THE

ONTARIO WEEKLY REPORTER

VOL. 23 TORONTO, OCTOBER 31, 1912. NO. 3

HON. MR. JUSTICE RIDDELL. OCTOBER 11TH, 1912.

WEEKLY COURT.

CORDINER v. ANCIENT ORDER UNITED WORKMEN.

4 O. W. N. 102.

Insurance — Fraternal and Benevolent Society — Constitution — Amendment by Grand Lodge — Increase of Insurance Rates — Notice of Proposed Amendment not Given Subordinate Lodges— Injunction Restraining Enforcement of Increased Rates.

Motion to continue until trial an injunction restraining defendant society from putting into force an amendment to defendant's constitution passed by the Grand Lodge of defendant providing for an increased tariff of insurance rates.

RIDDELL, J., *held*, that as notice of the amendment to the constitution had not been sent to each subordinate lodge prior to its consideration by the Grand Lodge as required by the constitution the amendment was *prima facie* invalid.

Injunction continued to trial, costs in cause unless otherwise ordered by trial Judge.

"The Court will not interfere unless and until all the domestic remedies are exhausted."

Zilliax v. *I. O. O. F.*, 13 O. L. R. 155, referred to.

I. F. Hellmuth, K.C., for the plaintiffs.

E. F. B. Johnston, K.C., for the defendants.

HON. MR. JUSTICE RIDDELL:—The defendants the Ancient Order of the United Workmen of the province of Ontario is a fraternal and benevolent society or order. The order has adopted a constitution, etc., which it publishes under the title:

"Constitution, Laws and Rules of Order of the Grand Lodge of the Ancient Order United Workmen of the province of Ontario." in a 12 mo. of 126 pages, including the Index of 20 pages. There is, in this volume, no distinction drawn between "Constitution" and "Laws"; but at p. 95 appears an appendix headed "Appendix."

"Rules of Order," after which appear only Forms and a Summary of the Ontario "Insurance Law for the guidance of members and recorders."

There is nothing corresponding to a division into "Constitution" and "By-laws," and I think the remainder of the provisions in the volume are the "Constitution"—and correspond to what is called "Rules" in R. S. O. 1897 ch. 211, sec. 12: "Constitution" in same stat. sec. 7 (2).

In this Constitution, sec. 63, a tariff is set out of the amount to be paid monthly by each member by way of assessment—the table runs from $0.74 per thousand at the age of 16, to $2.69 at the age of "49 and over." This assessment corresponds to the premium payable for a life insurance—and failure to pay it voids the insurance of the member.

At a meeting of the Grand Lodge holden at Toronto June 21st, 1912, that body purported to change the tariff by increasing the monthly assessment for those over the age of 49—at each additional year there was made a small additional tax so that at 65 the amount payable was $5.60.

The plaintiffs are persons affected by that change and bring their action to restrain the order from taking any proceedings under the pretended amendment.

They now ask for an interim injunction.

The Court is always loath to interfere in the domestic concerns of these Orders or Societies, deeming it best that they should govern themselves; but in a proper case a member is entitled to have the Order compelled to do him justice. Here, if the plaintiffs fail to pay the amounts which they claim to be wrongfully demanded of them, they run the danger of losing the benefit of an insurance which they have kept up for years and which may be a great part of their provision for those near and dear to them—and I think they are entitled to have the matter passed upon by the Court.

There are several objections urged against the amendment—only one of which I specially consider as I think that alone sufficient to dispose of the case.

The clause in the Constitution which governs is as follows:—

"169. Amendments. Alterations and amendments to this Constitution may be made at any annual meeting of Grand Lodge by vote of two-thirds of the entire number to which members present at such meeting are entitled.

Provided that all such alterations and amendments are forwarded to the Grand Recorder on or before the 31st day of October, in order that a copy thereof may be sent to each Subordinate Lodge and to all members of the Executive Committee and officers of Grand Lodge before the 15th day of November following."

The Grand Recorder is the officer of the Grand Lodge corresponding to the secretary, he keeps the minutes of the meeting, conducts the correspondence, notifies the members of meetings, has charge of the books, papers, etc., keeps the registers, etc. He also, sec. 24 (33), "shall have copies of the minutes of each . . . meeting of the Grand Lodge (except the secret journal . . .) correctly printed in pamphlet form and promptly forward two copies to each Subordinate Lodge, one to each Grand Officer and member of a Standing Committee of the Grand Lodge. . . ."

The regular meetings of the Grand Lodge are held on the third Wednesday in March in each and every year. Section 11. It is suggested that the amendments are to be sent to the Grand Recorder after they are passed and then a copy to be sent by him to the Subordinate Lodges, etc., before the 15th of November following the passage thereof. But this, I think, cannot be, when the amendment is passed, he himself has it, and it is not then to be "forwarded to" him. Who was to "forward" it?

Again, it is already the duty of the Grand Recorder to send a copy of every proceeding of the Grand Lodge to each "member of a Standing Committee of the Grand Lodge," sec. 24 (33). The Executive Committee to which the copy, by sec. 169, is to be sent, is only one of several committees, e.g., I find Standing Committees on Finance and on Laws.

But the reason of this provision makes it, to my mind, perfectly plain that the proposed amendment is intended to be sent to the Subordinate Lodges before it is passed upon by the Grand Lodge.

The Grand Lodge is composed (sec. 2), of the Grand Officers, Executive Committee, Grand Trustees, D.D.G. M.W.'s, and the "representatives of the Subordinate Lodges," each Subordinate Lodge to elect its representative at a regular meeting in December to serve for one year following such election, sec. 5.

No doubt the object of sec. 169 is that the Subordinate Lodge shall, before electing its representative, have an opportunity of knowing what amendments are proposed with which such representative will have to deal, of discussing the same and of either choosing some one of whose views in the matter they approve, or of giving instructions as to his conduct in reference thereto. The representative is a representative of his Lodge and not as in the political sphere, a representative of the whole people; it would be more accurate to call him a delegate or even a "proxy."

The method pursued is certainly well adapted to the purpose of procuring the opinion of the members of the Order at large. And this is particularly so when the provisions of sec. 8 are taken into consideration. It reads thus:—

"Voting. 8. Each officer and representative shall be entitled to vote, but when the yeas and nays are called for by any ten representatives, and at all elections for Grand Lodge Officers, Executive Committee and Grand Trustees, each representative shall be entitled to as many votes as there were members of the Lodge represented by him or her at the date of the last annual report made by said Lodge to Grand Lodge; and the representative of any Lodge instituted after the date of the annual election of Subordinate Lodge Officers shall be entitled to as many votes as there were charter members of the Lodge represented by him or her."

It will seem that in all important matters, the representative has as many votes as his Lodge has members.

The indispensable prerequisite then is that a copy of "all such alterations and amendments to this Constitution" is "forwarded to the Grand Recorder on or before the 31st day of October"—this is "in order that" he may send a copy to each Subordinate Lodge in time for a full discussion of the proposed alteration or amendment before election of a Grand Lodge Representative.

That this has been the practice is plain: it is not denied.

What was done in the present instance appears from the records.

On November 1st, 1911, a circular was sent out to the Subordinate Lodges "as per Constitution I send you the following proposed amendments to the Grand Lodge Constitution, to be submitted to the Grand Lodge at its . .

session to be held in Toronto on Wednesday the 20th day of March, 1912," sec. 63 (1) had read:

"63. (1) Each and every present member of this Order, from and after the 1st day of May, A.D., 1905, and each and every new member of this Order, without notice, commencing with the month following the receiving of the Workman Degree, shall pay to the financier of the Lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the Order according to the following graded plan: (the ages and amounts were then set out, beginning with 16 and ending with "49 and over"). The circular said:—

"1. Amendment proposed by the Executive Committee. That the following be substituted for sub-sec. 1, sec. 63, p. 39 of the Constitution:

"Each and every present member of this Order, from and after the 1st day of May, A.D., 1912, and each and every new member of this Order without notice, commencing with the month following the receiving of the Workman Degree, shall pay to the Financier of the Lodge a monthly assessment of the amount designated opposite the age of the member as at May 1st, 1905, according to the following graded plan; but provided that no member shall be required to pay a higher assessment than is designated for age 49." And a table followed with the same ages and amounts as before.

I am not concerned in the interpretation of this curious amendment and do not enquire whether the effect would have been to make the member pay more or less than on the previous plan.

The Grand Lodge met on March 20th and 21st, 1912. At the afternoon session of the first day the Executive Committee submitted their Report, incorporating the proposed amendment, this was referred back to the Executive Committee for further inquiry, and that all proposed amendments . . . in any form affecting the assessment rates which are before . . . this Grand Lodge session shall, after full discussion, remain in abeyance as to voting thereon until the Executive Committee shall have presented their findings and recommendations tomorrow morning for the consideration of the Grand Lodge." The Executive Committee met that evening to formulate their report which they submitted the following morning. It read thus:—

"Your Executive Committee having been duly instructed by Grand Lodge to report upon an adequate, equitable and permanent adjustment of the assessment rates, to sustain the Beneficiary and Reserve Funds, desire to submit their findings and recommendations, which are as follows:

Re Assessment Rates.—Your Committee find that our present rates, which were adopted May 1st, 1905, are practically the same as the rates adopted as a standard by the Ontario Legislature in 1897, which are recognized by authorities as being correct in principle and adequate in practice. Your Committee, therefore, recommend to Grand Lodge to adhere to this standard, and to apply and extend the same to all members of our Order at their present attained ages, provided, however, that the proposed change shall not affect the members admitted since May 1st, 1905. Your Committee further recommend that a competent actuary be selected by the Executive Committee to advise as to the application of the above mentioned rates, so as to attain the desired result set forth above and that this Grand Lodge be adjourned and reconvened at the call of the Grand Master Workman immediately upon the receipt by him of the actuary's report."

This report was it would appear adopted and afterwards the following resolution:

"Resolved: That this Grand Lodge do now adjourn, and that it shall stand adjourned until called together again on the order of the Grand Master Workman."

and ultimately,

"The business of Grand Lodge being completed, the Grand Master Workman declared the session adjourned to convene again immediately after he receives the report as to rates from the Actuary."

The adjourned meeting was called for June 21st, 1912, this meeting was, in a manner, attacked by the plaintiffs, but I find that sec. 12 authorizes the G. M. W. to call special meetings whenever he may deem it necessary: so that this meeting in any view is well enough.

