proof of negligence, MacMahon, J., treating the claim as one "arising out of contract," held it to be assignable . . . But in May v. Lane, 71 L. J. 869, the English Court of Appeal held that a right to recover damages for breach of contract to lend money is not assignable. . . .

In Dawson v. Great Northern R. W. Co., [1904] 1 K. B. 277, Wright, J., deeming compensation for an injurious affection of lands under statutory authority to be in the nature of damages for a tort, held that the right to recover such compensation is not a legal chose in action, and is therefore non-assignable. The Court of Appeal reversed this judgment, on the ground that such a claim for compensation is not a claim for damages for a wrongful act, [1905]

1 K. B. 260; but the Lords Justices certainly do not countenance the view that a right of action ex delicto is assignable.

There is a very considerable body of English authority for the proposition that a right to damages, though arising ex delicto, is a chose in action: Colonial Bank v. McWhinney, 30 Ch. D. 261, 275, 287, 11 App. Cas. 426; Termes de la Ley, Choses in Action; Blount's Law Dictionary, Chose in Action; Williams on Personal Property, 12 ed., p. 4. Blackstone apparently held the contrary view: see articles in Law Quarterly Review, vol. 10, pp. 143, 152; vol. 9, p. 311; vol. 20, p. 113; Warren's Choses in Action, p. 161; Cohen v. Mitchell, 25 Q. B. D. 262; . . .Stanley v. Jones, 7 Bing. 369, 375; . . . Simpson v. Lamb, 7 E. & B. 84; Traill & Sons v. Actieselskabat Dalbeattie Limited (1904), 6 F. 798.

Notwithstanding the idea of several text writers that causes of action in tort arising out of injuries to property, in which the measure of damages is certain, differ materially from causes of action arising out of personal injuries; that many objections which may be urged against holding the latter class of causes of action to be assignable do not apply to the former; and that although the latter are non-assignable the former may be assigned—a view which receives some support from the dictum of Park, J., in Stanley v. Jones, ubi sup., and is held by many Courts in the United States, I can find no English or Canadian authority upon which to rest such a distinction. It is true that causes of action of the former class pass to assignees in bankruptcy, while those of the latter do not. But this is because of the construction put upon the Bankruptcy Acts.

The decisions of the English Court of Appeal in May v. Lane, of Wright, J., in Dawson v. Great Northern R. W. Co., and of Armour, C.J., in Laidlaw v. O'Connor, afford a body of authority which I may not disregard. They are quite inconsistent with the assignment of a cause of action ex delicto, though it be for injury to property as distinguished from personal injury. This view as to the non-assignability of rights to damages ex delicto, accords with doctrines of English jurisprudence which have obtained for many years: Y. B., 34 Hen. VI. 30, pl. 15; Prosser v. Edmonds, 1 Y. & C. 481, 497, 499; and, excluding American

cases, is in conflict only with the Queensland decision in King v. Victoria Fire Insurance Co. It must, in my opinion, prevail.

There will therefore be judgment for plaintiff for $100 for his personal injuries, and dismissing the claim for loss of the horse. As plaintiff apparently brought his action for both causes in good faith, and with a desire to avoid multiplicity of suits, I exercise my discretion as to costs in his favour to the extent of awarding him costs on the County Court scale without set-off.

CARTWRIGHT, MASTER. OCTOBER 27TH, 1906.

CHAMBERS.

McDOUGALL v. MEIR.

Venue—Change—Convenience—Delay—Counterclaim.

Motion by defendant to change venue from Owen Sound to Sault Ste. Marie.

H. R. Frost, for defendant.

W. H. Blake, K.C., for plaintiff.

THE MASTER:—The action is ready to go to trial at the non-jury sittings at Owen Sound on 5th November next. If the venue were changed, there would be a delay of from 6 to 7 months, as the sittings at Sault Ste. Marie are usually held in June. This would be a sufficient ground for refusing to make the change: Servos v. Servos, 11 P. R. 135.

The motion is based on the counterclaim, which defendant says will necessitate "over 20 witnesses" who reside at the Sault. I am not impressed with this, in view of the uncontradicted affidavit of plaintiff, and the admission by defendant of a liability of $1,100 in January last, when nothing was said of the counterclaim.

