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C.A.

OATMAN v. MICHIGAN CENTRAL R. W. CO.

Railway—Fire from Engine—Negligence — Spark-arrester—Neglect to Adopt Latest Safety Devices—Conflict of Expert Evidence—Question for Jury.

This case was before the Court of Appeal on a former occasion, on appeal from the judgment at the first trial, 1 O. L. R. 145. A new trial was then ordered, which took place before MEREDITH, C.J., and a jury. Upon the answers of the latter to the questions submitted to them judgment was directed for plaintiff, and defendants again appealed.

I. F. Hellmuth, K.C., and D. W. Saunders, for appellants.

Charles Millar, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, and LISTER, JJ.A.), was delivered by

OSLER, J.A.:—The sole ground of negligence relied upon at the trial and on the appeal was, that defendants' engine was fitted with the stack known as the diamond stack, instead of with an improved modern stack, known as the straight stack. It was contended that the former was more dangerous as a fire-thrower than the latter, and that in May, 1897, when the fire occurred which destroyed plaintiff's property, the straight stack had come into such general use, and its superiority to the diamond as a safeguard against danger from fire had become so generally recognized, that defendants were negligent in not having adopted it.

The questions submitted to the jury and their answers thereto are as follows:—

1. Was the burning of the barn and its contents caused by fire which escaped from the locomotive of defendants? A. Yes.

2. Was the escape of the fire due to negligence of defendants? A. Yes.

3. What was the negligence? A. In not adopting the latest or modern improved smoke-stack.

4. What damages has plaintiff sustained? A. $700.

In answer to the question of the clerk as to whether they have agreed upon their verdict the foreman answers for the jury that they have, 10 to 2.

His Lordship: When you say the latest or modern improved smoke-stack, what stack do you mean?

Juror: The straight.

The only question before us is whether there was evidence upon which the jury could reasonably have found as they did in answer to the third question.

The case was left to them very clearly and fully by the trial Judge, to whose charge no objection was taken by either party. As we said in delivering judgment on the former appeal, quoting the language of Lord Herschell in the Port Glasgow and Newark Sail Cloth Co.'s Case (H.L.), 30 Rettie 35, the railway company are bound "to exercise their statutory powers reasonably, and, knowing that locomotive engines running along the line are apt to emit sparks, are bound to use the best practicable means, according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property, and if they do not adopt that reasonable precaution, they are guilty of negligence, and cannot defend themselves by relying on their statutory powers." I read this passage again because it seems to me to state concisely, with the necessary qualification, and without embarrassing superlatives, the obligation of the company with regard to the construction and equipment of their locomotives. The term "practicable" is, of course, an elastic one, bearing upon the rights of the company in respect of the efficiency of their engines on the one hand, and their duty to the public on the other. As Lord Ashbourne points out in the case just cited, there is no absolute standard to which companies are bound to conform, and, per Lord Maclaren, in the same case in the Court below, 19 Rettie at p. 614, "The question is one of degree in which common sense, rather than legal experience, must be the guide."

See also National Telephone Co. v. Baker, [1893] 2 Ch. 186, per Kekewich, J., at pp. 204, 206.

It is necessary to refer to the evidence, which, however, I shall endeavour to summarize as briefly as possible.

For plaintiff, Peter Clark, formerly mechanical superintendent on the Northern Railway and afterwards on the Grand Trunk Railway, said that the straight type of stack began to come into use about 1883 or 1884, and came into general use in 1885. It is the design and type in use on the Grand Trunk, Canadian Pacific, and Michigan Central railways, though the diamond is still occasionally used on branch roads. The principal object of the change was to lessen danger from fire. Of the two the diamond is the more dangerous, and throws much more fire than the straight. It is practically abandoned on all the roads the witness was acquainted with. In cross-examination he said that in May, 1897, there were still many engines in use with the diamond type of stack; the great majority, however, used the straight.

Alexander A. Maver, local locomotive foreman of the Grand Trunk at London, 29 years experience. Has 50 or 60 engines under his charge, of which all the stacks are of the straight type. Change from the diamond began about 20 years ago. It was made because the straight was cleaner as regarded smoke and was a better spark-arrester. It threw 50 per cent. less sparks, and in a less dangerous manner. He considered straight the better of the two for both reasons. It was about 5 years (speaking in March, 1901), since the change was completed.

Frank Morse, superintendent of motive power of the Grand Trunk. Part of his duties to select the best type of engine. There were about 1,000 engines on the road. Both kinds of stack were still in actual use, but the straight predominated, and they had built no other for 5 years past. The straight was adopted because it was considered more efficient, more substantial, and was a better spark-arrester. That is the main reason. So far as he knew, all modern engines are fitted with the straight stack. They still use the diamond on some of the branch lines, and they are used on the main line in New Hampshire, Vermont, and Maine. There were more in general use in May, 1897, than to-day. The diamond is a reasonably good spark arrester; the best known until the straight type was introduced. To make the change cost about $150 per engine.

W. D. Robb, a master mechanic on the Grand Trunk. The diamond stack throws a much greater quantity of sparks than the straight, probably three times as much. That was one reason why the company has adopted the latter type. It is the best spark-arrester of the two and throws fire in less dangerous manner. Witness came on the road in 1897. There were then some diamond stacks on the division. These

have since been changed to the straight form. If asked to advise a company as to which type to adopt, having regard to prevention of danger from fire, he would say the straight stack undoubtedly.

For the defence: Michael J. Flynn, master mechanic of the Canada Southern (sc., the defendants). His duty was to see that the engines were properly constructed, and in proper condition. In the spring of 1897 they were operating both types of engines. In his opinion, from a long experience, there was very little difference between the two as regards danger from fire. After the fire in question this engine was overhauled, and fitted with a straight stack. This was ordered by a superior officer "because of the diamond being a nuisance and on account of cleanness"—nothing said about danger from fire. No engines now in use on the road have the diamond stack. The company began to make the change in 1895. The New York Central use the straight, though, no doubt, some of their switch engines are still fitted with the diamond.

Samuel Behan, general foreman of Canadian Pacific at Toronto Junction, said that there were diamond stacks in use on the road in May, 1897, but the tendency now is to the straight, which is better as regards cleanliness, steaming qualities, and style. Thought the straight would throw more fire than the diamond (i.e., in a more dangerous manner), but had never used an engine fitted with one.

John Hall, formerly for many years a locomotive fireman on the Grand Trunk, thought the diamond stack the safer of the two as regards fire, because the mesh of the wire on the stack was smaller. The tendency had been for some years to adopt the straight type.

Geo. R. Joughins, mechanical superintendent on the Intercolonial Railway for the past 3 years. This road used some engines fitted with the diamond stack. There was no difference, in his opinion, between the two types in their value as spark-arresters. One was as safe as the other. They were however, giving up the diamond for the straight, and the change had been in progress for some years before he joined the road. The latter was thought to be the more economical as regards fuel; though there was a difference of opinion as to this.

In re-examination he said that the diamond was used in the company's yards and workshops.

All the witnesses appear to concur in saying that more sparks are emitted from the diamond stack, and escape therefrom in all directions. Those who speak in favour of it, however, say that, as they escape through a smaller mesh than that of the wire used in the straight stack, they are

necessarily smaller, and there is therefore less danger of fire, as they are more likely to be extinct when they reach the ground. The advocates of the straight stack shew that it is so constructed that the live cinders are more burnt up, beaten down, and deadened than is possible in the diamond, before they reach the point of escape, and that those that do escape, though they may be in one respect larger than those emitted by the diamond, are ejected from the stack by force of the exhaust, directly upwards to a great height, and thus are more likely to die before they fall.

The trial Judge told the jury that if they came to the conclusion upon the evidence, that as regards prevention of danger from fire, one stack was as good as the other, or if they thought this was a question upon which practical or scientific people, with a knowledge of the subject, might honestly differ, defendants were entitled to succeed. If they believed that the real reason for substituting the straight stack for the diamond was that there was less danger of fire from it, that might alter the case.

If there was a substantial difference, a substantial lessening of the danger, it was defendants' duty to have adopted the better method, and then the question would be whether they had acted reasonably in making the change, or had they delayed too long a time in doing so.

All the circumstances which could bear in favour of defendants were very fully pointed out, and if the jury had found a verdict the other way it would have been impossible to say that they were wrong. They might well, as it seems to me, have adopted the view that one engine had no practical advantage over the other, on the point in question.

On the other hand, I am clearly of opinion that the trial Judge could not properly have withdrawn the case from the jury. There was evidence of practical men that the straight stack was the better stack of the two for preventing the emission of sparks likely to be dangerous to property adjoining the line of way, and that this was one of the reasons, if not the main reason, why it had been substituted for the other. Defendants' witnesses, while admitting the superiority of the straight stack to the diamond, in the matter of cleanliness, and perhaps economy, would not concede that safety was one of the elements which influenced its general adoption by railway companies, asserting that as a spark arrester the diamond was quite as efficient as the straight. These two questions of fact, viz., whether the straight was inferior in point of safety to the diamond, and whether that was the reason or one of the reasons which had induced the companies to substitute it for the latter, were for the jury to decide, upon the opposing testimony, and if plaintiff's contention prevailed with them,

they were justified in finding on the evidence that a reasonable time had elapsed for making the change and abandoning the use of the diamond stack over the whole system.

I agree that negligence in not adopting a new style of engine or stack, ought not to be so easily inferred as in a case of mere non-repair. For a long time it must be a matter of observation and experiment, and experience alone can decide whether a new method or device is an improvement upon the old. And if it is, a reasonable time must elapse before it can be taken into use, having regard to the company's business, and the alterations rendered necessary in the rolling stock. Nevertheless once it is recognized that the improvement, whatever it may be, is a practical one, shewn by experience, as Kekewich, J., says in the case above cited, to be of large, indisputable, and permanent value, the time must arrive sooner or later when it may be said that it is negligence in the company not to adopt it. Upon the evidence I cannot say that the jury were wrong in finding against defendants on this branch of the case.

I think we can only dismiss the appeal.

CARTWRIGHT, MASTER. JANUARY 22ND, 1906.

CHAMBERS.

CAMPBELL v. CROIL.

Appeal—Master's Report—Extension of Time—Delay—Explanation—Grounds of Appeal.

Motion by defendant Croil for leave to appeal from Master's report of 19th June, 1905, which was confirmed by consent on 27th June.

G. A. Stiles, Cornwall, for defendant Croil.

E. C. Cattanach, for defendant McCullough, opposed motion.

W. E. Middleton, for plaintiff.

THE MASTER:—After the great lapse of time, a very plain case must be made out before this motion can succeed.

This is more especially the case in view of the great length and consequent expense of the litigation.

In that time the defendant Croil must necessarily have become sufficiently familiar with the course of an appeal from

a report to know that such a matter would not lie dormant from 1st September to end of December. He does not venture to say that during all the period since 29th June he ever made a single inquiry as to the appeal which he now says he instructed Mr. Gogo to make.

Even when the motion for payment out of Court was made in October, although he made affidavits in answer, no suggestion was made at that time of what is now stated with a great deal of apparent confidence and with some circumstantial detail. I have not overlooked Mr. Stiles's affidavit as to his conversation with Croil in the train on 27th June. No doubt, all that Mr. Stiles says actually took place. But on the other hand is the fact that no appeal was ever taken, although the time did not elapse until about 6th September. What is even more significant is that there is no affidavit from Mr. Gogo nor have any steps been taken to have his evidence on the motion. It may therefore be assumed that he would differ from Mr. Croil as to any instructions to appeal having ever been given by him.

It is not denied that a consent of some kind was given, so that the plaintiff's share was paid out to him before the vacation. If this consent was embodied in an order, then under Re Justin, 18 P. R. 125, this motion could not be heard until leave had been obtained from the Judge who made the order of confirmation. This objection will still be open to plaintiff if the defendant carries the matter further, and if any such consent order was made, as distinct from filing a consent with the accountant.

But on the merits, apart from the foregoing objection, if it exists, the motion should be dismissed with costs, in the absence of any statement from Mr. Gogo and of the long delay on Croil's part before raising any question of his having instructed an appeal, and of the importance of finality in litigation, unless very clear and satisfactory reasons can be given for opening a matter after judgment given more than 8 months ago.

BRITTON, J. JANUARY 22ND, 1906.

TRIAL.

DRULARD v. WELSH.

Trespass to Land—Boundary—Damages—Costs.

Action for trespass to land and for a declaration of boundary and for damages, etc.