The Executive Committee reported as follows:

"Your Executive Committee, having taken into careful consideration the report submitted by Actuary Sanderson, and having also carefully considered the opinion of counsel employed, desire to submit the following report for the consideration of Grand Lodge.

We recommend that section No. 63 of the Constitution be amended by striking out the entire section and substituting therefor the following:

"Every member of the Order from and after the 1st day of October, 1912, without notice, shall pay to the Financier of the Lodge a monthly assessment of the amount designated opposite the age of the member as of the said 1st day of October, 1912, or in the case of members joining after the said date, at his or her age at date of joining the Order according to the following graded plan." Then a table followed of ages and amounts, beginning with age 16, $0.74 per $1,000, and continuing down to 49, $2.69 per $1,000, the same as the original tariff; but instead of giving all over 49 the same rate as those of 49, the tariff went on increasing year by year till it reached 82 years and $16.12 monthly instalment; then the report continues:

"Provided that any member who shall have joined the Order prior to the said 1st day of October, 1912, shall have the option of having his or her certificate rated at his or her attained age as of the 1st day of May, 1905, or at his or her attained age at date of joining if he or she shall have joined the Order subsequent to the 1st day of May, 1905, upon either paying an additional assessment, consisting of the difference between the rate hereinbefore provided for, and the rate theretofore paid by such member, which is according to the following schedule." The schedule setting out ages and rates as in the original.

At the evening session:

"Past Grand Master Workman Cornett presented the following amendment: That the monthly rate of assessments now paid into the Beneficiary Fund of this Grand Lodge, by all members who joined the Order prior to May 1st, 1905, be increased by 25 per cent. and that said increase take effect from and after July 1st, 1912."

"The vote was taken on the amendment and was declared lost. The vote was then taken upon the report of the Executive, which was also declared lost."

Thereupon

"Representative W. H. Mills, of Ottawa, presented the following amendment to the Constitution, which was adopted:

Amend sec. 63, sub-sec. 1, by striking out all of that part of the said sub-section on pp. 39 and 40, and substituting therefor the following:

From and after the first day of October, 1912, each and every member of this Order, who joined prior to the 1st day of May, 1905, shall, without notice, pay to the Financier of the lodge a monthly assessment of the amount designated opposite the age of the member on the 1st day of May, 1905, members over 65 years of age to be taken as at age 65; and each and every new member, commencing with the month of receiving the Workman Degree, shall, without notice, pay to the Financier of the lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the Order, according to the following "graded plan":

The "graded plan" sets out ages and amounts from 16 to 49 the same as the original, then continuing from 50 to 65, inclusive, the same as recommended by the Executive Committee in their report, but stopping at the age of 65 years.

It is this "amendment to the Constitution" which is complained of. It must be perfectly manifest that this amendment never was submitted to the Subordinate Lodges for the consideration of their members, and that the members of the Order at large have had no opportunity of considering and discussing the same and of instructing their representatives in respect thereof. This, of course, would—or might—be no objection where the representative was a representative as in the Dominion and province of the whole Dominion or province and not of a particular constituency.

It may, perhaps, not be a prerequisite, taking sec. 169 strictly, for the Grand Recorder to send a copy of the amendment to the lodges, but it is in any reading necessary that the amendment shall be forwarded to the Grand Recorder on or before the 31st October before the meeting at which it was to be considered.

There are other objections to the amendment upon which I do not pass.

Were it the case of an incorporated company and were it certain that the proper number of votes would be secured to carry the amendment, the Court might not—probably would not—interfere; but this is quite a different case.

I do not lose sight of the principle as laid down in many cases that the Court will not interfere unless and until all the domestic remedies are exhausted. There are many provisions for appeal in the Constitution of this

order but none for an appeal from the action of the Grand Lodge itself; and that is what the plaintiffs complain of.

Zilliax v. *Independent Order Odd Fellows,* 13 O. L. R. 155, is perhaps the latest case on which the principle is applied, and the numerous decisions need not here be cited or discussed. There is no doubt of the general principle.

I cannot entirely disregard the consideration of the evil effects upon the Order which may result from this order, any more than I can disregard the hardship on old and on aging men arising from the amendment if held valid. That the Order may suffer if the present plan is retained is clear enough. Life insurance does not differ from any other matter to which the inexorable truths of mathematics can be applied. Assumptions of antiquity, a euphonious well sounding name, the enthusiasm of fraternity are well enough, but when it comes to paying a death claim they are found wanting; the cold gray light of a failing bank account makes perfectly manifest that cheap insurance is a sin against actuarial science, and the wages of this sin, too, is death.

On the other hand, these aged and aging men have paid for years money which went to pay for the support of those left behind by their comrades, believing that so long as they, during their own lifetime, paid their fees as fixed by them, their widows and orphans would in like manner be provided for—they are now told that they must pay an increased amount—which many of them will find it most difficult, some impossible, to pay, or lose all the benefit of their past payments of money which they could ill spare. It would be hopeless for them to expect to be admitted to another benevolent society—their lot is a hard one. Truly those who organize such societies undertake a tremendous responsibility; the failure of any such always results in tragedy.

On a balancing of convenience I cannot but think these individuals have the higher claim to consideration. I cannot think the Order is so rotten, so near bankruptcy, that it will go to pieces before a regular meeting can be held at which will appear delegates fully instructed; while if I permitted the new rates to go into operation, very great hardships might result.

An injunction will go as asked, but all parties must speed the trial. Costs to be in the cause unless otherwise ordered by the trial Judge.

If all parties consent this may be turned into a motion for judgment in which case judgment will go as asked, with costs.

MASTER IN CHAMBERS. OCTOBER 10TH, 1912.

BROWN v. GRAND TRUNK RW. CO.

4 O. W. N. 113.

Venue — Motion to Change — Failure to Set Case down at Proper Time — Avoidance of Delay.

MASTER-IN-CHAMBERS, *held*, that he had no power to change the venue in order to expedite a trial where plaintiff by his own oversight had neglected to set the case down for trial.

Taylor v. *Toronto Construction Co.*, 21 O. W. R. 508; 3 O. W. N. 930, followed.

Motion by plaintiff to change venue from Belleville to Toronto.

R. U. McPherson, for the plaintiff.

Frank McCarthy, for the defendants.

CARTWRIGHT, K.C., MASTER:—The motion in this case is made for similar reasons to those in *Taylor* v. *Toronto Construction Co.*, 3 O. W. N. 930, 21 O. W. R. 508.

Here the action was begun on 30th March, 1911, for damages for death of plaintiff's husband on 24th November, 1910. The cause was at issue nearly a year ago—and notice of trial was given for the jury sittings at Belleville at the end of February, but by an oversight the case was not set down.

A new notice of trial was given in due time for the sittings commencing on 16th September. But owing to the absence of the agent of plaintiff's solicitors the case was again not set down. No other jury cases were set down within the time required by 9 Edw. VII (Ont.) ch. 34, sec. 63 (2), and under the further provisions of that section the jurors were notified not to attend, so that there was no way of getting the action tried at that time. It was stated by Mr. McCarthy that on this appearing, other arrange-

ments had been made by defendants' counsel and witnesses on the supposition that case could not be heard until the spring sittings.

Belleville is admittedly the proper place of trial in this case. The delay, however, unfortunate for the plaintiff, is not in any way attributable to the defendants. I see nothing to distinguish this case from the *Taylor Case supra*, by which I am bound until reversed.

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

HON. MR. JUSTICE RIDDELL. OCTOBER 12TH, 1912.

WEEKLY COURT.

GOLD v. MALDAVER.

4 O. W. N. 106.

Church — Sale of Pews — Power of Directors — Lease of Part of Building — Resolution — Constitution and By-laws.

Motion to continue to trial an interim injunction restraining defendant, the President of an Hebrew Congregation, a corporation incorporated under the Ontario Companies Act from leasing the basement of the synagogue and from selling pews without the consent of the pew-owners. By the constitution of the corporation only pew-owning members could vote on property matters.

RIDDELL, J., *held*, that *prima facie* the action of the President in permitting the whole membership to vote on the proposed lease was invalid and he should be enjoined from carrying out the lease but that the selling of pews was a matter wholly for the Executive to deal with and the pew-owners had no right to interfere with their discretion.

Injunction continued until trial on first branch, dissolved on second branch.

Costs in cause unless otherwise ordered by trial Judge.

Motion to continue an injunction granted by HON. MR. JUSTICE MIDDLETON.

W. E. Raney, K.C., for the plaintiffs' motion.

L. F. Heyd, K.C., for the defendant.

HON. MR. JUSTICE RIDDELL:—"The Shaare Tzedek Congregation is a corporation formed by letters patent under the Ontario Companies Act, to take over the assets and liabilities and in every way to stand in the place of a previously existing Hebrew congregation in Toronto, to maintain a place of worship for Hebrews according to the Sephardic Ritual, a

school, etc. In the letters patent it was (amongst other things) ordained that the congregation should determine the conditions upon which future members should be admitted—that the officers who should together be known as directors should be (1) the president; (2) Parnas; (3) Gabboh; (4) treasurer; (5) secretary; (6) five trustees; (7) senior Gabboh, for burial ground, and (8) junior Gabboh, for burial ground—that at any general meeting unless a poll is demanded, a declaration by the president, that a resolution has been carried and entry to that effect in the minutes of the proceedings of the corporation shall be sufficient evidence of the fact without any proof of the number or proportion of the votes recorded in favour of or against such resolution—that the affairs of the corporation shall be managed by the directors, who . . . may exercise all such powers of the corporation as are not by the Act or the charter, required to be exercised by the corporation in general meeting," subject nevertheless to any regulations not inconsistent with the above regulations or provisions as may be prescribed by the corporation at a general meeting . . ." Clause 26 has also been considered in argument material though I think it applies only to committee meetings—it is as follows: "26. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present except where otherwise provided by the by-laws."

In general meeting a "constitution" was drawn up which may be considered as containing the by-laws of the company. A copy of these in Hebrew (without the massovetic points) and in English has been put in—I follow the English version for obvious reasons.

In this "constitution" appear the following:—

Article 3, sec. 1: "Any person of the Jewish creed, 18 years old and over, is eligible for membership to this congregation."

Article 5, sec. 4: "Each member is entitled to a seat in the Synagogue, and if married, also to a seat for his wife, each pew to be rented for the period of one year, *i.e.*, from one New Year's day to the other."

Article 5, sec. 5: "All members have a right to vote in all affairs of the congregation, except on property affairs, which are to be voted on only by those members who had their pews bought."

