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APPELLATE DIVISION.

DECEMBER 1ST, 1913.

RE NATIONAL HUSKER CO.

WORTHINGTON'S CASE.

Company — Winding-up — Contributory — Subscription for Shares—Failure to Prove Fraud or Misrepresentation—Approbation of Contract—Election—Finding of Master—Finding of Judge on Appeal—Further Appeal—Costs—Motion to Vacate Winding-up Order.

Appeal by E. P. Worthington from an order of MEREDITH, C.J.C.P., 4 O.W.N. 1077, dismissing without costs an appeal from an order of the Master in Ordinary, in a proceeding for the winding-up of the company, under the Dominion Winding-up Act, placing the appellant on the list of contributories for $3,760, the balance due upon a subscription for $5,000 worth of shares.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. E. Raney, K.C., for the appellant.

J. M. Ferguson, for the liquidator, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The winding-up order was made on the 6th July, 1911, and the appellant had, on the 27th of the previous January, begun an action in the High Court to rescind and set aside his subscription for 50 shares made on the 12th January, 1907, as having been obtained by fraud, and the action was at issue when the winding-up order was made. The action was tried before the Master in Ordinary on the 28th March, 14th and 27th June, and 4th October, 1912, and he found the issues in the action in favour of the defendants, and settled the appellant on the list of contributories in respect of 66 shares.

The evidence as to the alleged misrepresentation by which, as the appellant alleges, he was induced to become a subscriber for the shares, was conflicting, and the Master gave credit to Adams, a witness for the respondent, preferring it to that of the appellant and three of his relatives, all of whom are seeking to be released from their subscriptions for shares, on practically similar grounds to those relied upon by the appellant; and the Master's finding was concurred in by the Chief Justice, from whose judgment the appeal is brought.

In such a case as this an appellate Court is rarely warranted in reversing the findings of fact; but, if the question were merely one as to the weight of evidence, the appellant would not have satisfied us that the Master's conclusions were wrong; on the contrary, I think that he came to a right conclusion on the evidence.

As we have come to this conclusion, the appeal fails; but, if there were doubt as to its being a proper conclusion, the further fact, which the Master has found, that the appellant, with full knowledge of the true facts as to the matter with respect to which the representations are alleged to have been made, elected to remain a shareholder, that his finding is concurred in by the Chief Justice, and that there was ample evidence to warrant it, is fatal to the appellant's case; and the appeal must be dismissed.

We were asked by the appellant's counsel, if we should be against him, to vacate the winding-up order; but it is not open to us to do so, even if we were of opinion that it was wrongly made. This decision will not, however, prejudice any application which the appellant may be advised to make to vacate or set aside the order.

For the same reasons which influenced the Chief Justice to give no costs of the appeal before him, we may properly leave the respondent to bear his own costs of this appeal.

DECEMBER 1ST, 1913

CANADIAN LAKE TRANSPORTATION CO. v. BROWNE.

Contract—Dispute as to Terms—Conflict of Evidence—Counterclaim for Breach—Findings of Trial Judge—Appeal—Written Agreement—Alterations—Oral Assent to—Statute of Frauds—Amendment.

Appeal by the plaintiff company from the judgment of FAL-

CONBRIDGE, C.J.K.B., 4 O.W.N. 880, in favour of the defendants (wharfingers at Hamilton) upon their counterclaim.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LEITCH, J.

J. Bicknell, K.C., and T. Hobson, K.C., for the appellant company.

E. F. B. Johnston, K.C., and J. G. Gauld, K.C., for the defendants, the respondents.

MEREDITH, C.J.O.:—By their counterclaim the respondents claim damages for breaches by the appellant of an agreement between the parties in respect of the following matters:—

1. Wrongfully unloading at another wharf a shipment of wire from the steamship "Regina," which resulted in a loss to the respondents of $134.34, which they would have earned if the wire had been unloaded at their wharf.

2. Failing to unload at the respondents' wharf 6,000 tons of freight in each of the years 1911 and 1912.

3. Failure to pay one-half of the checker's wages in the years 1908, 1909, and 1910.

The learned trial Judge found in favour of the respondents as to the whole of their counterclaim, and directed a reference to the Local Master at Hamilton "to inquire, ascertain, and state what damages the defendants have sustained by reason of the matters in the defendants' counterclaim mentioned."

The evidence was very conflicting as to the terms of the contract, which both parties agreed had been entered into between them; and we are unable to say that the learned trial Judge erred in coming, as he did, to the conclusion that the evidence preponderated in favour of the respondents.