A. St. George Ellis, Windsor, for plaintiff.

S. White, Windsor, for defendant.

BRITTON J.:—Plaintiff claims to be the owner of that part of lot 7, according to registered plan 274, which lies to the west of Jeanette avenue and to the north of Pitt street, in the city of Windsor. The point in dispute is whether defendant's land is bounded on the south by an allowance for lane or . . . "alley-way," or whether it continues southerly to Pitt street. Plaintiff describes the land he claims as "all the land south of the old alley-way running from Jeanette street through to Pitt street and south of said alley and of the land of Catharine Welsh." Plaintiff complains that defendant has recently trespassed upon this land and has enclosed a portion of it, and has also enclosed the old lane, and claims as against plaintiff to own the same.

The land in question is now easily and readily located upon the ground. Plaintiff has not clearly and satisfactorily proved that this land is included in any grant from the Crown—but apparently it has been considered as part of the "Jeanette" land and dealt with as such since 1852. . . .

I am not able to find upon the evidence that the land in question is within the limits of the description in the patent to Samuel Porte, dated 13th February, 1874. On the contrary, on the proper construction of that patent, I am of opinion that the southern limit of the land described is the northern limit of the lane.

Plaintiff is entitled as against defendant to recover possession of the land claimed, and . . . to a declaration defining the northern limit of defendant's land as the southern limit of the lane. Plaintiff has not sustained any substantial damages that can be measured. I allow $5 damages. Defendant should pay costs, but plaintiff should not get costs of attempting to prove paper title from the Crown to Jeanette, as, whether there be such a paper title or not, it has not been proved in this action.

Counterclaim dismissed with costs.

JANUARY 22ND, 1906.

C.A.

BANKS v. SHEDDEN FORWARDING CO.

Negligence — Injury to Child in Street of City — Careless Driving—Disregard of Safety of Pedestrians—Evidence for Jury—Findings—Right of Child's Father to Recover for Medical and other Expenses.

Appeal by defendants from order of a Divisional Court reversing judgment of nonsuit of FALCONBRIDGE, C.J., at the trial, and directing judgment to be entered for plaintiffs for

the sums assessed by the jury. Plaintiff Ralph Banks, a child of 7 years, was on 28th April, 1904, knocked down and injured by a dray of defendants at the corner of King and Mercer streets, in the city of Toronto. His father, William Banks, joined with him in the action. The negligence alleged was fast and careless driving and disregard for the safety of foot passengers. The jury awarded the boy $700 and the father $300.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. E. A. DuVernet, for defendants.

I. F. Hellmuth, K.C., and E. C. Cattanach, for plaintiff.

GARROW, J.A.:—We are all, I think, of the opinion that the judgment of the Divisional Court ought not to be interfered with so far as it relates to the recovery by the infant plaintiff, but doubt is raised as to the right of the father to recover for his outlay for medical and other extra expense to which he was put in caring for the infant plaintiff after the accident, and for which the $300 was apparently awarded to him by the jury. And the question is not as to the amount allowed, but extends to any recovery by him for such expenses.

In the statement of claim the claim of the plaintiff William Banks is put thus: "The plaintiff William Banks by reason of the injuries to the plaintiff Ralph was put to great expense and was otherwise damnified."

Evidence was given by the plaintiffs without objection of the particulars of the expenses of the plaintiff William Banks and the learned Judge directed the jury also without objection that such expenses might be allowed.

The objection now taken was apparently not raised in the Divisional Court, nor does it appear in the reasons for the appeal to this Court, but was for the first time taken in argument before us by counsel for the appellant. The proper time to have taken the objection was, of course, when the evidence was tendered, or at latest immediately after the charge to the jury. If that had been done, it is fair to assume that if the claim by the plaintiff William Banks had been disallowed or reduced, the infant plaintiff might well have recovered a larger sum. The objection is therefore now too late and ought not to be entertained.

But is the objection well founded? In my opinion it is not.

The infant plaintiff at the time of the injury was 7 years old, and resided at home with and under the charge of his father, the plaintiff William Banks, who was therefore obliged under secs. 209 and 210 of the Criminal Code to supply him

with the necessaries of life, including medical attendance: see Rex v. Lewis, 6 O. L. R. 132, 2 O. W. R. 566. And if the burden of that duty was increased by the wrongful act of defendants or for which they are responsible, I see no valid reason and I know of no authority why the father should not recover as damages the amount of such increase.

In Mayne on Damages, 6th ed., at p. 113, it is said, correctly in my opinion, to be the law that "where the wrong complained of has involved the plaintiff in a legal liability to pay money to a third party, the amount of his liability may be included in the damages though not yet paid by the plaintiff. But it is otherwise where the obligation though a moral is not a legal one." And this right to recover does not at all, in my opinion, depend upon the assumed relationship of master and servant which by law is presumed to exist between a father and his infant child, but grows out of the statutory duty to maintain and the wrongful increase of the burden of that duty by the act of the defendant. Whether the right to recover could be put solely upon the ground of the relationship of master and servant is perhaps open to more doubt owing to the youth of the infant plaintiff and the absence of any evidence of service. In Jones v. Brown, 1 Peake N. P. 233, Lord Kenyon, C.J., is reported to have said in the case of a lad 14 or 15 years of age, that evidence that he was employed in his father's business was unnecessary, and that if he lived in his father's family and under his protection that was sufficient to maintain the action, which was for an assault on the plaintiff's son and servant. In Dixon v. Bell, 1 Starkie N. P. 287, a similar action, although the former was in trespass and this on the case, the boy was 10 years of age and attending school. There was apparently no evidence of service nor even objection taken on that ground, and the action was held maintainable, and, bearing on the other ground, that the plaintiff might recover for a surgeon's bill paid by him for attendance upon the son. In Hall v. Hollander, 4 B. & C. 660, the action was in trespass for driving a carriage against the plaintiff's son and servant whereby he was injured, and the plaintiff was deprived for a long space of time of his services and was forced to expend large sums of money in the cure of his said son and servant. The son there was only 2 years and a half old. And for this reason the action failed, although Abbott, C.J., offered to leave to the jury the question whether the child was capable of performing services to which value could be attached, but plaintiff's counsel declined the offer and the plaintiff was nonsuited. Bayley, J., in delivering judgment on the plaintiff's motion for a new trial, says: "I apprehend that the gist of the action depends upon the capacity of the child to

perform acts of service. Here it is manifest that the child was incapable of performing any service." And the father's claim for expenses incurred was disallowed because they were unnecessarily incurred; but as bearing on the other ground to which I have before referred, Bayley, J., says: "I am not prepared to say that he could not have recovered upon a declaration describing as the cause of action the obligation of the father to incur that expense."

In Smith's Master and Servant, 5th ed., p. 142, it is said: "If, however, there is a capacity to serve, very slight evidence is sufficient to support the allegation of service, and indeed in modern cases where there has been a capacity to serve, the tendency of the Courts has been to infer service from residence with the parent without proof of actual service." And this so called modern rule seems to me to be reasonable, the capacity to serve giving, in my opinion, a much more definite and desirable test than acts of service such as very young children can or do render to their parents, which, when not wholly imaginary as acts of real service, must vary not according to age merely, but according to the capacity of the child and the need of the parent. And the question of capacity, if there was any reasonable evidence, would, of course, be for the jury.

It was apparently thought upon the argument that there was something in plaintiff's way in the decision of this Court in Wilson v. Boulter, 26 A. R. 184. That, however, was the case of a mother suing for expenses, etc., to which she had been put in nursing and caring for her son aged 17 years, after an accident to him while employed as a servant of the defendants in their factory. And, as it pointed out in the judgment of Osler, J.A., there was upon the facts no relation of mistress and servant between the plaintiff and her son, and consequently no legal right arising from such relation or any obligation to incur the expenses which formed the subject of her claim, all circumstances which clearly distinguish that case from this.

In my opinion, for the reasons which I have given, the judgment of the Divisional Court should be affirmed and the appeal dismissed with costs.

OSLER, J.A., gave reasons in writing for the same conclusions.

MEREDITH, J.A., also gave reasons in writing for the same conclusion as regards the infant plaintiff, but expressed doubt as to the right of the father to recover more than nominal damages.

MOSS, C.J.O., and MACLAREN, J.A., agreed with the opinions of OSLER and GARROW, JJ.A.

JANUARY 22ND, 1906.

C.A.

REX v. GOODFELLOW.

Criminal Law—Conspiracy—Indictment—Depriving Person of Necessaries of Life — Medical Care and Nursing—Causing Death — Offence — Attempt to Cure Illness by Improper Means—Quashing Indictment.

Crown case reserved by MAGEE, J., on a joint indictment of Sarah Goodfellow, Isabella Grant, Elizabeth See, and William Brundrett, for unlawfully conspiring and agreeing together and with each other to deprive Wallace Goodfellow of the necessaries of life, to wit, proper medical care and nursing, whereby his death was caused, contrary to the Criminal Code. Upon this indictment the jury found defendants guilty of conspiracy. The questions reserved were: (1) whether the first count of the indictment should have been quashed on the ground that on its face it disclosed no offence known to the law; (2) whether evidence to shew specific cures effected by Christian Science treatment was properly rejected; (3) whether the Judge should have ruled that there was no duty upon defendants to supply the deceased with medical care and nursing; (4) whether there was evidence for the jury that defendants were guilty of the offence charged in the first count; (5) whether the charge was erroneous. Upon the request of the Crown a question was also reserved as to whether the second count of the indictment was properly quashed.

That count was as follows: that defendants on 4th January, 1905, and on other days and times before that date, at the city of Toronto, did unlawfully conspire and agree together and with each other to effect the cure of Wallace Goodfellow of a then sickness endangering life, by unlawful and improper means, thereby causing the death of the said Wallace Goodfellow.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. Cassels, K.C., for defendants Goodfellow, Grant, and See.

T. C. Robinette, K.C., for defendant Brundrett.

J. R. Cartwright, K.C., for the Crown.

OSLER J.A.:—I think the first count of the indictment should have been quashed. It seems to be a mere experiment and not to charge the defendants with a conspiracy to commit any indictable offence as described therein known to the law. None of the defendants is alleged to have occupied any position in relation to the deceased which involved any legal duty on the part of them or any of them towards him which they conspired to omit or neglect. It would have been just as sensible to have indicted them for conspiring "to deprive him" of a loaf of bread whereby, etc. The wide field over which the evidence wandered well illustrates the vagueness and uncertainty of the charge. It is very probable, I should say from reading it, that some of the defendants had laid themselves open to prosecution under sec. 209 or sec. 212 of the Criminal Code, but if the grand jury would not, as we are told, find a bill under those sections, that ought to have been an end of the matter without putting forward a vague charge of conspiracy under sec. 527 of the Code.

As to the question reserved upon the second count of the indictment, that count was quashed before the trial on the first count was proceeded with, and I have nothing to say to it. I do not think we should be asked to solve questions which have no bearing upon the final disposition of the case. The conviction must be quashed.

MEREDITH, J.A.:—The first question for consideration is whether the accuseds' motion to quash the indictment in question, on the ground that it disclosed no indictable offence, ought or ought not to have been allowed. There were two counts, and the motion was allowed as to the second and refused as to the other. If both should have been quashed, it will be unnecessary to consider the other points reserved.

The general rule was that every indictment ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy: see Rex v. Stevens, 5 East 244; but as to the crime of conspiracy to do an act in itself unlawful at common law or by statute, it was not necessary to set out the means by which it was to be accomplished; see Rex v. Gill, 2 B. & Ald. 204; Sydserff v. Reginam, 11 Q. B. 245; and Latham v. Reginam, 5 B. & S. 635.

Now, by virtue of legislation, it is enough if each count contains "a statement that the accused has committed some indictable offence therein specified," "in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged." So much detail of the circumstances is to be

stated as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to indentify the transaction; but the absence or insufficiency of the detail is not to vitiate the count: see the Criminal Code, sec. 611. But this legislation was not enacted for the encouragement of carelessness, nor as a reward for ambiguous, vague, uncertain, or embarrassing pleading; accuracy and certainty in all substantial things are yet as necessary as ever to the accused, to the Court, and upon the trial of or plea of former acquittal or conviction in a later prosecution.

Under this practice it is of course not sufficient to allege merely that the accused committed some named crime, as, for instance, that he committed murder; it is necessary that some specific crime be set out, for example, in a case of murder, that time, place, and person should be named or indicated: see Smith v. Moody, [1903] 1 K. B. 56; and Regina v. Stroulger, 17 Q. B. D. 327.