Defendant invoked the decision in Farmer v. Kuntz, 7 O. W. R. 829, affirmed 8 O. W. R. 4. There the facts were entirely different, as almost all the witnesses on both

sides were residents of the county of Huron, in which the cause of action and counterclaim both arose. That decision should govern if in the present case plaintiff had for his own convenience or to secure a speedier trial laid the venue at Toronto or Hamilton.

Motion dismissed; costs in the cause.

OCTOBER 27TH, 1906.

DIVISIONAL COURT.

SMITH v. McINTOSH.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Notice of Injury—Reasonable Excuse for Failure to Give—Release of Cause of Action—Inadequacy of Payment—Surrounding Circumstances—Invalidity.

Action for damages for injuries sustained by plaintiff on 13th March, 1905, while employed as a steam engineer in the mill or factory of defendants at Toronto.

The action was tried before ANGLIN, J., and a jury, at Toronto, on 12th and 13th February, 1906.

Plaintiff was injured by the bursting of a blow-pipe attached to the boiler which supplied the steam power to defendants' mill.

Defendants, besides denying any negligence, and alleging contributory negligence on the part of plaintiff, set up the payment before action of $30 in full settlement, satisfaction, and discharge of plaintiff's claim. The further objection was taken, on motion for nonsuit, that no notice was served as required by the Workmen's Compensation for Injuries Act.

The trial Judge submitted questions to the jury as to negligence, etc., and asked them to assess the damages. The jury answered all the questions in favour of plaintiff, and assessed the damages at $250.

Upon the motion for a nonsuit, the trial Judge held that want of notice was fatal. In giving his decision he further said: "I would also find, if necessary, that the release given

was given by plaintiff with full knowledge of its contents, was given by him with full intention of releasing defendants from all liability." And upon the two grounds the action was dismissed.

Plaintiff appealed and asked for judgment for $250 upon the findings of the jury.

J. M. Ferguson, for plaintiff.

R. U. McPherson, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.), was delivered by

BRITTON, J.:—The grounds of appeal taken by plaintiff in his notice of motion which were relied upon on the argument are that the trial Judge erred: (1) in holding that there was not reasonable excuse for the omission on the part of plaintiff to give notice as required by the Workmen's Compensation for Injuries Act; and (2) in holding good the document alleged to have been executed by plaintiff as a release by plaintiff to defendants so as to prevent plaintiff's recovery in this action.

This seems to me, upon all the evidence, to be clearly a case where under the Act there was reasonable excuse for the want of notice. It was practically conceded that defendants have not been by want of the formal notice prejudiced in their defence. Mr. R. K. McIntosh, the manager of defendants, knew of the accident on the day it happened, and he informed a Mr. Wickens, the chief engineer of the Canadian Casualty Boiler Insurance Company, in which company defendants held a policy, of this accident. Defendants knew that Wickens saw plaintiff shortly after the accident, and on 25th March, 1905, defendants received Mr. Wickens's report. On 26th March plaintiff wrote to Mr. McIntosh about the matter, and on 28th Mr. McIntosh replied, stating in substance that if the matter was not arranged with Wickens, be (McIntosh) would go further into it, and making a suggestion as follows: "It might be well to leave this until you are here again, when I shall discuss the matter with you, for, as no doubt you are aware, I shall do all I can to help you to obtain from these people sufficient to cover your loss for time and doctor's bill. To this letter plaintiff replied on 29th March, explaining from his

point of view what had taken place between him and Wickens, and asking to have the $30 which Wickens promised sent. This was not sent, and no reply was sent to plaintiff's last letter.

In due course, after some weeks of remaining in bed, plaintiff returned to work for defendants. Mr. McIntosh appeared to desire to act as plaintiff's friend down to 13th May, when the $30 was handed over, and plaintiff continued to work for defendants until some time after that date. By the conduct of defendants plaintiff was thrown off his guard as to seeking legal advice, and as to informing himself about giving and as to giving the statutory notice.