Article 6, sec. 1: "The seats in the Synagogus may be sold at any regular or special meeting called for such purpose."

Article 6, sec. 2: "The seats must be sold by auction to the highest bidder, and are to become the property of the buyer, his executors and heirs. When there are no heirs, the seat shall belong to the Synagogue."

As all the seats are individual, the words "seat" and "pew" are synonymous.

The subsequent provisions of article 6 make it plain that only a member can buy a seat or pew.

The result is that the members are divided into two classes, 1. those who have "their pews bought," and 2. those who have not. All may vote at general meetings "except on property affairs"—on these only the first class.

At a meeting of the congregation—corporation with the defendant, the president in the chair, it was proposed to lease the basement of the synagogue for two years at a rental of $200 per annum—a number of pew owners protested as an offer for $500 per annum had been received—it is said that the tenant in either case was to sweep out the synagogue, also. The president, against the protest of the majority of the pew owners, allowed the general body of members to vote and declared the motion carried.

I am asked to continue the injunction restraining the president from acting on this resolution.

There are two arguments which might be advanced to support this resolution, but I pass over them as the defendant does not object to the injunction being continued on this branch.

But there is another and more important matter—the defendant, the president of the synagogue intends it is said to sell pews "notwithstanding . . . that fully two-thirds of the total number of fifty-nine pew owners in said congregation are opposed to the sale of any further pews or seats at the present time." There does not seem to have been any vote of the congregation directing such sale, and, therefore, the first ground suggested why the leasing was proper does not here appear.

That was that in the charter the declaration by the president, etc., is made sufficient evidence of the passing of a resolution without any proof of the number of the votes, etc. But while the declaration of the president, and entry in the books are sufficient evidence, they are not con-

clusive evidence; and there is nothing to operate by way of estoppel or otherwise to prevent the truth appearing.

What is mainly relied upon is that the directors including the president are charged with the management of the affairs of the corporation; that the directors may exercise all the powers of the corporation except as specifically excepted. It is to be observed that these powers are to be "subject . . . to any regulations not inconsistent, etc., etc., prescribed by the corporation in general meeting . . ." Regulations were made in general meeting (Article 6, secs. 1, 2) as to the sale of pews; and these do not prevent the exercise by the directors of the power to sell the pews provided the sale be (1) at a regular or special meeting called for the purpose, and (2) at auction to members only. It is not a matter which requires to be brought at all before the congregation any more than the sale of part of an ordinary company's land by the board of directors of such company.

Article 5, sec. 5, then has no application in my view.

I do not think that the injunction as to this branch can be sustained, as I do not think the approval of a majority of the present pew holders is necessary.

The defendant seems to be proceeding in good faith to sell so as to raise money to pay off pressing liabilities, and if he has the authority of the directors I do not think he can be restrained.

It may not perhaps be wholly without effect if I were to urge these brethren of one race and one creed living amongst a vastly preponderating Gentile population to try to sink their differences and live as brethren. Their great ancestor said to his nephew "Let there be no strife, I pray thee, between me and thee . . . for we be brethern"—and their greatest poet said later: "Behold how good and how pleasant it is for brethern to dwell together in unity."

But if the parties cannot agree the injunction will be dissolved as to the last part, continued as to the first on the defendant's consent; costs in the cause unless otherwise ordered by the trial Judge.

HON. MR. JUSTICE RIDDELL. OCTOBER 12TH, 1912.

CHAMBERS.

PARISH v. PARISH.

4 O. W. N. 105.

Husband and Wife — Alimony — Interim — Arrears — Date of Commencement.

RIDDELL, J., *held*, that where a writ of summons in an alimony action properly endorsed with a claim for interim alimony was served on April 20th, but the motion for interim alimony was not launched until September 21st, the delay did not preclude plaintiff from receiving interim alimony, but the same should only run from the date of the order granting same, and not from the date of service of the writ or statement of claim.

Karch v. *Karch*, 21 O. W. R. 833,
Howe v. *Howe*, 3 Ch. Ch. 494, and
Thompson v. *Thompson*, 9 P. R. 526, followed.
Order of Local Judge Elgin Co. varied.
No costs of appeal.

An appeal from an order of the local Judge for the county of Elgin, directing the defendant to pay $104 as arrears of interim alimony since the service of the statement of claim up to the date of the order and $8 a week thereafter; also $40 for interim disbursements.

Joseph Montgomery, for the defendant.

Shirley Denison, for the plaintiff.

HON. MR. JUSTICE RIDDELL:—The appellant asks that the order be not effective unless and until the plaintiff returns their child to the defendant and his chattels she has—and in any event that the amount be reduced—and moreover that the sum of $113, taken away by the plaintiff from the defendant's house, part of his money, be taken into account.

In *Karch* v. *Karch*, 21 O. W. R. 833, I discussed the circumstances under which interim alimony should be allowed; and do not now depart from the conclusions there arrived at. I think that I cannot stay the operation of the order until the plaintiff does something which it may turn out she is not bound to do.

But as to the amount—while it is clear that interim alimony may be, and often is granted from the service of the writ (or statement of claim) that is only if there has been no delay in making the application.

Howe v. *Howe*, 3 Ch. Ch. 494; *Thompson* v. *Thompson*, 9 P. R. 526, and a claim for interim alimony is endorsed on the writ.

Peterson v. Peterson, 6 P. R. 150. Here the second requisite is found—the writ is properly endorsed; but the writ was served April 20th, for some reason the statement of claim was delayed till June 29th, thereby allowing the statement of defence to be delayed till September 9th. Even then notice of motion for interim alimony was not served for two weeks, *i.e.*, the 21st September, and for the 27th September. The delay has not been accounted for; and I think the interim alimony should run only from the date of the order.

In this view, I do not direct the $113 to be taken into account, as it otherwise should or might. Probably the possession of the money accounts for the delay in making application.

In view of the short time to elapse before the trial may be had, I do not at present, at least, weigh in apothecaries' scales the means of the defendant and the amount which the plaintiff should receive as interim alimony. If for any reason the case is not tried at the coming St. Thomas non-jury sittings, the matter may be brought before me again either on the same or other material.

No costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. OCTOBER 12TH, 1912.

MAITLAND v. MACKENZIE & TORONTO RW. CO.

4 O. W. N. 109.

Limitation of Actions—Action for "Damages" for Personal Injuries —Limitation Act, s. 49(g), (h).

FALCONBRIDGE, C.J.K.B., *held*, that an action for damages for injuries sustained by collision with a motor vehicle was not "an action for a penalty, damages or a sum of money given by any statute" under 10 Edw. VII. c. 34, s. 49(h), but an action on the case under sub-section (h) of the same section and therefor not barred in two years.

Peterborough v. *Edwards* (1880), 31 C. P. 231, and *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718, followed.

Action for injuries by collision with a motor vehicle.

J. M. Godfrey, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Defendants plead the Statute of Limitations. If the limitation is 2 years plaintiff has brought his action too late.

Mr. McCarthy contends that the case falls under 10 Edw. VII., ch. 34, sec. 49 (h) "an action for a penalty, damages or a sum of money given by any statute . . ."

I think it clearly is not. It is an action upon the case under sub-sec. (g) of the same section.

See *Peterborough* v. *Edwards* (1880), 31 C. P. 231; *Thompson* v. *Lord Clanmorris*, [1900] 1 Ch. 718.

The trial is postponed until next jury sittings.

In view of the long delay in bringing the action (about 3½ years) defendants have been unable to find the chauffeur, and I shall not order them to pay forthwith the costs of the day.

They will be costs to plaintiff in any event of the cause.

MASTER IN CHAMBERS. OCTOBER 12TH, 1912.

ALSOP PROCESS CO. v. CULLEN.

4 O. W. N. 114.

Venue — Action for Infringement of Patent of Invention — R. S. C. (1906), c. 69, s. 31 — "May."

MASTER-IN-CHAMBERS, *held*, that under R. S. C. (1906), c. 69 s. 31, a patent action must be brought at the place of sittings of the Court in which the action is brought nearest to the residence or place of business of the defendant.

Aitcheson v. *Mann*, 9 P. R. 253, 473, followed.

This was an action for alleged infringement of plaintiffs' patent by the defendant who resides at Woodstock—as was admitted.

The plaintiffs laid the venue at Toronto. Defendant moved to change to Woodstock in reliance on R. S. C. ch. 69, sec. 31.

J. Grayson Smith, for the defendant's motion.

R. McKay, K.C., for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The above statutory provision is a re-enactment of the provision in the Patent Act.

This was judicially interpreted by the Q. B. D. affirming judgment of Boyd, C., in *Aitcheson* v. *Mann*, 9 P. R. 253, 473. It was there held that the word "may" as governed by the context of the Act was obligitory and not merely permissive (as contended now for the first time in my experience), "and that the reasonable construction of the Act was that the venue *must* be laid at the place of sittings of the Court in which the action is brought nearest to the residence or place of business of the defendant." In accordance with this decision the motion must be allowed and the venue changed to Woodstock with costs in the cause to defendant in any event.

HON. MR. JUSTICE RIDDELL. OCTOBER 14TH, 1912.

CHAMBERS.

GERBRACHT v. BINGHAM.

4 O. W. N. 117.

Trial — Jury Notice — Struck out — Action against Physician for Malpractice.

RIDDELL, J., struck out a jury notice in an action against a surgeon for malpractice holding that all such actions should be tried without a jury.

Motion for an order striking out the jury notice in an action for malpractice against a physician.

E. F. Ritchie, for the motion.

J. H. Spence, for the plaintiff.

S. G. Crowell, for the defendant Easton.

HON. MR. JUSTICE RIDDELL:—The action is for malpractice against two surgeons—the statement of claim alleges that the defendants left certain gauze within the plaintiff's body after an operation, which had to be subsequently removed, and charge negligence and want of skill. Dr. Easton, one of the defendants says that Dr. Bingham had sole charge of the operation, and that he (Easton) was not negligent; Dr. Bingham says he performed the operation with skill and in the proper manner.

In *Bissett v. Knights of the Maccabees* (1912), 22 O. W. R. 89, I pointed out that since the change in the Rule "the Judge in Chambers is called upon to exercise his judgment as to how the case might be tried, he cannot pass that responsibility over to anyone else—and if it appears to him that the case should be tried without a jury he must—he "shall"—direct accordingly."

I have no kind of doubt that an action of malpractice against a surgeon or physician should be tried without a jury—and I am strengthened in that opinion by the almost if not quite universal practice for twenty years.