That the contracting parties met in Toronto in the spring of 1908, and there arrived at an agreement by which the respondents, who had acted as wharfingers for the appellant company in the previous year, were to be continued in that employment, on terms which were then settled, was not disputed; but there was a direct conflict of testimony as to the terms of the agreement. According to the testimony of Edward H. Browne and Edward J. Jordan, the employment was to be for five years (1908 to 1912 inclusive), and the agreement was that the appellant company was to be bound to unload at the respondents' wharf at least 6,000 tons of "freight" in each year, and was to pay one-half of the wages of the checker who was em-

ployed at the respondents' wharf; but, according to the testimony of Hugh Young, the traffic manager of the appellant company, the agreement was for the years 1908, 1909, and 1910 only, and there was no agreement as to the quantity of freight to be unloaded at the respondents' wharf, and no agreement that the appellant company should pay any part of the checker's wages. . . .

It was argued by Mr. Bicknell that the agreement, being, as it was, one not to be performed within a year, and not being, as he contended, in writing, was not enforceable, and he applied for leave to set up the Statute of Frauds as a defence to the action.

I am inclined to think that there was a sufficient memorandum in writing to satisfy the statute. According to Young's testimony, the agreement sent to the respondents was signed by the appellant company. The alterations were made on the face of one of the duplicates, which was signed also by the respondents, and there was a sufficient assent to the alterations made by the appellant company. The documents were not under seal; and, although an unauthorised material alteration of them would have vitiated them, I apprehend that a verbal assent to the alterations which were made would be sufficient to make the document as altered binding on the appellant company, and that re-execution was not necessary.

If, however, that is not the proper conclusion, I do not think that the appellant should be allowed to amend by setting up the Statute of Frauds as a defence. If, however, such leave to amend had been asked at the trial, it should have been granted. The respondents in their pleading rely upon a written agreement; and if, at the trial, they failed to prove such an agreement, and sought to rely on the parol agreement of which they gave evidence, the authorities are clear that the appellant should have been allowed to amend by setting up the statute if application to amend had then been made.

This Court, no doubt, has power to allow the amendment; but the exercise of the power is in its discretion, and an amendment should not be allowed except to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case (Rule 183); and in Sales v. Lake Erie and Detroit River R.W. Co. (1890), 17 P.R. 224, acting on the corresponding rule then in force, the Court of Appeal refuse to permit the defendants to set up a defence which they had not raised at the trial.

I may point out here that one of the cases cited in the judg-

ment (Odhams v. Brunning (1896), 12 Times L.R. 303) was reversed on appeal to the Lords (1896), 13 Times L.R. 65.

The Statute of Frauds is a defence which a litigant need not avail himself of, and there may be litigants who decline to use it as a defence against a just claim; and it appears to me that where, as in this case, it was obvious at the trial that the Statute of Frauds would be a complete defence to the respondents' counterclaim, if they had failed to prove an agreement in writing, and no application for leave to amend was made, the appellant may fairly be assumed to have deliberately refrained from making the application, and should not now be permitted to amend.

Although the respondents' case as to the wages of the checker was not made out very satisfactorily. . . . I am unable to say that the learned trial Judge was clearly wrong in allowing them. It may be that he accepted the excuse given by Browne for not claiming them sooner, and there was evidence that it was part of the agreement made in Toronto that the appellant should pay one-half of the checker's wages.

The only other item allowed was that in respect of the wire unloaded at another wharf, and as to this there was evidence that amply warranted the conclusion that there was no justification for not unloading the wire at the respondents' wharf.

The appeal should be dismissed with costs.

MAGEE, J.A.:—I agree that the weight of evidence leads to the conclusion that there was a written contract for five years. As to the plaintiff company's application to plead the Statute of Frauds against the counterclaim, it is, I think, unnecessary, and, therefore, should not be allowed. The counterclaim alleged a written contract. If the defendants could not prove one, they would need to amend. Having proved one, they did not require, and do not now ask, any amendment. If they were being allowed to amend now in order to do justice, then the plaintiff company should, I think, have liberty also to amend by setting up the statute, which hitherto, as against the defendants' allegation of a writing, was not called for.

MACLAREN, J.A., and LEITCH, J., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

DECEMBER 1ST, 1913.

*RE CITY OF OTTAWA AND GREY NUNS.