I think there was in this case such reasonable excuse for want of notice as is within the contemplation of the statute. The late case of O'Connor v. City of Hamilton, 10 O. L. R. 529, 6 O. W. R. 227, refers to and is consistent with Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. 560, 1 O. W. R. 612, and this case warrants my conclusion upon this point.

I confess to having had considerable difficulty in coming to a conclusion on the question of settlement and release. The case is very close to the line. When the alleged settlement was made, plaintiff had gone back to work, and there was the confidential relationship of master and servant between them. There is a great deal to be said against allowing such a settlement to stand, reading all the evidence in the way most favourable to defendants. . . .

[Remarks of Boyd, C., in Doyle v. Diamond Flint Glass Co., 8 O. L. R. 499, 502, 3 O. W. R. 921, referred to.]

No doubt plaintiff was competent to make his own settlement if the parties had come together, plaintiff making a claim and defendants disputing it, either as to liability or amount, so that there would have been discussion and determination once for all. But that is not what was done. Wickens, who was acting for the insurance company, was promptly at plaintiff's bedside, and so sympathetic that plaintiff, certainly at first, thought him some good friend willing to compensate him for 3 weeks' loss of wages. It is not pretended now that, if plaintiff is entitled to recover at all, this sum is anything like sufficient. It was in lieu of wages for 3 weeks, the third week having been entered upon. Nothing for any further time and nothing for pain and suffering or for medical attendance. Inadequacy of consid-

eration is not the test, but the circumstances must all be looked at to see whether plaintiff's intention was then to release all claim, as defendants now assert. Plaintiff had no legal adviser, and, although he could write his own name, and do it very well, he could not write a letter. His son-in-law wrote two letters for plaintiff, and I may say at once that one of these, the letter of 29th March from plaintiff to McIntosh, was mainly the cause of my difficulty in determining just what plaintiff understood he was doing and intended to do when he signed the receipt on 13th May.

The accident happened on 13th March. Plaintiff was in bed 8 weeks. His medical attendant made about 54 visits, and his account was $125.

Plaintiff's account of the alleged settlement, as given in examination and cross-examination, is, in substance, that quite a few days after he had gone back to work, McIntosh asked him if he was satisfied (with the settlement Wickens had made), and plaintiff said he was not, and McIntosh said he would telephone for Wickens. Wickens did not come to see plaintiff. A few days after that conversation, plaintiff got a message that McIntosh wished to see him at the office. At the office McIntosh had the paper ready, and simply said, "Robert, sign this, and I will pay you $30 in money;" "Sign this cheque, and I can draw the money out of the bank." "These were all the words." . . .

Plaintiff had in another part of his examination said that at the first conversation after going back to work, he asked McIntosh if he was going to do anything for him, and McIntosh replied, "You have arranged with the Boiler Insurance Company," and plaintiff asked McIntosh to telephone Wickens. Whether Wickens was telephoned for or not, he did not appear, and at the second interview, at the office, plaintiff signed the receipt, and indorsed the Boiler company's cheque for $30, which that company had made payable to the order of defendants. Plaintiff did not give candid or satisfactory answers as to his signature to the receipt. I think he knew that the signature was his, and should have said so at once, and his hesitancy and beating about the bush make it more difficult to accept his testimony when in contact with other evidence. Plaintiff knew that he signed a receipt and indorsed a cheque for $30.

The evidence of Mr. McIntosh is that after plaintiff returned to work, he, McIntosh, was passing the boiler shop one morning and spoke to plaintiff, asking him how he was feeling. Plaintiff replied that he was getting better. McIntosh said he had the $30 for him, if he wanted to come and get it. Plaintiff said he would like to see Wickens first, and asked, "would you telephone for me." McIntosh says he did telephone, and got word that Wickens would come, but, as I have said, Wickens did not come. McIntosh said further that a few days after and when passing the boiler shop again, plaintiff asked him if Wickens had been there, or if he (McIntosh) had heard. McIntosh replied that he had not heard. Then plaintiff said: "Well, I guess I won't wait; I want to close it up; so I will take the $30." McIntosh then said: "All right, I will be back in the office in a little while, and I will send for you." Plaintiff, after a little, went to the office. McIntosh said, "Bob, this will clean the thing up." The receipt had been prepared. It was written out, and the indorsement on the cheque was made. . . . "I took him over to the second standing desk in the office, and I said: 'Bob, this cleans the whole thing up; you had better read it.' He said, 'I have not my glasses,' and I said, 'I will read it to you.' I read it aloud and very distinctly, standing close to him, and he signed it in my presence. I turned over the cheque, and I said: 'This is the cheque, made payable to me; I have indorsed it to you; you sign it, and I will put it in the deposit and cash it for you.' He signed it, and I gave him the $30, and I said, 'Bob, this cleans the thing all up.'"