At the bar I had very many cases of this kind; and I never saw one tried with a jury since about 1887.

Town v. *Archer* (1902), 4 O. L. R. 383; *Kempffer* v. *Conerty* (1901), 2 O. L. R. 658 (n); *McNulty* v. *Morris* (1901), 2 O. L. R. 656, may be looked at.

It is said, however, that this case will or may turn upon one simple question of fact: "Did the operating surgeon leave a piece of gauze in the body of the patient?" But while that may be so as regards one surgeon, it is not so as regards the other—and in any case it may have been good surgery to leave the gauze as it is alleged to have been left.

Even if it were the case that there would be but the one question, and that a question of fact, to try in addition to the damages, I should still be of the opinion that such a fact should be passed upon by a Judge.

Shortly before leaving the Bar a case of malpractice in which I was counsel, came on for trial before Mr. Justice Meredith at Brampton. The sole question (outside of damages) was one of fact. Did the operating surgeon direct the nurse to fill the rubber bag (upon which the patient was to lie during the operation) with boiling water?" Mr. Justice Meredith, the trial Judge, nevertheless, dismissed the jury and tried the case himself.

The present is by no means so simple a case; and I think the jury notice should be struck out.

Costs in the cause.

MASTER IN CHAMBERS. OCTOBER 8TH, 1912.

RICKART v. BRITTON MANUFACTURING CO.

4 O. W. N. 110.

Pleading — Statement of Defence — Con. Rule 298 — Denial — Non-payment of Interlocutory Costs.

MASTER-IN-CHAMBERS struck out certain paragraphs of a statement of defence alleging non-payment of interlocutory costs awarded to defendants on ground that the non-payment of such costs was not a defence but a ground for moving to stay the action and refused to strike out certain other paragraphs alleging that plaintiffs were entitled to no relief in respect of their alleged trademark by reason of their illegal use of the word "registered" in violation of secs. 335 and 488 of the Criminal Code.

Stewart v. *Sullivan*, 11 P. R. 529, and *Wright* v. *Wright*, followed, as to first branch of case, and *Ont. & Minnesota* v. *Rat Portage L. Co.*, 22 O. W. R. 1; 3 O. W. N. 1078, 1182, as to second branch.

Costs of motion in cause.

The facts of this case are to be found in the report in 22 O. W. R. 81, 3 O. W. N. 1272.

The statement of defence was delivered on 10th September. The plaintiffs next day moved to strike out parts of paragraphs 3 and 5 and all of paragraphs 6, 7, 8, 9, and 13, on the usual grounds under Consolidated Rule 298.

J. G. O'Donoghue, for the plaintiffs' motion.

C. G. Jarvis, for the defendant, contra.

CARTWRIGHT, K.C., MASTER:—I noted on the argument that paragraph 13 was not objectionable at this stage, as it merely denied plaintiffs' right to the assistance of the Court. Paragraphs 6, 7, 8, and 9, set out the fact (which is not denied) that certain interlocutory costs awarded to defendants amounting in all to over $230, have not been paid, and allege that by this default the plaintiffs have abused the process of the Court, and are thereby disentitled to any relief which might otherwise have been given to them.

The question of the effect of non-payment by a plaintiff of interlocutory costs was fully dealt with by the Common Pleas Division in *Stewart* v. *Sullivan*, 11 P. R. 529, approved in *Wright* v. *Wright*, 12 P. R. 42. It was there laid down that the remedy in such cases was by application to the Court for a stay until payment had been made. No doubt this course is open to defendants, if they think it likely to succeed.

In that view only does plaintiffs' default give rise to anything in the nature of a defence to plaintiffs' action. If defendants wish to have the benefit of the principle enunciated in *Stewart* v. *Sullivan, supra,* they should proceed by way of motion. The fact of non-payment, though admitted, is no defence to the action. It follows that paragraphs 6, 7, 8, and 9, should be struck out leaving defendants to move if so advised, for a stay of proceedings. The part of paragraph 5 objected to alleges that the plaintiffs "by their use of the word registered" in their alleged trade mark, "are guilty of the indictable offence" defined in secs. 335 and 488 of the Criminal Code, and are thereby debarred from any relief in respect thereof.

I refer to the similar case of *Ont. & Minnesota* v. *Rat Portage L. Co.,* 22 O. W. R. 1; 3 O. W. N. 1078, 1182. There it was said at p. 2, that certain "facts stated in these eleven paragraphs were relied on by the defendants as reasons why the Court should not give the relief asked for by plaintiff," and they were, therefore, allowed to stand. At p. 5, it was said as to this that there was nothing "sufficient to justify a striking out of the pleading," per Middleton, J. And I so hold in this case. The part of paragraph 3 objected to is only useful as leading up to paragraphs 6, 7, 8, and 9. These being struck out, it follows that paragraph 3 should be curtailed as asked for in the motion. The costs of this motion will be in the cause as success has been divided.

PRIVY COUNCIL.

JULY 24TH, 1912.

THE TORONTO AND NIAGARA POWER COMPANY v. THE CORPORATION OF THE TOWN OF NORTH TORONTO.

28 T. L. R. 563, 32 C. L. T. 826.

Canada — Ontario — Electric Power Company — Power to Erect Poles to Carry Power Lines without Leave of Municipality.

The powers given to the appellants by their act of incorporation passed in 1902, to enter upon streets for the purpose of erecting poles to carry power lines for the conveyance of electricity without first obtaining the leave and license of the municipality, are not restricted by the provisions of the Railway Acts.

An appeal from a judgment of the Court of Appeal for Ontario, of February 1st, 1912, 25 O. L. R. 475; 21 O. W. R. 175; 3 O. W. N. 609, reversing a decision of Chancellor Boyd, 24 O. L. R. 537; 20 O. W. R. 57; 3 O. W. N. 77.

See also 19 O. W. R. 937; 2 O. W. N. 1507; 20 O. W. R. 260; 3 O. W. N. 164.

The appeal to the Judicial Committee of the Privy Council was heard by VISCOUNT HALDANE, L.C., LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, and SIR CHARLES FITZPATRICK.

Hon. Wallace Nesbitt, K.C. (of the Canadian Bar), Mr. Atkin, K.C., and Mr. D. L. McCarthy, K.C. (of the Canadian Bar), appeared for the appellants.

Sir Robert Finlay, K.C., and Mr. T. A. Gibson (of the Canadian Bar), for the respondents.

THE LORD CHANCELLOR, in delivering their Lordships' judgment to-day said the question raised by the appeal was whether the appellant company might enter upon the streets of the town of North Toronto for the purpose of erecting poles to carry power lines for the conveyance of electricity. Chancellor Boyd decided that they had such power, but subject to compliance with certain conditions. The Court of Appeal reversed his judgment, holding that the appellants had no such power unless they had first obtained the leave and license of the respondent corporation.

By their act of incorporation in 1902, the appellants were given, unless the powers which it *prima facie* conferred were restricted by the Railway Act, very large powers which entitled them to succeed in the present action. If it could be taken by itself, their Lordships were of opinion that the Act shewed that the Parliament of Canada treated the company, the works of which were expressly declared to be for the general advantage of Canada, and so brought within sec. 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. For that there might well have been, on the balance of advantages, good reason, the purpose of the company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas. To make its powers of entry subject to the veto of each municipality might mean

failure to achieve its purpose. It was therefore, not surprising that a pioneer company such as that should have been given large powers. But while *prima facie* such powers were given, their Lordships collected from other legislation of the period that the Legislature was fully aware of the difficulties of giving such powers without restriction, and that the question of safeguards were present to the minds of the draughtsmen. Companies which had power to bring electrical power and wires into Canadian cities might prove a serious danger to the public.

The evidence in the present case shewed the peril to the safety and the lives and property of the inhabitants of a populous district, which a high voltage such as that of a power company might occasion. The Parliament of Canada not unnaturally anxious to avoid dangers of that kind accordingly passed general statutes conferring upon municipal authorities large powers of control. Section 90 of the Railway Act, 1888, was amended by the Railway Act, 1899, which added to it a sub-section illustrative of that kind of control. The new sub-section enacted that when any company had power by any Act of Parliament of Canada to construct and maintain lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity, such company might, with the consent of the Municipal Council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising such power, and break up and open any highway, square, or other public place. If the powers conferred by that section displaced the less restricted powers of entering without any consent conferred by the act of incorporation, the appellants were in the wrong. Their Lordships had, therefore, to determine this question. They had to bear in mind that a Court of Justice was not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes read as a whole.

His Lordship referred to the General Railway Act, of 1906, which repealed and re-enacted with some modifications, the previous railway Acts, in order to see what light its language threw on the question, whether the powers originally conferred in 1902, by the Act of Incorporation still stood unrestricted. He said the draughtsman used language which expressed an intention to save all such powers.

By the definition of sec. (2) "company" meant a railway company and "Special Act" meant any Act under which the company had authority to construct or operate a railway, or which was enacted with special reference to such railway. By sec. 3, the General Act was to be construed as incorporated with the Special Act, and unless otherwise provided in the General Act, where the provisions of the General Act and of any Special Act passed by the Parliament of Canada related to the same subject-matter, the provisions of the Special Act should in so far as was necessary to give effect to such Special Act, be taken to override the provisions of the General Act. By sec. 4, if in any Special Act passed by the Parliament of Canada previously to February 1st, 1904, it was enacted that any provision of the Railway Act, 1888, or other General Railway Act in force at the time of the passing of such Special Act, was excepted from incorporation therewith, or if the application of any such provision was by such Special Act, extended, limited, or qualified, the corresponding provision of the General Act was to be taken to be excepted, extended, limited or qualified, in like manner. By sec. 247, when any company was empowered by Special Act of the Parliament of Canada to construct, operate, and maintain lines of telegraph or telephone or for the conveyance of light, heat, power, or electricity, the company might with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising its powers and subject to certain restrictions, break up the ground. If the company could not obtain leave from the municipality it might apply to the Board of Railway Commissioners, and the Board had discretion to grant such leave. Section 248 specially defined the word "company" for the purposes of that particular section to include a telephone company, and imposed restrictions on the powers of such companies to construct, maintain, or operate their lines of telephone upon, along, across, or under any highway, square, or other public place, in any city, town, or village, without the consent of the municipality. The materiality of that section, which was to apply, notwithstanding any provision of any Act of the Parliament of Canada, was that it shewed that where the Legislature intended to interfere with the powers of companies other than railway companies, it did so by special provision. Section 247 in the opinion of their Lordships applied so far as the

wording of the section itself was concerned, only to companies within the definition clause, that was to railway companies. Railway companies might have powers to construct lines of telegraph or telephone, or for the conveyance of light, heat, power or electricity. When they had such powers, and no special power to enter on municipal property, the section empowered them to do so, if the municipality consented and under restrictions. But if by its Special Act the railway company had been in terms given larger and less restricted powers of the same kind, secs. 3 and 4, already referred to, shewed that these special powers were saved. An exception to that appeared in sub-section (*g*) of sec. 247, where the Board of Railway Commissioners was given jurisdiction to abrogate rights given by the Special Act to the extent of requiring the lines to be placed underground. As to that sub-section, two observations must be made. The first was that no question of its application was raised in this litigation. The second was that the application of the sub-section was excluded by the wording of sec. 21 of the Act of Incorporation. It was inconsistent with the provisions of that Act, for it was in reality only one of the provisions of the Railway Act of 1906, relating to railway companies, and was, therefore, excluded.