Assessment and Taxes — Exemptions — Land and Buildings —Seminary of Learning — Philanthropic, Religious, and Educational Purposes—Convent and School—Chapel and Almshouse — Hospital — Sisters of Charity — Society Incorporated by 12 Vict. ch. 108—Amending Act 24 Vict. ch. 116—Assessment Act, 1904, sec. 5, clauses 3a, 9.

An appeal by the Corporation of the City of Ottawa from an order of the Ontario Railway and Municipal Board, dated the 5th March, 1912, allowing an appeal from a decision of the Court of Revision confirming an assessment of real property owned by the respondents, a body corporate bearing the name of "The Community General Hospital Alms House and Seminary of Learning of the Sisters of Charity at Ottawa," having been incorporated by 12 Vict. ch. 108, by the name of "La Communauté des Révérendes Sœurs de la Charité," and the name having been changed by 24 Vict. ch. 116.

The appeal was heard by MEREDITH, C.J.O., GARROW,† MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley and J. T. White, for the appellants.

H. M. Mowat, K.C., and D. J. McDougall, for the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The lands as to which the questions for decision have arisen consist of different parcels: the first being part of a block in the city of Ottawa bounded by Rideau street, Cumberland street, Besserer street, and Water street. In the building erected on part of this parcel a ladies' boarding and day school is carried on, and the land not occupied by the buildings is used as a playground for the pupils attending the school. This property is, in my opinion, exempt from taxation under the provisions of clause 3*a* of sec. 5 of the Assessment Act, as enacted by sub-sec. 2 of sec. 1 of ch. 88 of the Ontario statutes of 1910. . . . That this land and the buildings on it are and were the property of "a seminary of learning," and are and

*To be reported in the Ontario Law Reports.

†GARROW, J.A., being ill, took no part in the judgment.

were "actually used and occupied by such seminary," and that it was and is maintained for educational purposes, and probably also for religious purposes, is not open to question; but it was argued that the whole profits from it were not devoted or applied to philanthropic, religious, or educational purposes *only*. . . . In my opinion, that contention is not well-founded. . . . The profits from the school are, I think, clearly devoted to one or other of the purposes mentioned in clause 3*a*, and to such purposes only.

The second parcel consists of 203 feet of land on Cathcart street, 295 feet on Water street, and 290 feet on Sussex street; and is composed of lots 1, 2, 3, and 4, and the west one-third of lot 5, on Water street, and lots 1, 2, 3, and 4, and the west quarter of lot 5, south of Cathcart street. Upon part of this parcel there is a convent building, which is the home of the members of the community and in it or from it are carried on or directed the various activities of the community. There are 180 members, of whom 98 are regular sisters, 24 lay sisters, and 58 novices; 43 of them teach in the separate schools of Ottawa, and 9 in a separate school carried on in the convent building, and 6 give instruction to the novitiates in the building. All but the last-mentioned are paid salaries by the Separate School Board, but what they receive is handed over to and used by the community in carrying on its work. . . .

The part of the building rented to the Separate School Board has not been assessed, and no question as to it arises on the appeal. The vacant land which is used in connection with the hospital is exempt from taxation, the hospital being admittedly exempt. That part of the building is used as an alms house is not, I think, open to question. That the part of the building used as a chapel is exempt from taxation is also clear. The part occupied and used by the members of the community is also, I think, exempt, for the reasons I have given in dealing with the first parcel. The convent is, in my opinion, a charitable institution conducted on philanthropic principles, and not for the purposes of profit or gain within the meaning of clause 9 of sec. 5 of the Assessment Act.

The objects of the community are the dissemination of education, secular and religious, the care of the sick, and the relief of the poor. If it be necessary, as contended by the appellant, in order that an institution may be properly designated a charitable institution, for those having the charge of it to devote the proceeds derived from it to charitable purposes, that condition is

met, in the case of this community, by the provisions of sec. 2 of the Act of incorporation and the amending Act. That these proceeds may be applied to the maintenance of the members of the corporation is not inconsistent with this view, for the members of the community are the instrument by which the charitable work I have mentioned is directed and carried on.

The only question as to which a doubt might arise is as to the boarding of the pupils attending the schools which are carried on in the convent building. That is but a very small part of the work of the community, and, for the purposes of clause 9 of sec. 5, is, I think, immaterial, as the dominant or principal use of the building is for charitable purposes. The carrying on of that part of the work of the community may be in itself charitable; but, if not, the fact that it is carried on cannot deprive the institution of its character of a charitable institution conducted on philanthropic principles, and not for the purpose of profit or gain. . . .

[Reference to Salem Lyceum v. Salem (1891), 154 Mass. 15-17; Phillips Academy v. Andover (1900), 175 Mass. 118, at p. 126.]