Judged even by the relaxed modern rule, one may well doubt whether any indictment as vague and otherwise objectionable as that in question ever passed muster in any of the higher Courts of criminal jurisdiction in this province.

It does not comply with the requirements of either rule, though the facts are such that it might readily have been brought within the earlier and more stringent one.

A criminal conspiracy is such an indefinite thing, so different from other crimes, that little assistance as to the nature of the offence is afforded by the name alone. A conspiracy to commit a crime can readily be described, and under the earlier or the later rule can be stated sufficiently without detail; but in a case of conspiracy to do that which is not a crime or to do a wrong which is not well known as being the subject of a criminal conspiracy, the facts should be set out with such particularity that it may appear whether or not the conspiracy charged is really an indictable offence. The usual definition of a criminal conspiracy is in some cases very little if at all more helpful than to say that a criminal conspiracy is a criminal conspiracy.

In this case it is impossible, from the vagueness and inaccuracy of the language used in each of the counts, to tell just what the pleader meant, in some respects, if he really knew. The literal meaning of each, in so far as it refers to the death of Wallace Goodfellow, is that his death was caused by the accused conspiring and agreeing together, which is absurd: see Horsman v. Reginam, 16 U. C. R. 543.

If it were meant that the accused conspired to cause the death, the indictment should have been in simple form for conspiracy to murder; but there is nothing in the evidence

to warrant any such charge, and so it could hardly have been meant.

If it were meant that the accused conspired to deprive the man of "medical care and nursing," and that in pursuance of such conspiracy they did so deprive him, and that, by reason of such deprivation, but without malice, the death was caused, and if the indictment had been drawn accordingly, with a proper and sufficient statement of the facts, it might have been good as an indictment of manslaughter, or for a lesser crime of the like character, covered by sec. 208 of the Criminal Code, according to the facts alleged, but not as an indictment for conspiracy; the averment of the conspiracy would be unnecessary but not improper as shewing concerted action in doing the wrong alleged to have caused death. It is difficult to perceive how any charge of conspiracy could be evolved out of such circumstances.

But it was contended that all reference to the death might be disregarded and the first count considered good as a charge of conspiracy to abstain from supplying Wallace Goodfellow with medical care and nursing, or of preventing others from doing so, merely. It would be enough to say that that was not, in either respect, the charge made or intended to be made; but it may be added that, if it were, the indictment would be insufficient in regard to omission for want of an allegation of any duty to supply such care and nursing; one is not guilty of any legal wrong in omitting to supply that which he is under no legal obligation to supply; and insufficient in regard to omission in not alleging any need or want of such care or nursing. There are cases, and not a few, in which such prevention instead of being a wrong would be the very thing most in the interests of every one concerned. It is common knowledge that there are many persons who are never happy unless they can believe themselves to be miserable in health, whose best interests would be served by divorcing them from all sorts of medical care and nursing, to whom the buck saw or the scrubbing brush would be infinitely better than pills which are ever working another miracle or are worth a guinea a box. It such a case it could hardly be a crime to conspire to effect such a divorce. It follows that it cannot be enough as an accusation of crime to allege merely that the accused conspired to deprive some one "of the necessaries of life, to wit, proper medical care and nursing," which at the moment might be the very things he or she ought to be deprived of. And there is no allegation that the prevention was to be against the will of Wallace Goodfellow; with his consent it could not be wrongful. Besides this, the evidence would not support an allegation of prevention. The

medical attendant was discharged by Wallace Goodfellow himself, and, whilst it is plain that the accused were opposed to medical treatment, the evidence of the prosecutrix herself shews that they did not prevent it, that if she would she could have supplied it, but instead of doing so she was content with threatening the accused with the law if their treatment failed.

The verdict illustrates the insufficiency of the indictment. It was not a general verdict of "guilty" but was "we find all the defendants guilty of conspiracy." Conspiracy to do what? Which of the several wrongs which it is contended are disclosed in the first count? To what conspiracy is punishment to be fitted? Of what conspiracy will the conviction, if sustained, be a bar to conviction in another prosecution?

The second count was quashed, but the question whether it was rightly quashed was reserved at the instance of the Crown. It is not so complicated, but is quite as objectionable as the first count. That which has been said respecting the allegation as to the cause of death applies to this count as well as the other. Then there is no sort of statement of facts constituting a crime; nor any averment that the accused had committed any specified crime. "Unlawful and improper means" may mean almost anything. The count is little better than one charging the accused with having committed unlawful and improper acts or being guilty of unlawful and improper conduct would be. It gives no indication of the crime or wrong intended to be relied upon. The words may mean witchcraft or sorcery or many other things which are crimes—see sec. 396 of the Criminal Code—or they may mean many things which are not crimes. What was meant was declared by counsel for the Crown, at the trial, to be "this treatment of so called Christian Science." If so, and if so stated in the indictment, the count would be clearly bad without anything to shew that such treatment was unlawful.

The second count was therefore rightly, and the first count ought to have been, quashed.

The object of a criminal prosecution ought not to be to procure some sort of a conviction anyway, but ought to be to procure a conviction of the offence believed to have been really committed only. The difficulties by which the prosecution now finds itself surrounded in this case seem to have arisen from a desire to get some kind of a conviction anyway. A resort was made to the uncertain law of conspiracy to make the bill of indictment more palatable to a grand jury which had ignored a bill charging that offence which was believed to have been really committed and upon which the prosecution had been instituted and upon which the accused had been sent for trial, instead of sending the same bill to another

grand jury. The practice of resorting to a charge of criminal conspiracy when there is no evidence except such as proves the actual committing of the crime by all the persons accused and of flying to its uncertainty merely as a "cure all" for all obstacles, real or feared only, in the way of a prosecution, in the ordinary way, for the offence itself, is not to be commended. Fairness to the accused should be of the essence of every prosecution in the public interests and in the name of the Sovereign. One may well doubt the perfect fairness of a prosecution for conspiracy to commit a crime supported by nothing whatever but evidence of the actual committing of the crime itself by all the accused. To try, convict, and punish to-day for conspiracy to commit a crime, and to-morrow, upon precisely the same evidence, for the crime itself, or in the one case to have a verdict of conviction or acquittal and in the other the opposite verdict, to have one jury discredit the evidence in the one case and the other to credit it in the other case, because the one crime may be thought less serious than the other, and the punishment in the one likely to be light in comparison with that in the other, cannot be the fairest and most satisfactory way of administering the criminal law: see Regina v. Boulton, 12 Cox C. C. at p. 93.

The whole evidence shews that if the accused were guilty of any indictable offence it was not conspiracy, but was manslaughter, or the lesser crime of the like character before mentioned, for which they are yet liable to further prosecution; but this indictment should be wholly quashed and the accused discharged from any custody under it.

JANUARY 22ND, 1906.

C.A.

RE HARSHA.

Extradition—Forgery—Evidence of Commission of Offence—Identification of Forged Document—Failure of Testimony—Indictment not Evidence—Proof of Foreign Law—Irregularity of Extradition Proceedings—Absence of Information and of Foreign Warrant—Report to Minister of Justice.

Appeal by F. Harsha from order of TEETZEL, J., in Chambers, upon habeas corpus, remanding the appellant to custody under a warrant of extradition to the State of Illinois to answer a charge of forgery of certain tickets of admission to an entertainment.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. B. Mackenzie, for the appellant.

R. W. Eyre, for the State of Illinois.

OSLER, J.A.:—The prisoner was apprehended upon a warrant dated 10th November, 1905, issued by a Judge under the Extradition Act, and, after several remands, was on 24th November, 1905, finally committed by the said Judge for extradition for the offence as set forth in the warrant, for that he, the said F. Harsha, in the month of September last, in the city of Chicago, in Cook county, State of Illinois, one of the United States of America, and within the jurisdiction of the State of Illinois, did unlawfully make a false document, to wit, tickets of admission to an entertainment of the Policemen's Benevolent Association incorporated, of the value of $1 each, totalling in value the sum of $600, knowing the same to be false, with the intention that they should be used and acted upon as genuine, to the prejudice of the Policemen's Benevolent Association incorporated, and did thereby commit the crime of forgery, contrary to the form of the statute in such case made and provided (sic).

The prisoner was brought before TEETZEL, J., on a writ of habeas corpus, and his discharge was moved for on various grounds. The learned Judge refused to discharge him. He now appeals to this Court, and the following among other objections to his detention were argued before us:—

(1) That no offence was proved under the laws of the demanding State.

(2) That there was no proper evidence of the commission of the alleged offence or identifying the document with the forgery of which the prisoner is charged.

(3) That the extradition Judge acted without jurisdiction, and that all the proceedings before him were void, because the warrant of apprehension issued by him was not founded upon any information or complaint laid before him or on proof of any foreign warrant issued for the arrest of the fugitive offender.

The second objection is the only one which I find it necessary to consider.

From a certified copy of an indictment returned with other papers which were before the extradition Judge, the

prisoner appears to have been indicted by a grand jury of Cook county, in the State of Illinois, in the October term of the Criminal Court of that county, for the offence of forgery and uttering of "a ticket of admission to an entertainment for which admission was charged, which said ticket was in the words and figures following, that is to say: 'The annual entertainment of the Policemen's Benevolent Association will be held at the Auditorium two weeks, commencing October 2nd, 1905. George Cohan and company, in the musical comedy Little Johnny Jones, consisting of twelve night performances and Wednesday and Saturday matinées, tickets one dollar. This ticket is exchangeable at box office on and after September 25th. 76. Precinct 1. 1154.' On the back appear the words and figures following:" setting out what seems to be the copy of an impression of the seal of the association.

Annexed to this copy of the indictment is what purports to be a copy of a document called a "forthwith capias," dated 3rd November, 1905, both being vouched or certified as true copies by a certificate of the clerk of the Court, dated 9th November, 1905, but not further authenticated by the proper State and Federal officials until the 13th and 17th November, and therefore not before the extradition Judge when he issued his warrant for the apprehension of the offender on 10th November, or, as it would appear, earlier than the 24th November, when the prisoner was finally remanded for extradition. The original foreign warrant appears not to have been before the Judge at any time, and the only information or complaint before him during the pendency of the proceedings was the information of one Mackie, described as "police detective," taken before the Judge on 11th November, the day after the arrest. No evidence was taken in this country, and the only evidence produced consisted of 5 depositions or affidavits sworn in Chicago before a notary public of the State of Illinois. The caption of each is "State of Illinois, county of Cook." Three of them appear to be sworn on the 9th and 2 on the 10th November, 1905, and each of the deponents describes himself as "one of the witnesses named in the annexed and attached indictment," which is the copy of the indictment already referred to, on the back of which the names of 3 of them are indorsed. These affidavits, which appear to be duly authenticated, consist in great part merely of hearsay statements made by other persons to the deponents, not in the presence of the accused.

The following is a concise statement of the only relevant facts which can be said to be proved by them. Michael Dennehy, who describes himself as the president of the Policemen's Benevolent Association of Chicago, a corporation, &c., says that the association ordered that their annual entertainment be given at the Auditorium two weeks commencing 2nd October, 1905, and that he gave an order to the Workman Manufacturing Company to print 60,000 tickets for the said entertainment, which were to read as follows (setting out the words, "The annual entertainment" to "September 25th" as they appear on the alleged forgery as set forth in the copy of the indictment), and that the said ticket should also shew certain numerals indicating the number of the ticket and the number of the precinct from which they were sold; that the Workman Company printed and delivered the said 60,000 tickets to deponent. Then he sets forth conversations between himself and the ticket exchanger at the Auditorium Theatre, and the secretary of the Workman Company. In consequence, as it may be inferred, of what he heard from them, he interviewed one John Cox. Then he sets forth a conversation with Cox and what Cox said to him of himself and of what two other persons had said to Cox. That, in consequence, as it may be also inferred of what Cox said to him, he went to Cox's house and got certain tickets there, or from him there. That the tickets shewn to Byers, Miller, and Workman, the other deponents, are the tickets the deponent received from Cox. As a conclusion the deponent believes that Harsha forged a ticket in the words and figures set forth in the deposition, with intent to defraud, &c., the Policemen's Benevolent Association. None of the genuine or of the alleged forged tickets were produced or identified by the deponent.

James Byers, who is in the printing business in Chicago, states that Cox came into his place of business about 24th September, 1905, and asked him for "a seal of the Policemen's Benevolent Association;" one of his employees found one, and deponent gave it to Cox. Deponent has been shewn a forged ticket of admission to the entertainment, and says that the seal printed on the back of the said forged ticket is similar to the seal given to Cox, whom deponent knew as a policeman.