The only way in which sec. 247 of the Railway Act of 1906, was applicable to the appellants was by the language in which it was made applicable by sec. 21 of their Special Act. But if the provisions of sec. 90 of the Railway Act, 1888, as amended by the Railway Act, 1899, and in substance re-enacted with additions by the Railway Acts, 1903 and 1906, were, as appeared to be the case, kept alive by the Interpretation Act, those provisions were declared by sec. 21 of the Special Act, applicable only in so far as they were not inconsistent with the provisions of that Act. Moreover, the definitions of "company" and "railway" in sec. 21, made secs. 3 and 4 of the Railway Act, 1906, apply so that the provisions of the appellants' act of incorporation overrode and extended the provisions of sec. 247. In the result it appeared to their Lordships that the powers conferred by secs. 12 and 13 of the Act of Incorporation of 1902, remained intact.

In the Court below the trial Judge decided in favour of the appellants on the question of power to enter, and erect their poles without consent. The Court of Appeal took a different view. They held that the general restrictions

imposed by sec. 90 of the Act, 1888, as amended by the Act of 1899, and by sec. 247 of the Act of 1906, were not inconsistent with the provisions of secs. 12 and 13 of the Act of Incorporation. For those reasons their Lordships could not agree with that opinion. They would, therefore, humbly advise His Majesty that the appeal should be allowed, and that it should be declared that the appellants were entitled to a declaration that they were at liberty to erect poles for the purpose of stringing transmission or power wires along Eglinton avenue, without the consent of the respondents, and to have the latter restrained from interfering with them in doing so. The respondents must pay the costs of this appeal and in the Courts below.

Charles Russell and Co.; Blake and Redden, solicitors.

PRIVY COUNCIL.

JULY, 31ST, 1912.

THE BARNARD-ARGUE-ROTH STEARNS OIL AND GAS COMPANY (LIMITED), THE ALEXANDRA OIL AND DEVELOPMENT COMPANY (LIMITED), AND THE CANADA COMPANY v. FARQUHARSON.

28 T. L. R. 590; 32 C. L. T. 843.

Canada — Ontario — Deed — Conveyance of Land in Fee — Exception of Reservation — Mines and Minerals — Springs of Oil — Natural Gas.

A reservation or exception in a conveyance of land to the respondent in 1867, of "all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not."

Held, not to include natural gas.

Decision of Court of Appeal of Ontario, 25 O. L. R. 93, affirmed.

An appeal from a judgment of the Court of Appeal for Ontario (HON. MR. JUSTICE MEREDITH, dissenting), of November 20th, 1911, 25 O. L. R. 93; 20 O. W. R. 351; 3 O. W. N. 239, affirming a decision of Chancellor Boyd, 22 O. L. R. 319; 17 O. W. R. 523; 2 O. W. N. 276.

The appeal to the Judicial Committee of the Privy Council was heard by VISCOUNT HALDANE, L.C., LORD MACNAGHTEN, LORD ATKINSON, and SIR CHARLES FITZPATRICK.

Sir Robert Finlay, K.C., Mr. Hellmuth, K.C. (of the Canadian Bar), and Mr. Rowlatt, were counsel for the appellants.

Mr. Danckwerts, K.C., and Mr. C. S. MacInnes, K.C. (of the Canadian Bar), for the respondent.

The arguments were heard recently, when judgment was reserved.

LORD ATKINSON, in delivering their Lordships' judgment to-day, said the Canada Company in 1867, granted to Mr. Farquharson the fee-simple of 100 acres at Tilbury in the province of Ontario. The deed contained an excepting clause in the following terms: "Excepting and reserving to the company their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress and regress to and for the said company their successors, lessees, licensees, and assigns in order to search for, work, win, and carry away the same, and for those purposes to make and use all needful roads and other works doing no other unnecessary damage and making reasonable compensation for all damage actually occasioned."

The sole question for decision was what was the true construction of this clause? Did it or did it not except from the grant the natural gas which impregnated certain underlying strata of these lands. The case did not require that their Lordships should lay down a definition of minerals nor even draw the line between what were and what were not minerals; the only question for decision was what, having regard to the time at which that instrument was executed, and the circumstances then existing, the parties intended to express by the language they had used, or in other words, what was their intention touching the substances to be excepted as revealed by that language.

In one sense, continued his Lordship, natural gas is, as rock oil also is, a mineral, in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable, or mineral substance. It is obvious, however, for several reasons, that in this clause of the grant the word "Minerals" is not used in this wide and general sense. First because two substances are expressly mentioned in the clause which would be certainly covered

by the word "minerals" used in its widest sense, namely "metals" and springs of oil, in or under the lands." Secondly, because the words "all mines and quarries of metals and minerals" coupled with the words "search for, work, win, and carry away the same, "do not seem to be applicable to a thing of the nature of this gas, obtainable in the way it is obtained, and thirdly, because of the nature of the relation which exists between this gas and "rock oil, or the springs of oil in or under the ground," excepted in the grant of the function which the gas performs in winning, working, or obtaining the oil from these springs; and fourthly, because of the state of knowledge at the date of this deed, and the way in which gas of this kind was then regarded and treated.

As Lord Watson said in the *Lord Provost and Magistrates of Glasgow* v. *Farie* (13 A. C. 657, 675), "the words 'mines' and 'minerals' are not definite terms, they are susceptible of limitation or expansion according to the intention with which they are used." It is clearly established by the evidence that this gas is not volatilized rock oil, nor rock oil condensed natural gas. The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in their chemical composition, no doubt, both hydro-carbons, but they are distinct and different products, and it, therefore, could not be contended successfully, their Lordships think, that the words "springs of oil" cover this natural gas, simply because both are found in some cases to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring, leading to the surface, the gas in its escape to the upper air helps to bring up to the surface with it some of the oil. In some instances a stratum almost entirely impregnated with gas is found separated by a stratum imprevious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by separate pipes so arranged that the gas performs the same function as in the other cases, bringing or helping to bring, the oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil. Again it was proved at the hearing before the Chancellor that oil mining leases only began to be made by the Canadian Company in 1863.

At the date of this deed, January 22nd, 1867, the winning of mineral oil through gas wells was a comparatively new industry. This natural gas, according to a witness, did not become commercially valuable till 1880. And, according to the evidence of others, the accuracy of which did not appear to have been questioned, though gas might be found without the presence of oil, some gas was always found where oil was found, but the gas was regarded as a dangerous and destructive element to be got rid of as it best could. It did not begin to be utilized till 1890, over 20 years after the date of the deed. The inference to be drawn appeared to their Lordships to be that the idea of preserving the ownership of this product, whose presence was regarded in 1867, and for many years after, as a dangerous nuisance, never occurred to the parties to the deed. If in the attempt to exclude from the grant and preserve to the granting company what was then esteemed a valuable subject of property believed to be in the soil parted with, namely, oil, a term was used which in its wide sense would cover this then worthless product, gas, the parties never intended, their Lordships thought to use that term in this wide sense.

The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned. But, however that may be, their Lordships, are on the whole, of opinion that on the only question raised for their decision, the construction of the excepting clause in the company's deed of January 22nd, 1867, the decision appealed from was right and should be affirmed, and this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Freshfields; Blake and Redden, solicitors.

DIVISIONAL COURT.

OCTOBER 9TH, 1912.

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.

4 O. W. N. 111.

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

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

KELLY, J., 22 O. W. R. 42; 3 O. W. N. 1191, *held*, that both parties had failed to prove the location of the western boundary of lot 26, and that onus was on plaintiffs. Action dismissed with costs; no order as to counterclaim.

DIVISIONAL COURT affirmed above judgment.

An appeal by the plaintiffs and cross-appeal by the defendants from a judgment of HON. MR. JUSTICE LENNOX, 22 O. W. R. 42; 3 O. W. N. 1191.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL, on the 9th October, 1912.

C. A. Moss, for the plaintiffs.

E. D. Armour, K.C., and G. H. Pettit, for the defendants.

THEIR LORDSHIPS (V.V.) dismissed the plaintiffs' appeal without costs and allowed the defendants' cross-appeal without costs.

HON. MR. JUSTICE RIDDELL. OCTOBER 9TH, 1912.

BLACK v. CANADIAN COPPER CO.

4 O. W. N. 111.

Particulars—Negligence—Statement of Claim—Damage to Stock of Florist by Noxious Gases — Particulars Unnecessary — Motion Premature.

Motion for particulars of negligence and damage alleged in statement of claim. Action was for damage to the business and stock of plaintiff, a florist, by noxious gases, vapors, acids and smoke alleged to have been wrongfully and negligently permitted to escape from defendant's works.

MASTER-IN-CHAMBERS, 23 O. W. R. 20; 4 O. W. N. 62, *held*, that as the allegation of negligence was unnecessary to plaintiff's case, he need not give particulars of it.

Tipping v. *St. Helen's Smelting Co.*, 4 B. & S. 608, 616; 11 H. L. C. 642, referred to.

That particulars of damage were premature. Motion dismissed, costs in cause, without prejudice to plaintiff's right to renew application after discovery.

RIDDELL, J., affirmed above order.

An appeal by the defendants from an order of the Master-in-Chambers, 23 O. W. R. 20; 4 O. W. N. 62.