This conclusion is not inconsistent with the answers of the Court of Appeal to the questions stated for its opinion as to the liability of the property of the Sisters of the Congregation of Nôtre Dame to taxation (1912), 3 O.W.N. 693. In that case the question arose, not on clause 9, but on clause 3*a*, of sec. 5, which has application to seminaries of learning, and expressly provides that the grounds and buildings "shall be exempt only while used and occupied by the seminary." In that case the view of the Court was that the part of the building occupied by pupils attending the normal schools, and who were not pupils of the seminary, was not exempt from taxation. No such qualification is contained in clause 9; and that decision has, therefore, no application to the questions which are to be dealt with on this appeal.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

DECEMBER 1ST, 1913.

*OTTAWA YOUNG MEN'S CHRISTIAN ASSOCIATION v. CITY OF OTTAWA.

Assessment and Taxes—Exemption—Buildings and Lands of Young Men's Christian Association—63 Vict. ch. 140 (O.) — Construction — "Purposes" — "Object" — Bed-rooms Rented to Members and Meals Supplied—Occupation of Building—Declaratory Judgment—Jurisdiction of Court—Resort to Statutory Tribunals.

Appeal by the defendant corporation from an order of a Divisional Court of the High Court of Justice, the reasons for which are reported in 20 O.L.R. 567.

The appeal was heard by MEREDITH, C.J.O., GARROW,† MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley and J. T. White, for the appellant corporation.

J. F. Orde, K.C., for the plaintiff association, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action was brought for the purpose of obtaining a declaration that certain lands and buildings of the respondent were exempt from taxation in the years 1909 and 1910. By the judgment of the trial Judge it was declared that they were exempt from taxation in the year 1909, and the appellant was perpetually restrained from levying and collecting any taxes in respect of them for that year, and it was also declared that so much of the lands and buildings "as is or may be used as bedrooms, sleeping-rooms, dormitories, or for the purpose of lodging or the giving of meals, is not exempt from assessment or taxation, and the said portion of the said lands and building shall be assessed and taxed in like manner as other lands and buildings in the said city."

On appeal the Divisional Court affirmed this judgment as to the taxes of 1909, and reversed so much of it as declared that a portion of the lands and building was liable to assessment and taxation; and the appellant now appeals from the order of the Divisional Court.

*To be reported in the Ontario Law Reports.

†GARROW, J.A., being ill, took no part in the judgment.

Two questions are raised by the appeal: (1) whether that part of the land and buildings of the association which is used for bed-rooms, sleeping-rooms, or dormitories, or for the purpose of lodging or the giving of meals, is liable to taxation; (2) whether the lands and buildings were liable to taxation in the year 1909.

The answers to these questions depend upon the meaning of the Act 63 Vict. ch. 140, intituled "An Act to Incorporate the Ottawa Young Men's Christian Association." . . .

[Reference to the preamble and secs. 1, 2, 3, 7, 8, 10, and 11 of the Act.]

The provisions of secs. 4, 5, 6, and 9 throw no light upon the questions to be considered; and need not be referred to.

When the "association" was incorporated, it was possessed of land and buildings upon and in which its work was carried on. In 1906 the respondent purchased another site, and in 1907 began the erection upon it of a new building; the building was not completed until some time in the year 1909, and it was not until that year that, as the general secretary testified, the new building was made the "headquarters of the association." In this new building there have been provided nearly 100 bed-rooms, which are let to and occupied by members of the association, and meals are also supplied in the building to members, but no part of the revenue of the respondent is used or applied for any purpose but that of carrying on its work.

It was argued by Mr. Tilley that the exemption for which sec. 11 provides is applicable only to the buildings which belonged to the association at the time of its incorporation and the land on which they were erected; but that is not, in my opinion, the meaning of the section. According to the statutory canons for the interpretation of Acts of the Provincial Legislature, the law is to be considered as always speaking; and, so used, it is plain that the application of sec. 11 is not so limited unless, as was also contended, the words "the buildings of the Young Men's Christian Association of the City of Ottawa" require that that meaning should be given to the section. It was argued that where in the Act the association before its incorporation is intended to be referred to, it is called the "association," and where the incorporated body is intended to be referred to, it is called the "corporation." Doubtless that is the case in most of the sections, but it is not so in the 8th section, perhaps owing to a mistake of the draftsman; nor is it in the 4th line of sec. 11, where "association" is used to designate the incorporated body.