The document spoken of by the witness is not identified or produced by him, though the witness Dennehy says it is

one of those he got at Cox's home, nor does Dennehy produce or identify it.

Cloyd E. Miller (whose name is not on the indictment) states that he is employed by the firm of Messenger & Co., dealers in paper in Chicago; that about 22nd September, 1905, a man calling himself Harsha came into their place of business and ordered of deponent 20 sheets of No. 50 Bristol cardboard cut to a certain size, according to a sample then given to him. The cardboard was cut according to order, and deponent delivered it to Harsha. Several tickets have been shown to deponent which are printed on the same cardboard as deponent delivered to Harsha. Dennehy says these were those he obtained at Cox's house, but they were not produced or identified by the witness or Dennehy.

Charles Workman (whose name is not on the indictment) is secretary of the Workman Manufacturing Company. He speaks of the order given by Dennehy for printing 60,000 tickets and of their having been printed and delivered to Dennehy; that on 2nd October Dennehy brought to deponent several tickets, and deponent then said that these tickets were forgeries and had not been printed in his establishment or by the authority of the company.

These tickets were not produced or identified by the witness. Dennehy says they are those he obtained at Cox's house, but they were not produced or identified by him.

Benjamin Krohn, a person in the employment of the Western Card and Calendar Company of Chicago, states that a man whom he afterwards learned to be John Cox, an ex-policeman, came to his place of business and asked him if he was the printer. Deponent said he was not, and referred him to Fred. Harsha, who was in the next room. He, Cox, had a conversation with Harsha and left. Harsha then came to deponent and told him he had a chance to make a piece of easy money; that if he did make it, nothing could be done to him; that somebody was going to get him the seal of the Policemen's Benevolent Association of Chicago to print a number of tickets for said John Cox, and the only thing he was afraid about was that he might get into trouble with the Union if he put the Union label on when they were not printed in a Union shop; that about 24th September, 1905, deponent saw Harsha printing a number of tickets which read as follows—setting forth the words from "the annual entertainment" to "September 25th;" marked at the side

"Precinct 1;" with certain numerals to indicate the number of the ticket; but saying nothing of the copy of the seal on the back; that Harsha afterwards told deponent that he had printed about 600 tickets for Cox and had received $25 for the job.

These depositions, loosely as they are drawn, raise, it may be said, a strong suspicion against the prisoner of having forged something—of having committed an offence which, if committed in this country, would be forgery at common law, as well as under the Criminal Code of Canada, secs. 419, 421, 423 C. (a).

The main difficulty which lies in the way of supporting the order for extradition is one which need never have arisen had the proceedings been conducted with the most ordinary care. If it was worth while to apply for the extradition of the accused, it surely was worth while to have taken pains either to have sent forward a witness with a genuine ticket and one of the alleged forgeries, or at the very least depositions or copies of depositions drawn with some regard to what is necessary to be proved in a case of this kind. The statute expressly requires that evidence is to be given to shew the truth of the charge, and it has been constantly held that such evidence must be legal evidence. There is indeed no pretence for saying that anything less will do: Clarke's Law of Extradition, 3rd ed., p. 218.

The accused is entitled to insist that the charge shall be made out—a prima facie case is no doubt sufficient—but made out by proper evidence; and here, in my opinion, it fails because that has not been done. Much of what is stated in the depositions is hearsay, and of course quite inadmissible: Re Parker, 9 P. R. 332; but the plain defect in the proceedings is, that neither a genuine ticket nor one of those with the forging of which the prisoner is charged was produced to either of the deponents on making his deposition, or was verified or identified by any of them, or otherwise produced or identified before the extradition Judge. That is the initial step in a prosecution for forgery unless the genuine or forged instrument has been lost or destroyed, which is evidently not the case here: Re John Wesley Parker, 19 O. R. 612.

Even if we could look at the indictments and assume that the instrument set forth in or attached to it is one of the

alleged forgeries, yet even that is not spoken of or identified as such in any one of the 5 depositions referred to.

The indictment itself is not evidence, as was long since held in Re Browne, 31 C. P. 484, 6 A. R. 386.

On this ground, therefore, the prisoner is entitled to his discharge.

Even if all that is necessary to be found are facts which would constitute the offence of forgery according to the law of this country, and it is then to be presumed, unless the contrary is shewn by the accused, that the foreign law in that respect is the same as our own (as to which I reserve my opinion), yet the evidence in the present case does not come up to what is required and would not have justified the magistrate in committing the prisoner had the offence been committed in this country. If presumptions be discarded, there is in fact no evidence of the foreign law, but, as I have said, I am not disposing of the case on that ground.

It is hardly necessary to observe that when the prosecution rests entirely upon depositions taken in the absence of the accused, upon which he has had no opportunity of cross-examining the deponents, he is a fortiori entitled to urge to the fullest extent any defect, formal or otherwise, in the case as presented by them.

The grave irregularity of the proceedings before the extradition Judge ought not to be overlooked. His warrant for the apprehension of the accused seems to have been issued without any information or complaint taken in this country, or a foreign warrant duly authenticated, having been before him. Either of these simple preliminaries would have been sufficient, but both were omitted.

The prisoner seems to have been arrested on the strength of a telegram, and the depositions on which he was committed were not forthcoming pending their authentication until the day when the order was made remanding him for extradition. Whether the principle of such cases as Rex v. Whitesides, 3 O. L. R. 622, 4 O. W. R. 113, 237, and Re Walton, 6 O. W. R. 905, recently before us, would support the jurisdiction of the extradition Judge, the accused being in actual custody, to make the final order for extradition, need not now be determined. See The Queen v. Ganz, 9 Q. B. D. 93, 102; Ex p. Terraz, 4 Ex. D. 63. Section 6, sub-sec. (2), of the Extradition Act requires the Judge to report forthwith to the Minister of Justice, not merely the fact of the issue of the

warrant of apprehension, but also certified copies of the evidence and foreign warrant, information or complaint, on which he has issued it. I do not see how this provision could have been complied with in the present case.

For the reasons I have mentioned, viz., that the evidence was not competent to prove the alleged forgery, the prisoner must be discharged, though I must add that it ought to be of very little service to him, as I am not aware that there is anything to prevent fresh proceedings from being taken against him, which may be instituted by an information properly taken in this country or otherwise as provided by the Act.

On the question of the necessity for actual proof that the crime is an extradition crime, as well by the laws of the demanding State as of our own, the cases of In re Murphy, 26 O. R. 163, 22 A. R. 386, and Rex v. Governor of Holloway Gaol, Ex p. Silletti, 87 L. T. R. 332, may be referred to. In the present state of the authorities in this country, an extradition Judge will act with prudence who requires it, and does not act upon presumptions.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, giving reasons in writing.

JANUARY 22ND, 1906.

C.A.

RE WAKEFIELD MICA CO.

KING'S AND JOHNSON'S CASES

Company — Winding-up—Contributories—Subscriptions for Shares—Payment — Transfer of Property — Defective Organization of Company.

Appeal of Ernest A. Larmonth, the liquidator of the company, from an order of ANGLIN, J., 4 O. W. R. 535.

In the proceedings for winding up the company the local Master at Ottawa, to whom it had been referred to settle the list of contributories, placed the respondents, J. S. King

and C. A. Johnson the elder, on the list as joint contributories in respect of $12,484.86. Thereupon King and Johnson appealed and their appeal was allowed by ANGLIN, J.

W. M. Douglas, K.C., and T. A. Beament, Ottawa, for the appellant.

W. N. Tilley, for the respondents.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—. . . For the appellant it was contended that the decision of Anglin, J., proceeded on the ground that the company was never regularly organized, but this does not appear to be wholly the case.

It is true the learned Judge dwells on the fact that the only meeting of shareholders at which there appears to have been an election of directors took place on 13th June, 1903, whereas the letters of incorporation bear date the 22nd of the same month, and that no other meeting of shareholders or directors was ever held. But he also discusses the facts in regard to the alleged subscription for shares by King and Johnson before the incorporation, and comes to the conclusion that they were not bound as shareholders by reason of the action of C. A. Johnson the younger in subscribing in his own name for 148 shares of $100 each.

It is not necessary to discuss fully the extent of the authority of the provisional directors, or to determine whether before the organization of the company they could deal with the issue of stock certificates and the transfer of shares as if they were directors duly elected by the shareholders.

. . .

[Reference to Michie v. Erie and Huron R. W. Co., 26 C. P. 566, at pp. 574, 576.]

In view of the duty imposed upon provisional directors by sec. 16 of the Ontario Companies Act to call a general meeting of the company to be held within 2 months of the date of the letters patent for the purpose of organizing the company for the commencement of business, it may be well doubted whether it was intended to repose in provisional directors absolute power to deal with such important matters as determining who are or are not shareholders, the issuing of stock certificates, and the allowance of transfers of shares in the company's books. These are matters usually dealt

with by by-laws duly passed by a properly elected board of directors and confirmed by the body of shareholders.

But in the present case the plaintiffs cannot rely upon what was assumed to be done after the issue of the letters of incorporation, for it was not the act of the board of provisional directors, but of another body irregularly and improperly elected as a board of directors on 13th June, 1903. And it was probably in this sense that the Judge spoke when he said "the issue of stock certificates and their subsequent transfers through supposed officers of the company to Messrs. King, Johnson sen., and others, were all alike unauthorized and mere nullities."

It is to be regretted that when the local Master discovered the date of the meeting at which the supposed election of directors was held, he did not before making his report endeavour to get some explanation.

It is true that Holland, one of the provisional directors, and another witness, seemed positive that 13th June was the day. On the other hand, the minutes of the shareholders' meeting contain the statement that "The Chairman then stated that the letters patent of the company may be inspected by the shareholders," which could not be correct unless the meeting was after 22nd June.

However, on the evidence as it stands, the only conclusion can be that this statement was either not correct or was not made, and has been inserted in the minutes in error. The result is, that the company never was organized, but its affairs were not conducted by the provisional directors. Two of them, H. M. Johnson and T. R. Kennedy, had assumed to retire, and their places had been taken by J. S. King and C. A. Johnson sen., neither of whom was named as provisional director.

But upon another ground the order of the Judge is right. As he determined, King and Johnson cannot be held liable as subscribers for shares. The ground taken for the appellant is that C. A. Johnson jun., in subscribing for 148 shares, acted as the agent for King and Johnson, and it is said that this was admitted. But the varying statements of Johnson in the course of his evidence and even his assent to his counsel's question "you are a shareholder in the Wakefield Mica Company, Limited? A. Yes, I was," should not overbear the actual facts as shewn by the testimony.

H. M. Johnson and C. A. Johnson jun. were members of the firm of Johnson, Willetts, & Co. That firm was indebted to King and Johnson, and was desirous of paying them through the medium of the stock of mica mining machinery and other property owned by the firm. But it was never intended that the payment should be effected by a transfer in specie of the property to King and Johnson. The proposal for the formation of the company and the arrangement for the transfer to it of Johnson, Willetts, & Co.'s property were based on the intention that for the property Johnson, Willetts, & Co. should receive paid-up shares, and that the shares when received should be handed to Messrs. King and Johnson in the proportion in which they were interested in the debt. Obviously H. M. Johnson and C. A. Johnson jun. subscribed the memorandum and application for the letters of incorporation as representing Johnson, Willetts, & Co., and as the persons entitled to receive the shares to represent the property belonging to them. T. R. Kennedy was their nominee and not the nominee of King and Johnson.

Upon this state of facts, and having regard to sec. 10, sub-sec. 4, of the Ontario Companies Act, these persons, and not King and Johnson, must be held to be the subscribers for the shares. An examination of the cases cited on behalf of the appellant for the proposition that King and Johnson could be held as subscribers through the agency of the actual signatories, shews that in each case the agent signed not his own name but that of the person who was sought to be made liable. And the questions were, whether an authority to sign was required to be under seal, and whether there was authority in fact. And the finding of liability proceeded upon the familiar principle qui facit per alium facit per se.

In the present case King and Johnson never intended to subscribe and never authorized any person to subscribe for them. Even if they had done so, it would not assist the appellant, for the subscriptions were signed in the names of the agents, and they are the only persons whom the company or the appellant can regard as subscribers.