H. E. Rose, K.C., for the defendants.

C. M. Garvey, for the plaintiff.

HON. MR. JUSTICE RIDDELL:—The facts of this matter appear in the judgment of the Master in Chambers now appealed from. So far as is made to appear, the telegram of the plaintiff's solicitor may be absolutely correct—the defendants may have been fully informed of all the acts of negligence on their part, and the fullest particulars of damage may have been given to the defendants.

But aside from that consideration, it is quite too early to move, and I think, the order of the Master in Chambers is the right one. I agree that the case will probably be tried by a Judge without a jury—but in any case the defendants are not at present injured.

Costs to the plaintiff in any event.

HON. MR. JUSTICE RIDDELL. OCTOBER 9TH, 1912.

DICK v. STANDARD UNDERGROUND CABLE COMPANY.

4 O. W. N. 111.

Appeal — Leave to Appeal — To Divisional Court from Judge of Chambers — Con. Rule 777 (3) (a), (c) — Action — Stay of Proceedings — Mechanics' Lien — Independent Action.

BOYD, C., 23 O. W. R. 19; 4 O. W. N. 57, *held*, that where a contractor has a claim against an owner of land larger than the value of the land and wishes to prove his claim in an action, independently of Mechanics' Lien proceedings, s. 37 of the Mechanics' Lien Act, 10 Edw. VII. c. 69, does not give the officer charged with the trial of the lien proceedings power to stay his independent action.

Judgment of MONCK, Co.C.J., reversed, and stay vacated.

RIDDELL, J., refused defendants leave to appeal to Divisional Court.

Motion by the defendants for leave to appeal from a judgment of HON. SIR JOHN BOYD, C., 23 O. W. R. 19; 4 O. W. N. 57, whereby he allowed an appeal from the local Judge at Hamilton—forever staying the action.

G. H. Levy, for the defendants' motion.

E. C. Cattanach, for the plaintiffs.

HON. MR. JUSTICE RIDDELL:—It is, I think, admitted—at all events it is plain, that the conditions of Consolidated Rule (1278) i.e., 777 (3) (a), are not present here, and as I agree with the Chancellor in the disposition he has made of the matter (3) (c), does not apply either.

The motion will be dismissed with costs to the plaintiff in any event.

WEEKLY COURT.

HON. MR. JUSTICE RIDDELL. OCTOBER 10TH, 1912.

MOSHIER v. TOWNSHIP OF EASTNOR.

4 O. W. N. 114.

Drains — Municipal Corporation — Negligence of — Non-completion of Work — Damages — Mandatory Order — Referee's Report— Appeal Dismissed.

An appeal by the defendant township from a report of A. B. Klein, Esq., of Walkerton, as a Special Referee, who

found that the defendant township was guilty of negligence in not completing certain drainage works; that the plaintiff was entitled to $800 damages; and that the defendants should be ordered to complete the work.

J. H. Scott, K.C., for the defendant township.

D. Robertson, K.C., for the plaintiff.

HON. MR. JUSTICE RIDDELL:—Upon a perusal of the evidence, I find that the Referee was wholly justified in his conclusions. There are no questions of law, which require examination or discussion.

The appeal must be dismissed with costs.

HON. MR. JUSTICE RIDDELL IN CHRS. OCTOBER 12TH, 1912.

RE CARNAHAN.

4 O. W. N. 115.

Infant — Money in Hands of Trustees — Payment to Guardian for Maintenance.

Motion by the grandmother of an infant for an order authorizing trustees to pay her a sum for the maintenance of the infant, out of moneys of the infant in their hands—not in Court.

G. M. Gardner, for the applicant.

F. W. Harcourt, K.C., Official Guardian, for the infant.

HON. MR. JUSTICE RIDDELL:—I reluctantly yield to the authority of *Re Wilson* (1891), 14 P. R. 261, and *Re Coutts* (1893), 15 P. R. 162, and make the order asked. The order will be settled by the Official Guardian, and if necessary, I may be spoken to.

MASTER IN CHAMBERS. OCTOBER 14TH, 1912.

AIKINS v. McGUIRE.

4 O. W. N. 132.

Discovery — Examination of Person Directly Interested in Prosecution of Action — Con. Rule 440 — Insufficiency of Affidavit.

Action for specific performance in which defendant moved for the examination of two other persons, strangers to the action, under C. R. 440, upon an affidavit which alleged an admission by them that they were interested in the lands in question.

MASTER-IN-CHAMBERS, *held*, that the affidavit did not shew that the persons sought to be examined were persons for whose immediate benefit the action was being prosecuted and that therefore the motion could not succeed.

Stow v. *Currie*, 14 O. W. R. 61; 223, followed.

Motion dismissed, costs to plaintiff in cause.

In this action for specific performance defendant moved for an order under Rule 440, for the examination of Poucher and Percy, two persons alleged in the statement of defence to be partners of the plaintiff in the transaction in question.

J. T. White, for the motion.

A. F. McMichael, contra.

CARTWRIGHT, K.C., MASTER:—The only evidence in support of the motion is an affidavit of a member of the firm of the defendants' solicitors which says: "F. B. Poucher and John Percy have admitted to me that they are interested in the lands in question in this action."

The allegations as to this interest in the statement of defence are denied in the reply, and, therefore, do not afford the defendant any assistance at this stage. It was admitted that the agreement on its face was with plaintiff alone.

Even if the affidavit aforesaid is to be given full effect to, it is not sufficient for two reasons.

It might be perfectly true that Percy and Poucher are interested in the lands "in question" without it being possible to hold that they are persons "for whose immediate benefit" the action is being prosecuted. Further any such admissions by Percy and Poucher are not in any way binding on the plaintiff—nor in face of his denial in the reply can they be used against him. The scope of Consolidated Rule 440, was last considered (so far as I am aware) in the case of *Stow* v. *Currie*, 14 O. W. R. 61—affirmed 223. There

the cases are cited and an examination of them from *Minkler* v. *McMillan*, 10 P. R. 506, onward, shews that usually, if not uniformly, such motions have been based on some admissions made by the plaintiff or defendant on his examination for discovery or in the pleadings.

The observations as to the evidence required in these cases made in *Moffat* v. *Leonard*, 8 O. L. R., at p. 520—seem to have been confirmed by the judgment in *Stow* v. *Currie*, *supra*, at p. 224: "It is impossible to find as a fact that it (the action) is being prosecuted for the sole benefit of O'Meara and Kelly (the parties sought to be examined), or solely at their instance, for their benefit in the first instance, and incidently for the benefit of others, and, therefore, the case does not come within the Rule."

The motion, therefore, fails, and is dismissed with costs to the plaintiff in the cause.

If hereafter the defendant thinks it well to renew this motion and that he can then support it by sufficient evidence as above indicated, he can do so.

HON. MR. JUSTICE SUTHERLAND. OCTOBER 14TH, 1912.

WALLACE v. CANADIAN PACIFIC RW. CO.

4 O. W. N. 133.

Negligence — Railway — Infant "Stealing Ride" on Cow-catcher— Evidence — Nonsuit.

SUTHERLAND, J., dismissed action brought by infant by his father, his next friend for $10,000 damages for injuries sustained by reason of the alleged negligence of defendants' servants in allowing the infant plaintiff to ride on the cow-catcher of defendants' engine, holding that the accident in question was the direct result of the infant plaintiff's own negligence.

A. E. Fripp, K.C., for the plaintiffs.

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

HON. MR. JUSTICE SUTHERLAND:—At the conclusion of the case for the plaintiffs a motion was made on behalf of the defendants to dismiss the action. I reserved judgment and subject thereto the defendants put in their evidence and the case went to the jury on questions submitted.

Having further considered said motion, I think, it should be granted. I am unable to see that any evidence was submitted on the part of the plaintiffs from which it could be properly inferred that any of the alleged acts of negligence on the part of the defendants set out in the statement of claim caused or contributed to the accident. But in any event, upon the undisputed facts as disclosed by the evidence of the plaintiffs the sole cause of the accident was the deliberate disobedient and negligent conduct of the injured boy himself. He had been warned by his parents, the defendants' employees and others as to the danger and appreciated it. He voluntarily assumed the risk of getting on the cow-catcher of the engine when he saw those in charge of it were not looking and remained on it until the engine was put in motion. On then attempting to jump off he fell and the accident occurred.

The action will be dismissed with costs, if asked.

HON. MR. JUSTICE RIDDELL. OCTOBER 15TH, 1912.

WEEKLY COURT..

SMYTH v. HARRIS.

4 O. W. N. 134.

Injunction — Restraining Nuisance — Locus Standi of Plaintiffs — Enlargement of Motion for Interim Injunction — Leave to Apply — Speedy Trial.

RIDDELL, J., refused an interim injunction in an action to abate a nuisance caused by offensive odours from defendants' manufactories but ordered trial expedited to be brought on on a namd date and adjourned motion until such date.

Motion by the plaintiffs for an interim injunction restraining the defendants from operating his plant for the consumption of offal, etc., in such a way as injuriously to affect the plaintiffs' enjoyment of their neighbouring properties.

H. E. Rose, K.C., for the motion.

E. F. B. Johnston, K.C., and F. E. Hodgins, K.C., contra.

HON. MR. JUSTICE RIDDELL:—I have read all the voluminous affidavits and examinations in this matter—it is an application for an interim injunction—and have come to the conclusion that at least some or one of the plaintiffs cannot be said to have no *locus standi*.

And I do not dispose of the motion, but enlarge it before myself at the City Hall at the opening of the Court at which I shall preside on Monday morning, November 4th. This will enable the parties to get to trial; and it is perfectly manifest that a trial should be had without delay.

I, nevertheless, reserve leave to the plaintiff to bring on the motion sooner if the defendant is delaying pleadings or otherwise; or if for any other reason he may be advised to apply.

I retain the papers in the meantime.

HON. MR. JUSTICE LENNOX. OCTOBER 16TH, 1912.

GUNDY v. JOHNSTON.

4 O. W. N. 121.

Solicitor — Costs and Charges — Statute Fixing Amount of Costs of Litigation Payable to Client — Construction and Effect of — 2 Geo. V. c. 125, s. 6—Solicitors Act s. 34—Premature Action by Solicitor — Necessity for Delivery of Bill.

Action for the recovery of solicitor and counsel fees against a client incurred in respect of an action re certain drainage works which had gone to judgment in the Court of Appeal and had then been settled and the settlement ratified by private act of the Legislature. One of the clauses of the said private Act 2 Geo. V. c. 125, s. 6, was as follows: "The township shall pay to the plaintiff James Johnston, his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and the Court of Appeal and such costs are hereby fixed at eighteen hundred dollars." Plaintiffs claimed that this statute fixed the amount of their costs as between themselves and defendant and refused to render a detailed bill when requested.