It is to be observed also that it is not the buildings of the

"association" but "the buildings of the Young Men's Christian Association of the City of Ottawa" that are to be exempt from taxation, and that the association before its incorporation did not, and the incorporated body does not, bear that name. The reason of the thing is also, I think, against the interpretation contended for. If it were the proper construction, the result of the association's outgrowing its then quarters, and abandoning them for more commodious one, would be that it would lose its exemption altogether.

In the Divisional Court the meaning of the words "for the purposes of the association" in sec. 11, and the difference between the meaning of the word "purposes" and that of the word "object," were discussed.

It is immaterial for the purposes of the first question whether the view of the Divisional Court was or was not correct; for, even if the words as used in the Act of incorporation are synonymous, the conclusion of the Divisional Court was, in my opinion, right.

If the contention of the appellant is well-founded, lodging and providing meals for the members of the association is ultra vires, and it appears to me quite clear that it is not. The powers which the association may exercise are defined by secs. 3 and 10; and, in my opinion, for the reasons given by my brother Riddell in the Divisional Court, the ejusdem generis rule is not to be applied in determining the meaning of sec. 3. The section deals with two matters: (1) the objects of the association; and (2) the means by which those objects are to be attained. The objects are the spiritual, mental, social, and physical improvement of young men; and the means by which those objects are to be attained are the maintenance and support of meetings, lectures, classes, reading rooms, library, and gymnasiums, and such other means as may from time to time be determined upon; in other words, any means by which the spiritual, mental, social, and physical improvement of young men may be accomplished or promoted; and, in my opinion, the section is designed to give, within these limits, the widest latitude to the association as to the means which it may employ to that end.

So far from there being any ground for suspecting that in providing meals and lodgings for its members the association, under the cloak of carrying on its work, is carrying on a business, the evidence shews that this service is and has been for some years a recognised part of the work of such association; and, in my judgment, it is an important factor in the promotion

at least of the social and physical, if not also the spiritual and mental, improvement of the members who avail themselves of the privileges it affords to them.

For these reasons, I am of opinion that the first question should be answered in the negative.

The second question presents more difficulty. In order that the buildings and land shall be exempt from taxation, they must be "occupied by and used for the purposes of the association." That they were in 1909 used for the purposes of the association, I have no doubt; but were they "occupied by the association"? In the popular sense of the word "occupied" they were unoccupied until the buildings were made the "headquarters" of the association; but that would, I think, be too narrow a meaning to give to the word as it is used in sec. 11. Occupation does not necessarily involve residence; an enclosed field used in connection with a residence on other land would not be unoccupied, although no one lived there; and I have no doubt that the land of the association was occupied by it within the meaning of sec. 11. But were the buildings occupied by it? They were being used for the purposes of the association, as I have said, i.e., in getting them ready for the transfer to them of the "headquarters" of the respondent; and, upon the whole, I have come to the conclusion that they were also in that way occupied by the association.

For these reasons I would affirm the judgment of the Divisional Court and dismiss the appeal with costs.

No question was raised as to the right of the respondent to a declaratory judgment; and, therefore, I have not considered whether a proceeding of that nature is proper to be taken for the purpose of a determination as to the right of a municipal corporation to impose taxes. I must not, however, be taken to assent to the proposition that such a proceeding is a proper one. The Assessment Act now provides ample machinery for determining such questions, and I am inclined to think that relief must be sought from the tribunals which are by the Act charged with the duty of determining all questions as to assessment, and not by an action in which a declaratory judgment is sought. The inconvenience which may result from the latter course being taken is strikingly exemplified by what has happened in this case—a final judgment as to an assessment of the year 1910 not being obtained until near the close of the year 1913.

Appeal dismissed with costs.

DECEMBER 1ST, 1913.

*RE OTTAWA YOUNG MEN'S CHRISTIAN ASSOCIATION AND CITY OF OTTAWA.

Assessment and Taxes—Exemption—Buildings and Lands of Young Men's Christian Association—63 Vict. ch. 140 (O.) —10 Edw. VII. ch. 163, sec. 2—Supplying Lodgings and Meals to Visitors, not Regular Members—Order of Ontario Railway and Municipal Board—Appeal.

Appeal by the city corporation from an order of the Ontario Railway and Municipal Board, dated the 28th February, 1912, declaring the lands and buildings of the association exempt from taxation for the year 1912.

The appeal was heard by MEREDITH, C.J.O., GARROW,† MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley and J. T. White, for the appellant corporation.