Then the shares were issued as paid-up shares, and undoubtedly King and Johnson never intended to take other than paid-up shares. Their intention was to receive payment of their debt from Johnson, Willetts, & Co., not to incur liability in respect of unpaid shares. The certificates issued to H. M. Johnson and C. A. Johnson jun. do not state

that the shares are paid up. On the other hand, they do not state that any sum is payable upon the shares; and, so far as the entries in the books make any intelligible shewing, they shew that the shares were considered and treated as paid-up by transfer of property. Neither King and Johnson's possession of these certificates, nor the other facts and circumstances disclosed in the evidence, are sufficient to convert them into holders of unpaid shares in the company. Their intention and the intention of all concerned was that when the company was duly incorporated and organized, an agreement would be entered into whereby the terms of the preliminary arrangement would be carried into effect in a binding manner. If the company has not been bound, neither ought King and Johnson, who certainly never intended to be bound unless the company was, to be held to occupy a position in which it was never contemplated they should be.

The appeal should be dismissed.

JANUARY 22ND, 1906.

C.A.

RE WAKEFIELD MICA CO.

CHUBBUCK'S AND HOLLAND'S CASES.

Company — Winding-up—Contributories—Subscriptions for Shares—Payment—Transfer of Property.

Appeal arising out of the same series of transactions as those in question in the previous case. The difference between the two cases was that in this the local Master refused to place Chubbuck and Holland on the list of contributories, and ANGLIN, J., on appeal (4 O. W. R. 535), affirmed the Master's ruling. The liquidator appealed.

W. N. Tilley, for the appellant.

A. W. Fraser, K. C., for the respondents.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.:—On the argument of this appeal no valid reason was advanced against the judgment, and on consideration we are unable to see any ground for interfering with the

conclusions arrived at by the local Master and Anglin, J. Chubbuck and Holland fully performed their part of the arrangement, by virtue of which they were to receive and become the owners of 250 fully paid-up shares in the capital stock of the company, and the company obtained the full benefit and advantage thereof. The property which the company acquired as the consideration for the shares has been sold in the liquidation proceedings for the benefit of the creditors. It is now beyond the power of the company or the liquidator to restore the parties to their former position.

The present proceeding seems very like an attempt on the part of the company or the liquidator, while deriving the full advantage of that side of the bargain to be performed by Messrs. Chubbuck and Holland, to utterly ignore or evade the other side.

The appeal must be dismissed with costs.

JANUARY 22ND, 1906.

C.A.

ELGIN LOAN AND SAVINGS CO. v. LONDON GUARANTEE AND ACCIDENT CO.

Principal and Surety—Guarantee Policy—Fidelity of Manager of Loan Company—Misappropriation of Moneys—Release of Surety—Untrue Statements—Conditions of Policy—Necessity for Setting forth in Policy—Incorporation by Reference to Application—Change in Duties of Manager.

Appeal by plaintiffs from order of a Divisional Court (5 O. W. R. 349, 9 O. L. R. 569), affirming judgment of MACMAHON, J. (4 O. W. R. 99, 8 O. L. R. 117), dismissing action upon a guarantee policy issued by defendants in favour of plaintiffs (an incorporated loan company) to secure the fidelity of one George Rowley as manager of that company. The guarantee was for the sum of $2,500 against loss by embezzlement during the continuance of the agreement. The defendants alleged that there was no proper audit of Rowley's accounts, as was required by the terms of the policy, and that a change had been made in the duties of Rowley without notice to defendants.

W. K. Cameron, St. Thomas, for plaintiffs, appellants.

J. B. Clarke, K.C., and C. Swabey, for defendants, respondents.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., and TEETZEL, J.), was delivered by

GARROW, J.A.:— . . . Since the decision of the Divisional Court, the case of Hay v. Employers' Liability Assce. Corpn., 6 O. W. R. 459, was before this Court, in which it was determined that plaintiff's proposal and the statements therein contained are, by reference thereto in the policy, sufficiently incorporated therewith, and are therefore part of the contract between the parties.

The policy now in question refers to the proposal and statement of plaintiffs delivered to defendants by plaintiffs, "setting forth, among other things, the duties and remuneration of the employee, the moneys to be intrusted to him, and the checks to be kept upon his accounts," and states that plaintiffs have consented that such declaration and statement shall form the basis of the contract, limited to such statements as are material. This, in my opinion, sufficiently refers to and incorporates the statement sent in to defendants by plaintiffs' president, D. McLarty, when the application was under consideration. And I also am of opinion that such statement was binding upon plaintiffs, although apparently not authorized by any resolution of the directors. Mr. McLarty's statement is dated 19th February, 1897. Rowley had been in plaintiffs' employment from 1st May, 1879, and in this respect the case differs from Hay v. Employers' Liability Assce. Corpn., where the employee was just entering upon his duties when the application was made. In these circumstances, it was held in that case that the statements as to the mode of business and the various checks to detect dishonesty mentioned in the employer's statement, could not be said to have been untrue when made, but were merely in the nature of declarations of intention, and the judgment really proceeded upon the change of employment, which was held to be fatal to plaintiff's recovery.

The circumstances of this case require, I think, a different construction of the employer's statement. The checks by audit and otherwise stated in the employer's declaration, in the case of an employee already in the service and requiring a new surety in the place of one retired or dead, ought, I thing, to be regarded not as mere statements of intention, but as representations of an existing course of business, embracing both the past and the future, which, if materially untrue, should be held to vitiate the contract.

Any other conclusion would be manifestly unjust to the guarantor, who is not in a position to otherwise ascertain the facts, so obviously material to be known by him in order to estimate the risk about to be undertaken. And it is or ought to be no hardship upon an employer to hold him implicitly to the truth of the statement so made, which from the circumstances he must have known, even if he had not been told, as he was, that the contract in question would form the basis of the contract.

This reduces the matter to the simple question of fact—were the statements, or any of them, made by or on behalf of plaintiffs upon the application for the policy in question, materially untrue when made—a question which, without any hesitation, must, I think, be answered in the affirmative, for the very full and satisfactory reasons set forth in the judgment of MacMahon, J., and the Divisional Court.

JANUARY 22ND, 1906.

C.A.

BANK OF HAMILTON v. JOHNSTON.

Company—Shareholder—Action by Assignee of Company to Recover Value of Shares Subscribed for—Conditional Subscription—Allotment — Notice—Written Offer—Conduct —Estoppel—Director.

Appeal by plaintiffs from judgment of TEETZEL, J., at the trial without a jury, dismissing action brought to recover from defendant $3,000, the par value of 30 shares of preference stock in the United Electric Company, Limited, for which they alleged defendant subscribed on or about 30th May, 1902, and that the claim to recover payment had been assigned by the company to them.

L. G. McCarthy, K.C., and Britton Osler, for appellants.

H. Cassels, K.C., and J. D. Falconbridge, for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—Defendant does not admit that he subscribed or became a shareholder in respect of the shares, but

he alleges that any subscription made was subject to certain conditions, and was made in faith of certain things to be done and performed by one Oscar W. Rogers, which were not done; that no shares were ever allotted and no notice of allotment was ever given; that his name was not entered on the list of shareholders in the stock register ledger, or other book of the company. There are other defences pleaded, but at the trial the main defence was that defendant never was a shareholder, and it was upheld by the trial Judge.

On 30th May, 1902, defendant, upon the application and solicitation of one W. A. Johnston, the president and chief shareholder of the company, signed a paper in the following words: "Toronto, May 30th, 1902. I, Charles A. Johnson, of Toronto, hereby make application for thirty-one hundred dollar shares in the preference stock of the United Electric Company, Limited, of Toronto, and agree to pay for same at par at 60 days from this date, on the understanding that, at the time of payment, I am to receive ½ of one hundred dollar share of the common stock for each and every share of preference stock so purchased. The preference to be cumulative 7 per cent. The common stock to be fully paid and non-assessable." . . .

This was addressed to W. A. Johnston, and beneath were written the words, "Accepted W. A. Johnston," and "Accepted The United Electric Company, Limited, W. A. Johnston, President and General Manager," which were shewn to have been written by Mr. W. A. Johnston.

A meeting of the shareholders of the company was being held on the day in question. Mr. W. A. Johnston reported to the meeting that certain persons were desirous of acquiring and were acquiring stock, and, after the meeting had agreed to amend a by-law, it was adjourned for an hour. During the adjournment a meeting of directors was held, at which it is said W. A. Johnston and his wife were present, they being two out of the three directors. W. A. Johnston presented a report setting forth a statement of the subscribers for stock "paid for or satisfactorily agreed to be paid for." The defendant's name was included in the list, but the terms of his subscription were not set forth, nor, as far as appears, was his application produced. The directors resolved that the statement was satisfactory, and that it be referred to the shareholders' meeting with a recommendation that the shareholders be admitted to the adjourned annual meeting and take part in the business of the company. The shareholders'

meeting was resumed, and Mr. W. A. Johnston submitted the statement and recommendation agreed to by the directors, and it was adopted. It was further resolved that certain named persons, including the defendant, be admitted to take part in the business of the meeting and of the company. It does not appear that defendant's application was produced or submitted or its terms stated to the meeting. The defendant was present, and was elected a director, and immediately thereafter attended a meeting of the directors, when he was appointed one of an executive board and took part in the transaction of other business. Subsequently he took part in the final proceedings at the shareholders' meeting continued on the same day.

But he never thereafter took any part in the affairs of the company. He attended no meetings either of directors or shareholders. W. A. Johnston testified that notices of the meetings of shareholders in 1903 and 1904 were mailed to him, but he denies having received them or either of them. No demand for payment of the amount was made upon him until 3rd March, 1904, about the time when the assignment was made to the plaintiffs. He immediately repudiated through his solicitors, and was then informed of the assignment. The action was commenced on 31st March, 1904, and soon after, and he says for the first time, he received a notice of a directors' meeting to be held on 5th April, 1904, to which he replied disclaiming any position in the company. The entries in the book required by the Companies Act do not assist plaintiffs' contention that there was an allotment of shares to defendant. The first entry (p. 81) appears under the head of "Register of Transfers," and shews the defendant as a transferee from W. A. Johnston, under date 23rd January, 1904. The next entry, under the head of "Register of Subscribers to Stock" (p. 88), gives the defendant's name and the date of 30th May, 1902. The third and final entry is in what appears to be the "Stock Ledger Account" (p. 104). It is headed "Chas. A. Johnston, St. George Street, Toronto." In the date column, "April 25, 1904." In the column headed "To or from whom," appears "W. A. Johnston." And in other columns, "Shares 30," "Amount 3,000."

These entries, made apparently not earlier than 25th April, 1904, after the commencement of the action, and not

improbably with a view to the preparation of the certificates used as evidence at the trial, indicate that there was no allotment by the company up to that date, and that the only means there were of placing shares at defendant's credit was by transfer by W. A. Johnston of some part of his holding. But no transfer executed by him is proved, and there is no explanation of the entries. Whatever may have led to their being made as they appear, they do not prove an allotment by the company to defendant.

It is contended for plaintiffs that defendant is liable, first, upon the written offer or agreement to take shares dated 30th May, 1902, and, secondly, irrespective of that paper, by reason of defendant's acts and conduct, coupled with the dealings of the company as shewn by their books.

Although the company are not the plaintiffs, this case is not to be dealt with in any way differently than if the company were suing. It is not a proceeding under the Winding-up Acts, in which it is sought to make defendant liable as a contributory. No special rights of creditors intervene, and the case is to be regarded as one in which the company are suing to recover against a defaulting shareholder.

The paper of 30th May, 1902, was the initiation of the dealings between the company and the defendant. It contains an offer and agreement to take 30 shares of preference stock upon certain terms. The company could not adopt it in part and reject the remainder unless they first succeeded in obtaining defendant's assent to the variation. And, in suing upon the paper, plaintiffs are placed in this position; either the company accepted the offer as a whole and according to its terms, or they did not, but procured a different engagement from defendant.

If the first is the true position, plaintiffs' case fails, for the reason given by the trial Judge, viz., that the agreement was one for the acquisition of the shares by defendant at a discount, and there was no by-law authorizing a sale of the shares at a discount, and for the further reason that plaintiffs have neither offered, nor shewn themselves in a position, to comply with the terms of the agreement by giving to defendant 15 $100 shares of the common stock fully paid up and non-assessable: Pellatt's Case, L. R. 2, Ch. 527, at p. 536.