This evidence presupposes a settlement with Wickens, and there was no such settlement in fact. The evidence of Wickens is that he had only one interview with plaintiff, and then plaintiff told him he would be laid up for 2 or 3 weeks. Wickens states: "I told him I was sorry for him; I told him that if he would be satisfied perhaps I could get him enough to pay him for 3 weeks. . . . He said he was surprised—that he did not expect to get anything." So Wickens left and made a report to his company which resulted in his company sending a cheque to defendants for $30. Wickens did not explain to plaintiff why he (Wickens) was to give plaintiff the $30, and he did not tell plaintiff that the company were amenable in any way, but he did tell him that "the company had a policy covering the McIntosh

place." . . . On cross-examination he said that he thought the company were "practically" making a present to plaintiff of $30.

If Wickens, instead of having to report to defendants and having a cheque sent to them, had actually, and under the circumstances as stated by himself, handed over the $30 and taken such a receipt as was taken by McIntosh, could that be held as a binding release upon plaintiff? I think not.

Wickens was simply interested for the insurance company, and he offered to pay for 3 weeks' wages, because he thought plaintiff would be back to work at the end of that time. When the alleged settlement actually took place, defendants knew that plaintiff had been laid up for a much longer time than 3 weeks, and that plaintiff was not then well, but only "getting better." There seems to have been no negotiation by defendants for a settlement. They notified Wickens, and put him upon the case. There was the correspondence and the letter of 29th March, 1905, before referred to. This letter is the only thing that offers reasonable argument in favour of upholding the alleged settlement. Plaintiff is comparatively illiterate. He could not write, and I am inclined to think could not dictate such a letter—although he would, as against defendants, if the letter had been acted upon and if held to mean a settlement of his entire claim against defendants, be bound by it. McIntosh admits that plaintiff did not read the receipt or read the indorsement on the cheque—plaintiff says because he could not read writing—McIntosh says because plaintiff had not his glasses.

With all the evidence before me, I have carefully read and considered the cases to which we were referred by counsel for defendants. . . .

[Reference to North British R. W. Co. v. Wood, 18 Ct. Sess. Cas. (Rettie) H. L. 27; Begg v. Toronto R. W. Co., 6 O. W. R. 239.]

I am of opinion that all the cases cited are distinguishable upon the facts. Plaintiff, in my opinion, did not understand the situation, or that a complete release was being asked of him. He did not intend to release defendants from all liability, if there was such liability. He intended to accept the $30 as offered by the insurance company as in-

demnity for the 3 weeks' wages, and to that extent, and so far as was under discussion, to release both insurance company and defendants. It would not be difficult in very many cases for the representative of an insurance company, by being early after an accident in communication with an injured person, and by expressions of sympathy and offering payment in lieu of wages, to get a receipt, purporting to be in full, which the person giving it would not understand to be a complete release to either the insurers or insured.

I do not express any opinion as to the position of defendants with the Canadian Casualty and Boiler Insurance Company. I do not say that defendants are at all prejudiced by what has taken place. It may be that Wickens did not state to defendants fully and truly what had taken place between him and plaintiff. If defendants are prejudiced, it may be by reason of McIntosh not seeing Wickens after the receipt of the cheque and after the receipt of plaintiff's letter of 29th March, before handing over the proceeds of the cheque. Apparently McIntosh intended to see him—else why did he wait until after plaintiff's return to work before saying anything more to plaintiff?

The damages found are $250. There is no reason to think, from the . . charge or from the question or answer, that the jury took the payment of $30 into consideration in fixing the amount, so that sum should be deducted from the $250.

Appeal allowed with costs, and judgment for plaintiff for $220 and costs.