LENNOX, J., *held*, that the statute in question should not be read as depriving defendant of his right to be rendered a detailed solicitor and client bill.

Action dismissed without costs and without prejudice to plaintiffs' rights to bring a new action later after delivery of bill.

An action by a firm of solicitors to recover of solicitor and client fees.

M. Wilson, K.C., for the plaintiffs.

M. Houston and A. Clark, for the defendant.

HON. MR. JUSTICE LENNOX:—I heard the evidence, sitting without a jury, at Chatham on the 9th of October, instant, and reserved judgment.

The plaintiffs sue for the recovery of solicitor and counsel fees. They delivered a signed bill of costs on the 8th May last, the principal item of which was set out as follows:

1912. April 15.	Solicitor and client costs in litigation over By-law No. 17 of 1910, of the Township of Tilbury East, concerning the Forbes Drainage Works, both in the High Court and in the Court of Appeal, as settled by agreement between the parties and fixed by statute of the province of Ontario passed on or about April 15th, 1912, which cost is settled and fixed as aforesaid were by the said statute directed to be paid by the township of Tilbury East to you...	$1,800 00
There were other items amounting to		84 68
Payments on account are admitted, amounting to		575 00
The plaintiffs claim to recover a balance of...		1,309 68

With interest from the time the Act was assented to, April 16th, 1912.

The retainer of the plaintiffs is not disputed, nor their right of lien upon the money payable by the township of Tilbury East; but as far back as May last, at all events, the defendant demanded and insisted upon the delivery of an itemized bill. A letter of the 8th May to the plaintiffs, from the solicitors then acting for the defendant, defined the attitude of the defendant in this way:

"The bill that you gave us this morning is not a detailed bill, and we require a detailed bill from beginning to end so that we can have them taxed. If you refuse to deliver your bill we will be obliged to make an application for an order in the usual way under the rules. If you will read the statute you will see that Mr. Johnston gets the $1,800, and not you. We again say that we do not deny your lien and our client is ready and willing to pay you whatever you are entitled to so soon as the bill is taxed."

There are some minor matters; but, as indicated in the letter quoted from, the substantial question is this: Is the defendant precluded by the provisions of the private Act referred to, or is he entitled to the delivery of a bill of costs shewing how the $1,800 is made up, and to an opportunity for taxation, before being called upon for payment?

Section 34 of R. S. O. ch. 174, provides that no action shall be brought until one month has elapsed after delivery of a bill. The section of the statute referred to in the plaintiffs' bill of costs, 2 Geo. V., ch. 125, is sec. 6: "The township shall pay to the plaintiff, James Johnston, his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and in the Court of Appeal, and such costs are hereby fixed at $1,800."

The plaintiffs submit that this private Act supercedes the ordinary right of the client to have a bill delivered, and an opportunity for taxation, before being called upon to pay; and that it finally fixes the costs in this case at $1,800, not only as between the township of Tilbury East and the defendant, but between the defendant and plaintiffs as well.

I am unable to accede to this proposition. It is true that "a statute is the will of the Legislature," and that the will of the Legislature, acting *intra vires*, whether reasonable or unreasonable, just or unjust, is supreme. If this enactment is to shut out all right of information and enquiry, it is glaringly unjust to the defendant, but if it is clearly the Legislative will there is no redress except by its repeal. Maxwell on Statutes, 4th ed., p. 5. But the presumption is that the Legislature intended what is fair, reasonable, convenient and just, and if the language is capable of two interpretations, that which avoids an injustice is to be adopted. Maxwell, pp. 285, 299, 300. It is not to be presumed that the Legislature intended to confiscate the property or encroach upon the rights of any one; and if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt. *Western Counties Rw. Co.* v. *Windsor & Annapolis Rw. Co.*, 7 A. C., at p. 188. *Commissioners of Public Works* v. *Logan*, [1903] A. C. 355.

In construing a statute and ascertaining the intention of the Legislature, the preamble, context, history, and object of the enactment is to be taken into account. Max-

well, pp. 37 and 78. It is to be presumed that the Legislature did not intend to interfere with the existing law beyond what it declares or beyond the immediate scope and object of the statute. Maxwell, 152.

The services in respect to which the $1,800 is claimed were rendered in connection with the defendant's opposition to a drainage by-law of the township of Tilbury East, No. 17. The judgment of the Official Referee was against the defendant, with costs, and against all the other appellants. The defendant alone appealed, and he succeeded in quashing the by-law in the Court of Appeal, with costs against the township. This relieved him of assessment in respect of the drainage works.

What, then, was the object of the private Act? The object was the relief of the township of Tilbury. The municipal council had diverted the general funds of the township to provide moneys for which only the ratepayers of the drainage area should be liable; and the object was to enable the council to recoup the township.

The defendant occupied a position of exceptional advantage. He was free from the by-law, free from taxation, and the township was liable for his costs. He was not seeking legislation; he was opposed to legislation. He engaged the plaintiffs, and specifically he engaged Mr. Gundy of the plaintiffs' firm, to prevent legislation, or, failing in this, to see to it that the relief granted to the township did not invade or impair the defendants' rights.

There was no suggestion of interference in any way whatever with the contractual or statutory relations existing between the plaintiffs and the defendant. Such a thing was not contemplated by the parties to this action, was not within the purview of the relief sought by the municipality, and could not be in the contemplation of the Legislature.

The defendant was physically unable to come to Toronto. He sent his son Thomas to supplement the efforts of his lawyers or to assist them. The son was a special agent, with powers limited within the scope of his instructions. He had no power whatever to vary in any way the relations between the parties to this suit, much less to sweep away this beneficient statutory condition precedent to the recovery of costs, and he did not profess and was not asked to do so.

It was the manifest and absolutely imperative duty of Mr. Gundy, acting there in the absence of the defendant, not only to safeguard his client's interest against the municipality but to sedulously guard him against any collateral embarrassment, inconvenience, or loss arising from careless or slovenly drafting; and, *a fortiori,* of course, to absolutely refuse an advantage to himself or his partners at the expense of his client. It would indeed be an extraordinary thing, if while representing the defendant as solicitors and counsel, and bound to protect him, the plaintiffs could by a side-wind and by doubtful implication, legislate themselves out of a long established legislative disability, the inability to sue until a signed bill had been delivered; and I would certainly think it unfortunate if, notwithstanding the limited scope and object of the Act, the clearness of the language employed compelled me to give effect to the plaintiffs' contention. But it does not. On the contrary, I am clearly of the opinion that the Legislature never intended to do more, and upon a proper construction of the language does not do more than,

(a) Provide for the payment to the defendant of the defendant's costs as between solicitor and client;

(b) Determine that as between these parties, and only as between these parties, the sum which the Legislature will compel the municipality to pay and the defendant to accept is to be $1,800.

A statutory contract, in fact, between these parties; the only parties before the Legislature. The solicitors were not acting for themselves; they were there to represent the defendant, and the defendant alone. They had no personal interest in the matter whatever. The money, when paid, is the money of the client, and if paid to the solicitors they receive it as trustees and agents of the client. *Re Solicitors,* 2 O. L. R. 255, affirmed in appeal, 22 O. L. R. 30.

But there was no agreement at all between the plaintiffs and defendant for the Legislature to confirm; and in fact there could be no binding executory agreement between them before the delivery of a bill in conformity with the statute. In *Re Baylis,* [1896] 2 Chy. 107; and with this decision *Belcourt* v. *Grain,* 22 O. L. R. 591, and the English cases there referred to, do not conflict; nor do any of them relax the vigilance with which the Courts have been accustomed to guard the client's rights concerning taxation. On this

latter head, *Re Solicitor*, 14 O. L. R. 464, and *Re Mowat*, 17 P. R. 182, may also be referred to.

It is, perhaps, right to add that my reference to the duty of a solicitor is not to be taken as an indirect reflection upon the conduct of Mr. Gundy, but merely for the purpose of defining how I should approach the interpretation of the private Act in question. On the contrary, I formed the opinion that Mr. Gundy acted throughout the legislative proceedings with the utmost good faith, and with skill and judgment.

In my opinion the action cannot be maintained. I have not referred to the other items of the bill, but, with the exception of "costs re Hickey" $5, all the charges relate to this drainage matter and are all included in the same bill. In any event they constitute one cause of action, and the plaintiffs could only have judgment upon them separately if they were prepared to abandon their other claim. I may say, too, in view of the possibility of an appeal, that if I were giving judgment upon these items alone, it would be without costs, as the litigation arose in reference to the $1,800 item alone.

The action, then, will be dismissed; and, the parties each standing upon what they assumed to be their legal rights, it will be dismissed with costs. The plaintiffs will have the right reserved to them of suing again. I trust, however, that further litigation may be avoided.

MASTER IN CHAMBERS. OCTOBER 16TH, 1912.

ALSOP PROCESS CO. v. CULLEN.

4 O. W. N. 135.

Pleading — Statement of Defence — Action for Infringement of Patent Rights — Attack on Patent Process — Offers of Settlement — Venue.

MASTER-IN-CHAMBERS in an action for infringement of a patented process struck out paragraphs of the statement of defence alleging that the process had been condemned by various foreign health boards, etc., that certain offers of settlement had been made before trial and that the venue of the action should be changed, which latter had already been done *supra*.

Costs to plaintiff in cause.

This was an action for alleged infringement by defendant of plaintiffs' patent process of bleaching and ageing flour.

The statement of defence was delivered on 28th May, and on 10th September, plaintiffs gave notice of motion to strike out paragraphs 10, 11, 12 and 13 of that pleading as being embarrassing and irrelevant.

The motion was argued on 11th October, instant.

R. McKay, K.C., for motion.

J. Grayson Smith, contra.

CARTWRIGHT, K.C., MASTER:—The 10th paragraph alleges that plaintiffs' "process has been condemned and prohibited by legislative enactments in Minnesota and other States of the American Union and has been condemned by Public Health Boards in Great Britain and Europe as being injurious to the health of the persons consuming the flour so bleached or aged and as being a fraud upon the innocent purchasers of the flour so aged or bleached."

This attack on the character of the plaintiffs' process is fully set out in the 9th paragraph which is not objected to by the plaintiffs. The 10th paragraph therefore, at best, only indicates evidence in support of the 9th paragraph nor does it seem possible that the opinions said to have been given by other legislatures or health boards would be receivable at the trial of this case.