If, on the other hand, plaintiffs rely on another agreement for the unconditional taking of 30 shares of the preference stock, the evidence does not support any agreement to

that effect. There is nothing whatever to shew that defendant ever assented or agreed to any variation of the terms of his offer. It is not attempted to be shewn that it was stated to him or in his presence that his offer would only be accepted as one to take the 30 shares to be paid for in full without any right to receive the shares of the common stock for which he stipulated, and that he agreed to that variation of his offer. The silence of the report upon the persons subscribing for stock made by W. A. Johnston to the directors and again to the shareholders does not evidence any bargain by defendant in variation of his offer. He was entitled, in the absence of anything said to the contrary, to rely upon the paper signed by him as evidencing the agreement upon which he was to become a shareholder. W. A. Johnston was the agent of the company in procuring the agreement. He had assumed to accept the offer in the terms in which it was made, and defendant was quite justified in believing, in the absence of any notice to the contrary, that the company was accepting his offer as made. There does not appear to be the slightest ground for supposing that he had any reason to suppose the contrary. It was suggested in argument that the arrangement for receiving the common stock was a private one between W. A. Johnston and defendant, whereby, in consideration of the latter's agreement to take and pay for the 30 preference shares, the former was to make over to him 15 shares of common stock. But there is nothing in the evidence to support this argument. The only pretext for it was the fact that W. A. Johnston was the owner of a large part of the common stock, but in his testimony he did not throw out the slightest hint that the nature of the bargain was as now suggested. . . .

[Reference to Chapman v. Great Central Freehold Mines, 22 Times L. R. 90.]

Plaintiffs cannot enforce the agreement contained in the paper of 30th May, 1902, and they have failed to prove any modification or variation of it, agreed to and accepted by defendant.

Then as to the effect of defendant's acts and conduct and the entries in the books. He only attended the meetings on 30th May, 1902, and in respect to them he must be taken to have attended only as a shareholder upon the terms of his offer, and as between him and the company it cannot be said that his doing so operated in any way to the prejudice of

the company, or induced them to take a position or engage in acts which otherwise they would not have done. In other words, there was no estoppel. The entries in the books appear to establish nothing, but in any case they were no more than prima facie evidence. There is nothing in them inconsistent with the position taken by defendant. They are no more conclusive than the fact of his attending the meetings on 30th May, 1902.

The cases cited for plaintiffs on this question only go to illustrate the well-worn rule that each case must depend upon and be governed by its own circumstances. The payment of money on account of shares, the active participation in the affairs of the company, the knowingly allowing the name to appear as a shareholder or director, and the like, have always been considered as important but not conclusive elements. None of them occur in the present case, and the facts proved remove any impression unfavourable to defendant that his conduct on the one day and the entries in the books might create, if left wholly unexplained.

The appeal fails and ought to be dismissed.

JANUARY 22ND, 1906.

C.A.

AMES v. SUTHERLAND.

Broker—Shares—Pledge for Advances—Margins—Speculative Shares—Fall in Price—Sale without Notice to Customer—Laches—Measure of Damages—Intention of Customer to Retain Shares—Price at Time of Trial.

Appeal by defendant from order of a Divisional Court (6 O. W. R. 20, 9 O. L. R. 631), dismissing defendant's appeal from judgment of STREET, J. (5 O. W. R. 328), in favour of plaintiffs, in an action to recover moneys advanced by plaintiffs, as defendant's brokers, to protect 400 shares of Dominion Coal Co.'s stock bought by plaintiffs for defendant on margin. Plaintiffs sold defendant's stock, as was held by the Divisional Court, wrongfully, but it was also held that defendant was not entitled to recover damages for the sale, because the Court concluded, upon the evidence, that defendant would have held the stock if

it had not been sold, and at the time of the trial it could have been bought very much below the prices at which it was sold by plaintiffs.

S. C. Biggs, K.C., for defendant.

W. N. Tilley, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—The contentions on behalf of the appellant are: (1) that the respondents never had any cause of action against him; (2) that, being unable to restore the pledge held as security for the moneys advanced by them, they cannot enforce payment of the debt; and (3) that the appellant was entitled to substantial damages; all of which are substantially questions of fact.

The respondents admittedly paid for the appellant, at his request, the sum of money of which that in question forms part, and so had the usual right of action at law on the common count for money paid.

It is also not in accordance with the fact that the respondents were or are unable to restore the pledge; they could at any time have acquired in the market 400 shares of the stock which they had sold, as readily as they could have bought 400 bushels of any particular grade of wheat, or any other marketable commodity; and any 400 shares of the same stock would have answered the appellant's demand for redemption as well as the actual 400 which had been negligently sold; indeed he never had any knowledge what those shares actually were, if in truth any defined shares were actually transferred to the respondents for him under his order to them to purchase for him. The appellant was not bound to seek to redeem; he might treat the respondents as wrongdoers—as guilty of a conversion of his stock, if it ever assumed that state; but when his claim is based upon an inability to restore the pledge, under his second contention, it is to be met upon that ground. If he desired to redeem, it was his duty to pay or tender the debt, but that he never did; to do so would put the respondents in a much better position than they have assumed in this action, the stock having not long after the sale gone down in price much below that at which it was sold and ever since so remaining. I find it difficult to perceive how anything is to be made out

of the second contention. The assignment of the brokers would not have prevented them or their assignees receiving payment of the debt and giving the 400 shares which would be acquired out of part of the payment. Not having sought and been denied redemption, how can the appellant answer for the respondents that they would not have restored the shares?

The last contention covers the real question upon this appeal. Treating the respondents as wrong-doers, or as guilty of a breach of contract, is the appellant entitled to damages greater in amount than the price for which the shares were actually sold and with which they have credited him? The trial Judge and the Divisional Court have found that he sustained no damages beyond that amount. What should be the measure of his damages? Surely the measure of his loss through the acts of which he complains. It is not a case in which the respondents can but will not supply the means by which the damages can be accurately estimated, and there are no other available means of doing so; and the case is otherwise free from some of the difficulties which frequently beset cases of this kind; there is reasonable evidence as to what the appellant would have done if the shares had not been sold. The appellant leaves in much doubt the time when he first learned of the sale he now complains of; his best effort at fixing the time was that it was not on 9th June nor till some time afterwards. So he makes it plain that until some time after 9th June he had no intention of selling. The finding hitherto has been that he would still have retained them "on margin," and so gained, instead of losing, by the sale; and that finding is well supported by the evidence. His testimony is that he did not desire to sell, that he had other very large holdings of the same stock, which he still holds, and that he was so desirous of retaining these shares that he would rather have let 400 shares of his other holding go, if he could not have kept both; and this testimony as to the tenacity of his intention is supported by the fact that he did not sell at a time when he might have sold at a great profit, soon after buying. I cannot doubt that the finding, upon this question of fact, in the other two Courts, was right.

The case has been dealt with throughout as one of a pledge of goods, and doubtless such was its true character, though I have been unable to find sufficient in the evidence to shew that the shares in question ever assumed a sufficiently

definite shape to be the subject of a pledge and of trover; but if the case were to be treated as one of contract between broker and speculating customer only, the same result would be reached with even less contention.

I would dismiss the appeal.

JANUARY 22ND, 1906.

C.A.

CITY OF TORONTO v. TORONTO ELECTRIC LIGHT CO.

CITY OF TORONTO v. INCANDESCENT LIGHT CO. OF TORONTO, AND TORONTO ELECTRIC LIGHT CO.

Appeal to Privy Council—Motion to Allow Security—Leave to Appeal—Jurisdiction of Court of Appeal—Amount in Controversy—Right of Appeal.

Motion by plaintiffs to allow security on proposed appeal by them from the judgment of this Court (6 O. W. R. 443) to the Judicial Committee of the Privy Council.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. S. Fullerton, K.C., for plaintiffs.

E. F. B. Johnston, K.C., and J. S. Lundy, for defendants, opposed the motion, on the ground that the appeal was not competent, the case not being within R. S. O. 1897 ch. 48, an Act respecting Appeals to His Majesty in His Privy Council.

OSLER, J.A.:—In Gillett v. Lumsden, [1905] A. C. 601, it was said by the Judicial Committee that it was clear to their Lordships, on considering the Ontario Act, that an allowance of the appeal was contemplated, and that such allowance must be one by the Court of Appeal for Ontario—that it was essential that the appeal should be admitted by the Court, and that the Court was bound to exercise its judg-

ment in considering whether any particular case was appealable or not. I do not understand, however, from anything that was said in that case that anything which this Court could do or say would make an appeal competent in a case not within the Act, though I infer that where the appealable value may be said to be uncertain, the Judicial Committee would be disposed to entertain the appeal where this Court had passed upon the subject and had decided that it was competent, and had allowed the security upon that footing. All that we are bound to do is to exercise our judgment upon the question whether the case is within the Act or not. If we should think that it is, we ought to approve the security if satisfactory and thus allow the appeal. If we should think otherwise we should refuse to do so and leave the party to petition for leave to appeal, a leave which we have no jurisdiction to give. Our jurisdiction is confined to allowing the security, though in doing so we decide quantum valeat that the case is appealable under the Act.

In Allan v. Pratt, 13 App. Cas. 780, a Quebec appeal by the defendant in an action where no more than $1,100 had been recovered, though $5,000 had been claimed, the Court below "admitted" the appeal (an expression not used in the jurisprudence of this province), though the recovery was for a sum below the appealable amount. The validity of their order was objected to, and the appeal was dismissed on the ground that the case was governed by Macfarlane v. LeClaire, 15 Moo. P. C. 181, on the question of value, i.e., that it was the amount recovered, not the amount claimed, which ruled, and that it was not at all affected by the circumstance that the Court below did not give effect to the objection, but gave leave to appeal, as they seem formally to have done. "It has been decided in former cases," said the Committee, "that leave so given does not make the thing right if it ought not to have been done."

It appears to me that the appeal in the present case is not competent, that is to say, that the case is not appealable under the Act. The right of appeal is defined and limited by sec. 1. An appeal shall lie to His Majesty in His Privy Council only "where the matter in controversy exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty or fee, or any like demand of a general or public nature affecting future rights."

Here the action is brought for a declaration that the rights conferred upon the defendants the Toronto Electric Light Company for laying down and operating their underground wires, conduits, and appliances in the city streets under their agreement with plaintiffs of 13th November, 1889, have been forfeited by the amalgamation of the company with their co-defendants, the Incandescent Light Company of Toronto, contrary to one of the terms of the agreement, and the action has been dismissed. Clearly that is not a matter in question within the last branch of the section, if for no other reason than because there is no annual or other rent payable by defendants to plaintiffs in respect of the rights conferred by the agreement. Whether the words "sum or value" in the first branch are confined to cases in which "the matter in controversy" is of a pecuniary nature, may be an arguable question. But however that may be, the whole matter in controversy at the trial was whether the Toronto Electric Light Company had forfeited their rights by amalgamation with their co-defendants. This was the only claim made, the only contention put forward, at the trial, and there is nothing before us to shew that such a matter is or can be of value to plaintiffs of more than $4,000 or of any sum or value capable of being ascertained or defined. Defendants would be in a different position if they were the parties desiring to appeal, but from plaintiffs' point of view (and that is what is now to be considered, see Macfarlane v. Leclaire, supra, p. 187), all that is sought is the destruction of defendants' franchise. The plaintiffs are not seeking to acquire it. They seek only to be freed from it. What they might be able to do in that event by dealing with another company or by handling the electric lighting business themselves, is not the matter in controversy, nor are such incidental or possible consequences elements to be taken into consideration in determining the value, giving that word its widest meaning, of what is really in contention between the parties.

Motion dismissed.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons given in writing.

JANUARY 23RD, 1906.

DIVISIONAL COURT.

RE McINTYRE.

Surrogate Court—Passing Accounts of Administrator—Creditor's Claim—Refusal of Administrator to Pay—Allowance by Surrogate Judge—Jurisdiction.

Appeal by Mary Dean, sister of Archibald A. McIntyre, intestate deceased, from order of Judge of Surrogate Court of Elgin, upon passing accounts of administrator, assuming to disallow in part the claim of the appellant for payment by the administrator of a sum of $792 alleged to be due to appellant upon a bond. Appellant claimed as a creditor of the estate, and had not been paid by the administrator.

J. A. Robinson, St. Thomas, for the appellant.

S. Price, St. Thomas, for the administrator.

The Court (MEREDITH, C.J., TEETZEL, J., MABEE, J.) held that the Surrogate Jurge had no jurisdiction, upon passing the accounts, to allow or disallow the claim, which did not form part of the administrator's account.

Appeal allowed as to this claim, upon the ground of want of jurisdiction in the Court below.