J. F. Orde, K.C., for the respondent association.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—Unless the facts which were brought out before the Board as to the persons to whom lodgings and means were supplied by the respondent make the conclusion to which we have come on the appeal in the action between the parties in which judgment has just been given (see the preceding case) inapplicable, this appeal fails.

It did not appear from the evidence given at the trial of the action that any but members of the association were provided with lodgings and meals, but upon the hearing before the Board it was shewn that members of other associations and occasionally visiting relatives or friends of members were admitted to these privileges.

It is clear, I think, that this practice does not disentitle the respondent to the exemption provided for by its Act of incorporation. The members of other associations who were admitted to these privileges became what is termed, in club parlance, privileged members, and therefore members for the time being of the association, but not having, in some cases at least, all the rights and privileges of a full member. The association is essen-

*To be reported in the Ontario Law Reports.

†GARROW, J.A., being ill, took no part in the judgment.

tially a club, and its practice in this respect does not differ from that of clubs generally.

Apart from this aspect of the case, I find nothing in the Act of incorporation which limits the field of the association's activities to young men who are members of it; but that which, it is contended, has the effect of disentitling it to the exemption is, in my opinion, well within the powers of the association.

Section 2 of 10 Edw. VII. ch. 163, which amends the respondent's Act of incorporation, was not, as far as I recollect, refered to on the argument. The effect of it is to extend the objects of the association, as defined by sec. 3 of its Act of incorporation, so as to include dormitories, bed-rooms, and lunch rooms, but it is provided that any portion of the buildings and land used for these purposes "shall be subject to assessment and taxation for municipal purposes except in so far as the same may be decided to be exempt therefrom in the action now pending between the association and the Corporation of the City of Ottawa." The action is that in which judgment has just been given, and the effect of the exception is, therefore, I think, to render the provision as to liability to assessment and taxation nugatory.

The appeal fails, and should be dismissed with costs.

DECEMBER 1ST, 1913.

RICHARDS v. LAMBERT.

Company—Diversion of Assets—Account—Reference—Report—Findings of Master—Debits and Credits—Agreement—Quantum Meruit—Appeal—Costs.

Appeal by the defendants from the judgment of LATCHFORD, J., 4 O.W.N. 646, affirming with a variation the report of the Local Master at Sandwich, dated the 8th April, 1912, made pursuant to the reference directed by the judgment at the trial, dated the 23rd May, 1911, and directing that the appellant the Regal Motor Car Company should pay to the appellant the Regal Motor Car Company of Canada Limited $11,634.20, with interest from the date of the report, and that the appellants should pay to the plaintiff his costs of the trial, reference, and appeal.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and A. R. Bartlet, for the appellants.
J. H. Rodd, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The action is brought by the plaintiff, suing as the only shareholder of the Regal Motor Car Company of Canada Limited, which I shall afterwards refer to as the Canadian company, other than the defendants C. R. Lambert, J. A. Lambert, Bert Lambert, and F. W. Haines, against those defendants and against the Regal Motor Car Company, afterwards referred to as the Detroit company, and the Canadian company.

The Detroit company carries on business in Detroit, and its principal if not only shareholders are the four individual defendants.

The allegations contained in the statement of claim, after setting out the proceedings leading up to the incorporation and the incorporation of the Canadian company, and its organisation early in February, 1910, are that, in breach of an agreement between the respondent and the four individual appellants, that he should be appointed manager of the Canadian company they appointed the appellant Haines to that position; and that afterwards, in consequence of the respondent having protested against this, he was appointed resident or assistant manager and put "in charge of the work;" that the manufacture of automobiles was continued until about the middle of June, 1910; that the appellants continually interfered with the respondent in the management of the business, and wrongfully took charge of the finances of the company, and about the middle of June, 1910, "wrongfully conspired together to deprive the plaintiff of any voice whatever in the management of the affairs of the said company, with the fraudulent intention of disposing of the assets and of winding up the company;" and that, in pursuance of such conspiracy, they assumed to dismiss the respondent from his position; that the manufacture of automobiles was immediately stopped, and those that had been manufactured were sold at and below cost; that the appellants "proceeded to appropriate the other assets of the company to their own use and to the use of the Regal Motor Car Company of Detroit, assuming to pay non-existent debts, and by the end of December last had removed from the premises of the company and disposed of practically all of the assets except the land and buildings, leaving a considerable indebtedness still unpaid, although there was in the beginning more than ample assets for the satisfaction of all liabilities, with a reasonable

margin besides;" that the result of these wrongful acts was, that not only was the Regal Motor Car Company of Detroit enabled to obtain payment "for a large non-existent liability by which the said defendants benefited, but the said company got possession also of stock and machinery at an improper price, and the value of the interest of the plaintiff in the company so formed was greatly reduced, if not entirely wiped out, and the plaintiff thereby lost the money invested and the time expended by him in connection therewith;" that the Regal Motor Car Company of Detroit was a party with the individual appellants to these wrongs, and that they and the company are liable in damages to the respondent and to the Canadian company; and the respondent claims to recover from the appellants other than the Canadian company damages for the wrongs complained of. . . .