If the allegations in the 9th paragraph are to be pressed at the trial, they must be supported by the testimony of experts and others given there and then to be tested by cross-examination and weighed in the judicial balance. For this reason, as well as in the view of the decision in *Canavan* v. *Harris*, 8 O. W. R. 325, I think this paragraph should not be allowed to stand. See, too, *Blake* v. *Albion*, 35 L. T. 269; 45 L. J. C. P. 663; 4 C. P. D. 94. Paragraphs 11 and 12 allege certain offers of settlement made by plaintiffs to defendant before action.

I agree with Mr. McKay that these officers (even if admitted) are not relevant to the issues and cannot be given in evidence even as to damages.

Paragraph 13 sets out that Woodstock should be the place of trial. On a substantive motion to that effect I have ordered this to be done. It now is immaterial whether this paragraph is struck out or not. But perhaps it may as well go with the others. The costs of this motion will be to plaintiffs in the cause.

HON. MR. JUSTICE RIDDELL. OCTOBER 17TH, 1912.

CHAMBERS.

ROSCOE v. McCONNELL.

4 O. W. N. 126.

Trial — Jury Notice — Action for Declaration of Trust in Respect of Land — Exclusive Jurisdiction of Chancery — Ontario Judicature Act, s. 103 — Striking out Notice.

RIDDELL, J., struck out a jury notice in an action for a declaration that a conveyance to defendant absolute in form was made to him only as trustee or mortgagee, on the ground that the relief sought was equitable only and as such covered by sec. 103 of the Judicature Act.

Costs to defendant in cause.

Motion by the defendant to strike out the jury notice filed and served by the plaintiff.

J. Grayson Smith, for motion.

J. P. MacGregor, contra.

HON. MR. JUSTICE RIDDELL:—The statement of claim sets out that T. McConnell, the father of the parties, was in his lifetime the owner of certain lands in Toronto; that suffering heavy losses he was forced to have "the lands he bought and sold in his . . . real estate business, held in the names of various nominees, as trustees for him, pending their resale; that he bought the lands in question and put them in the name of one J. H. S. an employee of his as trustee for him—a mortgage was made by J. H. S. to S. C. S., and the proceeds applied in improving the property, building on it, etc. The mortgage was collateral to certain notes made by T. McConnell upon which his son the defendant was also liable; and the defendant persuaded his father T. McConnell to have J. H. S. convey to him, the defendant, the said lands as security against his liability on the notes. This was done, S. C. S., who is a solicitor preparing the conveyance—it is claimed (somewhat loosely) that this was "for the purpose of making the eldest son (the defendant) holding trustee for him (T. McC.) instead of the said J. H. S., until the said houses could be sold and the said advances repaid when the father expected to be able from the profits to clear off all his old obligations and hold the remainder of the lands himself." The plaintiff claims that this conveyance though absolute in form was to have the same effect as that

to J. H. S. "with the additional proviso that when the said lands were reconveyed, the defendant . . . was to be released from his liability upon the . . . accommodation endorsements . . ." T. McConnell went on collecting the rents for a time when the defendant notified the tenants not to pay him any more and "from that time forward the . . . defendant . . . has asserted all the rights of a mortgagee (sic) in possession." T. McConnell asked the defendant to convey the property to a purchaser and he "refused so to convey and alleged that his father must first discharge the said liability of the defendant in respect of the said notes;" but he several times agreed to convey upon payment of the amount charged upon the lands in favour of himself and S. C. S., amounting to less than $9,000. The plaintiff further alleges that the conveyance was procured by duress and misrepresentation. The defendant sold a part of the land to W. W. P. W. for $12,500; but he holds the rest of the property still. T. McConnell died leaving a widow and issue, the plaintiff, the defendant and three others—the plaintiff took out letters of administration. She sues on behalf of herself and all other the heirs-at-law of T. McConnell, and claims: (1) "a declaration that the defendant . . . holds the said lands as equitable mortgagee thereof from his father the said T. McConnell;" (2) an accounting as such mortgagee in possession; (3) sale and division amongst parties entitled; (4) or partition; (5) declaration as to the rights of all parties; (6) costs, and (7) general relief.

The defendant denies everything, claims estoppel against T. McConnell, etc., by reason of illegality of his alleged scheme and claims that the conveyance to him was intended to be an absolute conveyance.

A motion is made by the defendant to strike out the jury notice. The defendant has a conveyance of the property in form absolute, it is obvious that to obtain any kind of relief the plaintiff must have a declaration that the defendant is trustee or mortgagee. That kind of declaration never could be had from a common law Court and it was necessary to apply to the Court of Chancery—the case accordingly comes within sec. 103 of the O. J. A.; and the jury notice must be set aside, costs to the defendant only in the cause.

The same result would have followed had it been necessary only to apply the new rule 1322.

Bissett v. *K. O. T. M.* (1912), 22 O. W. R. 89.

HON. MR. JUSTICE BRITTON. OCTOBER 18TH, 1912.

WALKER v. WESTINGTON.

4 O. W. N. 136.

Water and Watercourses — Diversion of Surface Water by Adjoining Owner — Trespass — Injunction — Damages — Costs.

Action by one co-owner against the owner of adjoining lot for an injunction restraining the throwing water upon plaintiff's land and for damages. At trial plaintiff abandoned his claim for damages admitting that so far no damage had been sustained.

BRITTON, J., *held*, that as no damage had been shewn (the plaintiff only asking for general relief and protection, not against any particular thing, such as obstruction in a stream or continuing an open ditch, but that defendant be restrained from committing in future any trespass by causing surface water to flow upon plaintiff's land) an injunction should not be granted.

That upon the evidence plaintiff failed upon the main ground of his action, viz., that defendant wilfully and wrongfully diverted water from its natural course and turned it upon plaintiff's land.

Action dismissed with costs fixed at $100, plaintiff's conduct before action warranted some relief to plaintiff from payment of costs.

Tried at Cobourg, without a jury.

F. D. Boggs, for the plaintiff.

J. B. McCole and J. F. Keith, for the defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff is one of the tenants in common, owners of lot 10 in the 8th concession of the township of Hamilton.

The defendant is the owner of the adjoining lot 9. The plaintiff alleges that the surface water which flows over defendant's land is of a very considerable quantity, especially in times of spring freshets, and other freshets, and this water if not interfered with, would flow northerly over the land of the defendant and on to a natural water way or outlet on its way to Rice Lake. This outlet is at the north-west corner of defendant's land. The complaint is that in the year 1910 the defendant with the intention of stopping the surface water, referred to, from flowing in a northerly or north-westerly direction, divided it and caused it to flow upon the lands of the plaintiff. The plaintiff charges that the defendant did this, by digging upon his own land a series of ditches, and constructing a series of dams. The plaintiff further charges that the defendant again in the fall of 1911 in aggravation of former wrongful acts, again dug ditches and again placed obstructions, this time making his ditches westerly

to the line fence, cutting through the bottom of the fence thus facilitating the flow of water westerly upon plaintiff's land. The plaintiff says he has already sustained damage and will suffer more unless the defendant be restrained by injunction.

The ditches complained of are simply plow furrows. The ditches and dams were made, defendant says, in due course of good farming to protect the growing wheat from water resting upon the land and from the effect upon the stock by the water freezing there in the fall. Of course the defendant has no right to do damage to his neighbour merely to protect his own crop. I mention the facts—as the charge of digging ditches and constructing dams, is hardly sustained by the evidence.

The claim is for damages and injunction.

In Court the plaintiff admits that no damage has so far been sustained. None whatever and the claim for damages was abandoned. Therefore, even if the plaintiff is right in his contention as to flow of water and its diversion by the defendant, the injunction as to future acts by the defendant of the same or similar character to those complained of, should be refused, and the plaintiff left to recover damages, if any, in an action at law—I am not attempting to formulate any general rule as to granting or refusing injunctions. No doubt where a trespass has been committed and is being continued and where damage is being done the Court will interfere and restrain further trespass. Here, no damage and the plaintiff is asking for general relief and protection, not against any particular thing such as obstruction in a stream, or continuing an open ditch, but that the defendant be restrained from committing in future any trespass by causing surface water to flow upon plaintiff's land. Under such circumstances an injunction should not be granted.

I am also of opinion that the plaintiff fails upon the main grounds of his action. He alleges that the defendant wilfully and wrongfully diverted water from its natural course and turned it upon plaintiff's land. Why should the defendant desire to do this? The plaintiff suggests as a reason that the natural outlet was the north-east corner, and that the quantity of water finding its outlet there was so great that it was eating into defendant's land, and to reduce the quantity, the defendant by these furrows diverted a part. The fact is, and I so find upon the evidence that the larger quantity of water, finding its outlet at the north-west corner,

comes from land to the east and north of defendant's furrowed field from which field the water complained of flows. The water from last mentioned field is of comparatively small quantity. The fact that the defendant plowed in the direction he did, and for the reasons he gave, makes a strong *prima facie* case in his favour. Defendant desired to get rid of water. If the flow was to the north as plaintiff says, why should defendant not accelerate its flow in that direction.

I do not accept the theory that defendant had any thought of diverting water in case of the outlet, or to save his land there. He plowed so as to have the water flow on the line and in the direction of least resistance, and that was not the northerly direction, but the westerly. There is no dispute about the law applicable to this case—defendant's counsel admitted the contention of plaintiff's counsel as to the law. The questions are wholly questions of fact. I have considered the professional evidence—and have gone over the measurements and the sketches filed. The weight of evidence, as to height of land—and the direction of natural flow from the particular field of defendant is in favour of defendants' contention. There are other parts of defendant's land—which to some extent—would shew the flow more northerly.

The action must be dismissed.

The attitude taken by the defendant when objection to the furrows and the opening under the fence was made by Anderson—representing the owners of this lot 10, and his attitude since warrant my relieving the plaintiff to some extent of the costs of the defence. Had the defendant reasonably discussed the matter with Anderson or with the solicitor, it is quite likely that litigation would have been avoided.

On the 25th August, 1910, Anderson wrote to the defendant. The defendant replied on the 27th August denying liability which was quite right, but threatening to hold Anderson as representing the Walker estate for defective fences, etc. It was such a letter as was calculated to annoy the plaintiff—to whom this letter was reported.

The defendant appeared to be somewhat arbitrary and aggressive.

The action will be dismissed with costs payable by plaintiff to defendant—which costs I fix as so payable by plaintiff at $100.

Thirty days' stay.