CARTWRIGHT, MASTER. JANUARY 24TH, 1906.

CHAMBERS.

HAIGHT v. MENZIE WALL PAPER CO. AND T. S. PATILLO CO.

Writ of Summons—Service out of Jurisdiction—Joint Cause of Action—Rule 162 (g)—One Defendant in Jurisdiction—Necessary Party out of Jurisdiction—Joinder of Defendants.

Motion by defendants the T. S. Patillo Co., whose head office was in Nova Scotia, to set aside order permitting plaintiff to serve the applicants with the writ of summons out of

the jurisdiction, and to set aside the writ and service thereof; and motion by defendants the Menzie Wall Paper Co. to compel plaintiff to elect against which defendant company he would proceed.

W. N. Ferguson, for defendants the Patillo Co.

Strachan Johnston, for defendants the Menzie Co.

A. W. Ballantyne, for plaintiff.

THE MASTER:—As appears from the statement of claim as amended, plaintiff is a traveller who was engaged by the Menzie Co. for 1905 at $1,000 a year and expenses. In May of that year plaintiff was sent by the Menzie Co. to Truro, N.S., with instructions that for the rest of the year he was to travel under the direction of the Patillo Co., as agent of the Menzie Co., and the Patillo Co. was to pay his salary and expenses as such agent. Plaintiff accordingly went to Truro and sold the goods of the Menzie Co., under the instructions of the Patillo Co., until 15th July, when he was wrongfully dismissed by both defendants, and he seeks to recover from them a balance of salary and damages for such wrongful dismissal.

In support of the first motion it was argued by Mr. Ferguson that the Patillo Co. was not a necessary and proper party to this action under Rule 162 (g). . . .

[Reference to Witted v. Galbraith, [1893] 1 Q. B. 577; The "Duc D'Aumale," [1903] P. 18.]

These cases seem to shew that the motion must fail, as the amended statement of claim on its face alleges a joint cause of action, and to this plaintiff must be confined.

For the same reason, I think the motion requiring plaintiff to elect also fails. Such a motion can only succeed where the matter lies on the face of the statement of claim, as in Baines v. City of Woodstock, 6 O. W. R. 601, and that class of cases.

Here plaintiff sets up a joint cause of action. Whether he can prove it is something which cannot now be considered.

The agreement with the Patillo Co. produced on the motion . . . is dated at Toronto, which would seem to bring these defendants within Rule 162 (e) as to their separate contract with him. But that is not in question now. The present action is on a joint hiring by both defendants, involving a joint liability.

If it was any advantage to the Patillo Co., they perhaps might enter a conditional appearance. But it was conceded on the argument that nothing would be gained by so doing. If the claim was an alternative one, as in Langley v. Law Society of Upper Canada, 3 O. L. R. 245, such an appearance would be a benefit, if a defendant could shew that any agreement was not such as to bring Rule 162 into operation. There would then be only a separate cause of action against one of the defendants, but against which he could recover, plaintiff might be in doubt, as in Tate v. Natural Gas Co., 18 P. R. 82.

As the matter is not clear, the costs of these motions will be in the cause.

BOYD, C. JANUARY 24TH, 1906.

TRIAL.

DUNDAS v. DINNICK.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Relief from Contract—Hardship—Equitable Terms—Payment of Damages and Costs—Evidence of Contract.

Action against the trustees under a trust conveyance from one W. W. Farley for specific performance of a contract, dated 22nd August, 1904, made by defendants as trustees, with plaintiff, as alleged, to sell certain lands and houses for $1,200.

R. McKay, for plaintiff.

H. E. Rose, for defendants.

BOYD, C.:—The terms of the contract are made out with certainty, and there is no dispute as to what was agreed upon by all parties. The difficulty is, that considerable hardship and probable loss will be brought upon defendants if the contract is to be enforced in specie. In all the circumstances, they should be relieved from this position, on the equitable terms of making good to the purchaser the outlay and costs incurred by him, that is, such damages as would be given for breach of the contract at law. This can be worked out in

the one suit: Casey v. Hanlon, 21 Gr. 445; Tamplin v. James, 15 Ch. D. 223. There is sufficient evidence of the contract to bring all letters and documents, including deed signed in escrow, into consideration, as forming one transaction: Gillatley v. White, 18 Gr. 1; Hubbard v. Hatch, 174 Mass. 296.

Action dismissed, upon defendants returning deposit with interest, paying $25 for outlay to solicitor of purchaser, and costs of action.

JANUARY 24TH, 1906.

DIVISIONAL COURT.

WALKER-PARKER CO. v. THOMPSON.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent to Contract for Vendor—Misapprehension as to Instructions—Specific Performance—Refusal to Enforce.

Appeal by defendant Minnie Hammerton from judgment of TEETZEL, J., in favour of plaintiffs in an action, so far as the appellant was concerned, for specific performance of an alleged contract made by her, as vendor, for the sale to plaintiffs of a house and lot in Wellington street west in the city of Toronto. The appellant gave defendants the Real Estate Agency Co., an incorporated company, a written authority to sell the property, and the agreement which plaintiffs sought to enforce was signed by defendant J. Enoch Thompson, who was in fact manager of that company, as agent for the appellant. The latter set up that she was not bound.

H. H. Dewart, K.C., for appellant.

E. E. A. DuVernet and T. L. Church, for plaintiffs.

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

BOYD, C.:—I think all the evidence leads to the conclusion that the reason for the appellant deciding to sell the property in Toronto was, that out of the proceeds she might be able to purchase another property in Cuba (or the South). She was apparently in ill health at and after the transaction in question in this action, and discussed the change with Mr.

Thompson, in whom she had confidence, and from whom she thought of buying a place in Havana. She says: "I gave authority to sell under these circumstances and with these instructions, that, if I bought property in Cuba, I was to sell the property here. . . . I thought they would let me know if they got a purchaser before signing an agreement." She did not want to leave her house in Toronto till the autumn, intending apparently to spend the early spring months in the South and return to her Toronto home when it got too warm in the South. She says she told Thompson that if she got the property—Cuba—she would not have enough money to set her up, and that "I would then sell the property in Toronto—that is how the whole matter came up with Thompson." Thompson said to her, "Are you going to sell that property if you buy in Cuba?" And she said "Yes," and then he said, "Well, put it in my company's hands." She said, "Very well," and then her signature was put to the paper authorizing the Real Estate Agency Co. to sell. That is her version.

Thompson says: "She told me she had decided to sell the property here on account of the winters here, and she said she would let me have the property to sell exclusively."

The power to sell was signed by her while ill in bed and without any consideration of its terms, and she was under the impression that it was not so drawn as to give power to conclude a sale without reference to her.

The power was signed 9th February, 1905, and next day she started for the South, from which she did not return until after this action was begun (which was 4th April, 1905). On being advised of the sale, she despatched a hurried answer by wire from Jacksonville, 5th March, saying, "Cannot give up place till the fall;" and in a letter soon after says, in answer to Thompson's letter (in which, on 4th March, he says, "Better come back and close deal and dispose of furniture, then you will have money to buy what you want down south"): "About the house, I will not give it up till 1st November, so, if they won't wait till then, it is off. . . . Anyway I can't give it up till then." This was written in a hurry to catch the post, and it explains truthfully why she was disappointed in the sale.

In letter of 11th March Thompson defends himself and says: "You said nothing about keeping the house on, or I would have made that a condition." To which the appellant

telegraphs on 14th March: "You should have submitted offer to me; won't pay rent; must stand till I return or won't sell." Thompson's answer is dated 15th March: "I cannot tell you how annoyed I am with myself, but I thought I was following your instructions to close for $6,000 cash, as you wanted to get out of the business."

I think that the misapprehension arose from his failing to note that she did not want to sell forthwith, but only conditionally, and that, even in the event of an acceptable sale, she was not prepared to go out of possession at once of her house and furniture in Toronto. I do not think that any writing signed by her precludes her from setting up this honest misapprehension of her position on the part of the agent, as a reason to induce the Court not to enforce specific performance, even if the authority to sell had been given to Thompson himself.

This was the last letter she received from Thompson when absent, and it was not answered till 5th April, when by a telegram from New Orleans she explained the delay—"Been ill; leaving to-night; do nothing till I arrive." But on the day before (4th April) this action had been commenced for specific performance.

I do not think blame is to be cast on Thompson for suggesting the defence of this action. Before the letter written by him on 12th April, in which he refers to the "Real Estate Agency not being on the agreement," she had returned to Toronto, and had seen a lawyer—had apparently received a copy of the written authority, and had been told that the sale could not be forced against her or Thompson. See her letter, dated "Wednesday" only, beginning, "Will you kindly let me have the paper I signed," which from internal evidence would seem to be prior to Thompson's letter of 12th April, though it may have been written earlier on that day. I do not think the enhanced price had anything to do with the refusal to carry out the transaction; for that offer of $7,000 was not made till well on in April, after action begun. And she then offers it to plaintiffs at an advance of $500 if she is left in possession till October, and before this the matter might have been settled if plaintiffs had acceded to her wish to be left in possession rent free till the autumn.

There is no doubt that on the documents the duly authorized agent for sale was the company, and not defendant Thompson. He purported to act on that written authority, shewing it to the purchaser, but he made the mistake of

signing the contract of sale in his own name as agent for the appellant. I think the affirmative evidence of the appellant as to what occurred with defendant Thompson is to be preferred to his absence of recollection on the point, and her conduct confirms her truthfulness. I think also the weight of evidence is in affirmation of the writing that the company was constituted her agent and not defendant Thompson individually. Now, if the agent was the company, Thompson had no right of his own motion to sign so as to represent or bind that company. The company was not a nonentity, though not of great material substance—having a little land and a president. But Thompson does not assume to sign for the company; he signs for himself as agent; and, unless his signature is sufficient under the Statute of Frauds, it cannot be said that the contract of sale has been signed by or on behalf of the constituted agent—the Real Estate Agency Co. Upon this ground, I think there is no contract signed by or for the owner within the meaning of the statute.

Could Thompson be regarded as a collateral agent, on the oral testimony I think there would be a good equitable defence as against him, that he failed to carry out the instructions given as to the manner of sale—that she did not contemplate or direct an immediate sale or an immediate relinquishing of possession, and that there was, at the least, improvidence if not carelessness on the part of the agent, which should induce the Court to hold its hand and not specifically perform the contract against the unwilling owner. It is not without hesitation that I have reached this result, but it seems to me preferable to the view taken by Mr. Justice Teetzel.

Appeal allowed without costs, and action dismissed without costs.

JANUARY 24TH, 1906.

DIVISIONAL COURT.

IMPERIAL CAP CO. v. COHEN.

Sale of Goods—Contract—Statute of Frauds—Order Taken by Travelling Salesman of Vendor—Memorandum—Authority of Salesman as Agent of Purchaser—Correspondence—Recognition of Order.

Appeal by defendant from judgment of District Court of Algoma in favour of plaintiffs upon the fourth claim made

in the action, which was for the price of a bill of goods alleged to have been ordered by defendant and shipped to her. Defendant said that she countermanded the goods before they reached her, and then refused to accept them, and she pleaded the Statute of Frauds. Plaintiffs' traveller took the order from defendant. There was no signature by defendant.

J. E. Jones, for defendant, contended that there was no evidence to support a finding that plaintiffs' traveller was authorized to sign the order for defendant, relying on Benjamin on Sales, 4th ed., p. 241, and cases there cited.

W. E. Middleton, for plaintiffs, contended that the order in writing defining the goods, the invoice of the goods sent, and the subsequent letters refusing to take the goods, and recognizing the order, were sufficient to satisfy the statute, and also that the order written by plaintiffs' traveller was in itself sufficient.

The judgment of the Court (BOYD, C., STREET, J., MABEE, J.), was delivered by

BOYD, C.:—Upon the state of facts disclosed in the evidence the last word in point of law appears to be spoken in 1875 by the Court in Murphy v. Beven, L. R. 10 Ex. 126, which appears to have settled the law down to that time, and it has not since been modified or disturbed by any more recent decisions. The upshot of all the cases as there determined is that the traveller or salesman of a wholesale dealer is presumably not authorized by the persons why buy from him to sign a contract for them as purchasers. And the presumption is not rebutted by the memorandum of the order being made up in the purchaser's presence in duplicate—one part being given to the buyer and the other part forwarded to the wholesale house. The entry of the name of the buyer, as in this case "Miss H. Cohen," made by the salesman, is not evidence per se of his agency to sign unless some further facts are given to shew that he was acting in the premises as the agent of the purchaser. Upon that point there is no evidence reported to us by the Judge or set forth in any way on which such a conclusion of law could be based.