It is clear, I think, that what was referred to the Master was the account between the Canadian company and the Detroit company, and that it was intended that the account should be taken on the footing that the Detroit company should account for everything belonging to the Canadian company which had come into the possession of the Detroit company.

It is evident from the course of the proceedings in the Master's office that this was the view of all parties. By direction of the Master, the Detroit company brought in its account, in which it purported to give credit for the proceeds of everything that it had received from the Canadian company, and according to which that company was indebted to the Detroit company in the sum of $6,245.53. . . .

The only item on the debit side of the Detroit company's account that was the subject of controversy was one of $5,607.20, made up of two items; $2,841.41, representing a charge of ten per cent. on the amount charged to the Canadian company for articles supplied to it by the Detroit company; and $2,765.79, charged for advertising the business of the Canadian company. This item was wholly disallowed by the Master. . . .

In my opinion . . . on the ground of the express agreement, as well as upon a quantum meruit, the item of $2,841.41 should not have been disallowed.

As to the item of $2,765.79 there is more difficulty. It is not shewn that there was any agreement as to the advertising or any arrangement that any advertising for the Canadian company should be done by the Detroit company. . . . This item was, I think, properly disallowed.

The other items in question affect the credit side of the account, and the contention of the respondent is that a much larger sum than was credited to the Canadian company should have been credited to it for the property that was taken from its factory to the factory of the Detroit company; and the Master has found in favour of this contention, and has charged the Detroit company with everything that, according to the account kept at the Walkerville factory, was shipped to that company, at cost price, with the duty added on articles that had been imported from the United States. . . .

Having regard to what took place at the trial, and the form of the judgment, the account should not have been taken on the basis of the appellants other than the Canadian company being wrongdoers, but the Detroit company should have been charged for what it actually received, at a fair value, having regard to all the circumstances; and the assumption that the business of the Canadian company could have been carried on successfully is wholly unwarranted. . . .

Upon the whole, I am of opinion that the respondent failed in his attack on the accuracy of the appellants' accounting for the property of the Canadian company which was sent to Detroit except as to two items, one of $198.15 and the other of $298.37. The item of $198.15 is for articles amounting in value to that sum, which were received by the Detroit company but were not included in the invoices made out by Hartman. By an error, this item was debited instead of being credited to the Canadian company; and, when the error was discovered, a cross-entry was made which merely cancelled the debit entry. The item should also have been credited to the Canadian company. The Master, under the erroneous impression that the Canadian company had been improperly credited with it, deducted it from the sum for which he found the Canadian company to be entitled to credit; and, upon appeal to my brother Latchford, instead of the error being rectified, the sum was again debited to the Canadian company.

The item of $298.37, as was admitted by counsel for the appellants, should have been, but was not, credited to the Canadian company. By mistake, upon the appeal to my brother Latchford, instead of crediting it to the Canadian company, that company was debited with it.

If we had agreed with the conclusion of the Master in other respects, the amount in which the Detroit company has been found to be indebted to the Canadian company should be increased by three times the amount of the item of $198.15 and

by twice the amount of the item of $298.37; but, as we do not agree with the conclusion, $198.15 and $298.37 should be deducted from the balance at the credit of the Detroit company, as shewn by their account filed in the Master's office, $6,245.53, and there should also be deducted from that balance the amount of the advertising account, $2,765.79; and, these deductions having been made, that balance is reduced to $2,983.22, which is apparently the sum in which the Canadian company is indebted to the Detroit company.

Counsel for the appellants, upon the argument, said that all that they desired to obtain by the appeal was to wipe out the balance which, acording to the report and the judgment in appeal, is owing by the Detroit company to the Canadian company; and, in view of this, there will be no declaration that the Canadian company is indebted to the Detroit company, but a declaration that neither company is indebted to the other in respect of the matters in question in the action; and each party will bear his own costs of the litigation throughout.