The letters put in evidence do not eke out what is insufficient, for they in no way identify this contract, but speak of goods generally. The cases relied on are those in which the letter had enclosed in it or in some other way identified

the particular contract, as in Elliott v. Dean, 1 Cab. & Ell. 283, based on Wilkinson v. Evans, L. R. 1 C. P. 407.

The appeal is allowed with costs of appeal. The judgment below will be reduced by this bill of goods $191.75, and the costs of this appeal set off against the reduced judgment below and costs of Division Court to plaintiff.

JANUARY 24TH, 1906.

DIVISIONAL COURT.

ROBINSON v. ENGLAND.

Costs—Taxation—Appeal—Omission to File Written Objections before Certificate Signed—Slip of Solicitor—Relief—Setting aside Certificate—Extension of Time.

Appeal by defendant from order of MAGEE, J., ante 47.

Joseph Montgomery, for defendant.

J. C. Hamilton, for plaintiff.

The judgment of the Court (BOYD, C., STREET, J., MABEE, J.), was delivered by

BOYD, C.:—In a carefully edited book of practice, In re Furber, [1898] 2 Ch. 538, is cited for this, that where there was a blunder, and in order to prevent miscarriage of justice, the Master's certificate may be set aside and re-signed and dated as of a later date so as to enable objections to be carried in as to his taxation: Yearly Practice for 1905, p. 709. This rule is justified by the report as given in [1898] W. N. at pp. 303 and 313. It is said in Campbell v. Baker, 9 O. L. R. 295, 5 O. W. R. 372, that where, owing to the mistake of a solicitor, objections have not been carried in, it is very difficult to obtain any relief. Difficult it may be, but not impossible according to the well understood principles and practice of the Court. Thus it was said in an early case that there is no general rule with respect to the practice of the Court that will not yield to the demands of justice: Kennedy v. Wakefield, 18 W. R. 884; Burrell v. Nicholson, 6 Sim. 213. The general power of the Court to relax its rules exists, and it only depends on whether a sufficient special case is made out to warrant its exercise. This is recognized by Jessel, M.R., in In re Pilcher, 11 Ch. D. 907.

Here the mistake is one of pure form, arising out of the solicitor's slip, which he sought to repair on the day of its

occurrence. The matters as to the allowance or disallowance of the costs of the commission were all brought and argued before the taxing officer, and he passed upon them deliberately—so that all that remained to be done formally was to put the objections to his ruling in writing, that he might answer them in writing—and this could well be done nunc pro tunc, after the signing of the allocatur as before. But the solicitor omitted to file his objections, and before he could do so the certificate was signed, and technically the Master was functus officio. But upon application to the Judge who tried the case he is evidently of opinion that the costs of the commission evidence should have been taxed, as contended for by Mr. Hamilton, and so made the order for opening up, now under appeal. We think he had the power to intervene, and that the exercise of his discretion should not be touched on appeal.

Affirm order, but no costs.

JANUARY 24TH, 1906.

DIVISIONAL COURT.

JONES v. REID.

Promissory Note—Alteration after Signature of Maker—Insertion of Interest Clause—Material Alteration—Avoidance of Instrument—Subsequent Conduct of Maker—Estoppel—Ratification.

Appeal by plaintiff from judgment of MACMAHON, J., 6 O. W. R. 608, dismissing action as against defendant John M. Reid.

J. B. Mackenzie, for plaintiff.

A. H. Clarke, K.C., for defendant John M. Reid.

THE COURT (MEREDITH, C.J., ANGLIN, J., MABEE, J.), dismissed the appeal with costs.

STREET, J. JANUARY 26th, 1906.

CHAMBERS.

RE HODGE AND KERR.

Prohibition—Magistrate—Criminal Prosecution—Motion—Forum—Jurisdiction of Magistrate—Submission.

Motion by Frederick Kerr for prohibition to a magistrate to prohibit him from proceeding to hear a complaint against

the applicant for an offence against the Railway Act, upon the ground of want of jurisdiction.

R. D. Gunn, K.C., for the applicant.

Frank Ford, for the complainant.

STREET, J., held that there was no jurisdiction in Chambers to prohibit a magistrate in respect of a criminal prosecution, and adjourned the motion into the Weekly Court, where it was dismissed on the ground that the applicant had appeared and submitted to the jurisdiction.

STREET, J. JANUARY 26th, 1906.

CHAMBERS.

ONTARIO LUMBER CO. v. COOK.

Particulars — Statement of Claim — Settlement of Accounts—Allegations of Error—Specifications of Error.

Appeal by plaintiffs from order of Master in Chambers, ante 58, requiring plaintiffs to give particulars of the 8th paragraph of the statement of claim.

A. G. F. Lawrence, for plaintiffs.

A. H. Marsh, K.C., for defendants.

STREET, J., dismissed the appeal with costs.

BRITTON, J. JANUARY 26TH, 1906.

TRIAL.

HOVENDEN v. O. C. HAWKES LIMITED.

Principal and Agent—Agent's Commission on Sale of Goods—Time for Payment—Rate of Commission—Contract—Correspondence—Payment for Samples Sent to Agent.

Action for a commission on the sale of goods by plaintiff as agent for defendants. Counterclaim for price of samples, &c.

J. E. Jones, for plaintiff.

W. E. Middleton and R. G. Hunter, for defendants.

BRITTON, J.:—Plaintiff was for a time agent in Ontario for the sale of goods of defendants, and this action is brought for commission on sales. At the close of the case only 3 things remained in controversy:—

1st. The time when commission became due.

2nd. The right of plaintiff to charge full commission on order from Krug Bros.

3rd. The liability of plaintiff for samples sent out to him by defendants.

(1) I am of the opinion, and so find, that the letter of 7th August, 1903, was not intended to postpone and did not in fact postpone the payment of commission until at or after the receipt by defendants of the price for goods sold. The interpretation put upon this letter by defendants is (1) inconsistent with the part of same letter which provides for payment of commission monthly. That must mean monthly after commission earned. The commission was earned when order was sent in by plaintiff and accepted by defendants. (2) With the dealings between the parties as to commission. Defendants' acted upon and in accordance with plaintiff's contention.

The principal witness for defendants is, I think, in error in stating that the commission was paid before receipt of purchase money, because plaintiff was hard up, and pressing for pay. The correspondence put in does not bear out this statement. Plaintiff did not say money would be acceptable, but it was not put as asking grace—or a favour. Defendants are clearly wrong in supposing, if they do suppose, as Baddeley says, that there would be no commission payable in case of a customer's insolvency, or in any case where the customer did not from any cause pay for the goods sold on order to plaintiff. Non-liability in case of insolvency was not contended for, at the trial. The fair reading of the letter shews that the words "net amount received" were used to determine the amount of plaintiff's commission and not the time when commission became payable. The word received means in that letter "receivable," or "to be received." If defendants' contention that the strict reading of the letter must govern be correct, then it might be argued that 3 per cent. would be payable only when price received for bevelled and silvered plates, and all kinds of glass, and the 5 per cent. on other manufactured goods, would be payable as earned. That

clearly was not the intention. There is nothing in the correspondence or conduct of the parties to indicate any difference as to the time of payment of commission or how computed on the different kinds of goods.

In the present case there was no insolvency of purchasers, and all the goods have now been paid for—the only difference is that if defendants' contention prevail the action was commenced prematurely.

(2) It seems clear to me that it was not proposed or intended by plaintiff to allow half of his commission on the Krug order, and plaintiff never assented to defendants' proposition that plaintiff should accept only 3 per cent. on this order. There is no evidence of fraud either in representation or concealment on the part of plaintiff in this Krug matter. Plaintiff and defendants were dealing with one another directly, and there was no misunderstanding between them. It is a matter of no importance that Krug did not understand the arrangement as plaintiff and defendants did. This is simply between plaintiff and defendants, and plaintiff's letter of 19th December, 1904, put the thing plainly. Plaintiff, by giving 2½ per cent. off, took the risk of defendants not accepting the order. Defendants so understood it. If they had understood that plaintiff would allow to Krug any part of plaintiff's commission, there would have been an end of the discussion, and defendants would, no doubt, have thanked plaintiff.

The correspondence, so far as material, about the Krug order, begins with plaintiff's letter of 12th September, 1904, enclosing telegram from Krug, and informing defendants that plaintiff had offered 2 per cent. reduction. Defendants refused by cable of 23rd December, and by letter of same date declined to allow this discount. Plaintiff wrote on 15th enclosing further order for 950 plates. Defendants replied to this by letter of 28th December, accepting this order, but confirming cable and letter of 23rd as to any further orders except at net rates. On 31st December defendants received plaintiff's letter of 19th, and then distinctly, contrary to their letter of 23rd, accepted the order, acknowledged it to Krug Brothers, and asked them for specifications for the 2,500 plates, so as to enable defendants to deliver. Then, having accepted the order allowing to Krug Bros. the discount of 2½ per cent. from net rate, defendants asked plaintiff to be content with 3 per cent. commission. Plaintiff declined to

accept the 3 per cent. commission, resented defendants' advice about being more firm, tendered his resignation as agent, and drew for amount of commission. The defence, in my opinion, fails as to this 2 per cent. commission deduction from the Krug order.

(3) As to samples. Plaintiff by his letter of 1st September, 1903, asked for advertising samples similar to plates 969, 971, and 973, and anything else in that line that defendants might think of that would help, and either deduct the price of these from commissions, or draw for them at sight. I confess to a little difficulty in understanding why plaintiff offered to pay. Samples of goods sold by agents are not usually paid for by agents. They remain the property of the principals, and would only be charged as a matter of keeping a record of them, and of having them accounted for. From the correspondence and what has taken place between the parties, I do not think that plaintiff expected to pay for these samples or that defendants intended to exact payment for them. Defendants sent a large amount, most of them absolutely useless to plaintiff as a traveller, for the purpose of assisting him in making sales—all admittedly of no commercial value. They were not intended for sale, and could not be sold except possibly for a trifle. Defendants sent invoices of these samples to enable plaintiff to have the goods pass the customs, and duty was paid on them by plaintiff, and plaintiff also paid the freight, but defendants afterwards refunded to plaintiff without question the amount of freight and duty so paid. Plaintiff says he did not expect to pay for these samples, and that in writing the letter mentioned, he was only "jollying" defendants. That is no answer, and I hold plaintiff to the fair meaning and intent of that letter. There was no warrant or authority in that letter to defendants to send the greater part of such samples as were sent. That letter in part reads: "I am also after the brewers and distillers and hope to get some orders from them. Their advertising "fad" just now is finger or push plates of bevel plate, about 3x7 or $3\frac{1}{2}$x$8\frac{1}{2}$, with their names and business thereon, with 4 holes for screws to fasten up, and similar in design to Nos. 969, 971, 973. If I had samples of your plates here I could get orders easily, so kindly furnish me with all the information possible, together with some advertising samples, similar to 969, 971, 973, and anything else in that line you can think of that

would help, and either deduct from my commission or draw at sight."

Defendants sent no special information, but sent, of their own choosing, a lot of samples not within the fair meaning of plaintiff's request. The evidence is, that the value of the samples that would fairly come under the description in plaintiff's letter, would be about £4. I will allow $20 for these. Plaintiff does not want these—puts no value upon them—and he does not own and is not entitled to any of the others, so defendants must, as against the plaintiff, be held entitled to get free of any charge for storage all the samples sent to plaintiff. Defendants are not entitled to anything for the freight or duty paid by plaintiff and refunded by defendants.

Plaintiff is entitled to 5 per cent. on the $5,661.64, amounting to $283.08, and deducting the amount allowed to defendants, $20, leaves $263.08.

Plaintiff is entitled to interest from commencement of action, 11 months, at 5 per cent., $12.02. Judgment for plaintiff for $275.10, with costs.

Counterclaim, except as to the sum of $20 allowed, as above, dismissed without costs.

MABEE, J. JANUARY 9TH, 1906.

CHAMBERS.

GARDINER v. BEATTIE.

Venue—Change—Convenience—Witnesses—Cause of Action.

Appeal by plaintiff from order of Master in Chambers, 6 O. W. R. 975, changing venue from Toronto to Milton.

C. H. Porter, for plaintiff.

W. I. Dick, Milton, for defendants.

MABEE, J., dismissed the appeal with costs to defendants in any event.