The result of this will be, that the Canadian company will receive the benefit of $2,983.22 as compensation for any errors which, though not proved to exist, may have been made in the credits to which it was entitled in respect of this property shipped to Detroit.

DECEMBER 2ND, 1913.

*RE KENNA.

Infant—Custody—Right of Father—Welfare of Child—Foster Home—Children's Protection Act of Ontario, 8 Edw. VII. ch. 59, secs. 13, 27, 28, 30—3 & 4 Geo. V. ch. 62— Review of Decision of Commissioner—Father's Right to Determine Child's Religion—Limitation—Abdication of Paternal Right —Discretion of Judge of High Court—Appeal.

Appeal by Philip Kenna, the father of Frederick Kenna, an infant of five years of age, from the order of MIDDLETON, J., 4 O.W.N. 1395, dismissing the application of the appellant, upon habeas corpus, for the custody of the child, and remanding the child to the custody of its foster parents, Albert Breckon and his wife.

*To be reported in the Ontario Law Reports.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

T. L. Monahan, for the appellant.

H. M. Mowat, K.C., for the respondents.

The judgment of the Court was delivered by HODGINS, J. A.:—I do not think that, in the circumstances of this case, it makes any difference whether the Act . . . 8 Edw. VII. ch. 59 or the present Act, 3 & 4 Geo. V. ch. 62 (in force the 6th May, 1913), which repealed that enactment, governs this application.

A writ of habeas corpus was issued . . . on the 20th February, 1913, and a return was made on the 12th April, 1913. On that return it was open to the appellant, under the Ontario Habeas Corpus Act, 9 Edw. VII. ch. 51, sec. 7, to dispute the validity of the return in law and its accuracy in fact. In the latter case, evidence might be taken by affidavit or otherwise, and in this case was taken, viva voce, before the Judge, following the practice approved in Re Smart Infants, 12 P.R. 2. . . . Further material was filed after the return; and on the 5th June, 1913, the order now in appeal was made. . . .

The application was clearly one under sec. 13 of 8 Edw. VII. ch. 59, for an order for the production of the child. The writ of habeas corpus appears to be the proper method, or one of the proper methods, of obtaining the relief sought, for upon the return of the writ the custody of the infant is determined: Simpson on Infants, 3rd ed., p. 123. Notwithstanding that the application is made under the section mentioned, and although on the return of the writ the provisions of that section may be invoked, the case does not differ from any ordinary application made upon the return of a writ of habeas corpus. The section quoted, 13, presupposes a committal, and one made by proper authority, and deals with the matter on the footing that, in spite of what has taken place, the legal guardian's custody (see sec. 14 of 3 & 4 Geo. V. ch. 63) may be displaced in favour of the right of the parent. This parent must bring himself within that section, and shew that he or she has not been guilty of such conduct as should disentitle him or her to the custody of the child, that he or she is not unmindful of parental duties, nor is the parent applying one who has forfeited the right to have his or her wishes regarded in respect to the religion in which the child should be brought up.

These are all matters which may be and should be considered

by the Judge who has the return before him; but they appear to me to be conditions which arise subsequent to the committing order, and form reasons which, notwithstanding the order, either operate for or against the change of custody.

I do not see that it is intended, but rather the contrary, to reopen matters before the Commissioner or to revise his decision.

. . .

In any view, it is evident that the argument for the appellant goes too far in assuming that the matters before the Commissioner can be reviewed by the Judge in any way save that provided by the Ontario Habeas Corpus Act, namely, upon the proceedings being brought before him on a writ of certiorari in aid (see 9 Edw. VII. ch. 51, sec. 6).

No doubt, the order made by the Commissioner may be interfered with, because the effect of an order changing the custody interferes with its continuance; but the order is not set aside nor varied, but rather superseded, when the custody of the child is otherwise disposed of.

I agree with the decision of my brother Middleton in Re Maher, 4 O.W.N. 1009, 28 O.L.R. 419, so far as it holds that the Acts in question recognise the power of the High Court Division to act notwithstanding the order of the Commissioner, provided that power is exercised in the way and to the extent I have mentioned, and not by way of review.

The proceedings taken before the Commissioner under 8 Edw. VII. ch. 59 were not brought up on certiorari, and therefore could not be looked at or reviewed by the Judge of first instance, nor can they be by this Court. It was held in Re Granger (1897), 28 O.R. 555, by a Divisional Court, affirming the decision of Moss, J.A., that no appeal lay either to the Sessions or to any other Court from an order made by the "legislative Judge provided by the Children's Protection Act." . . .

The application, treated as under either Act, being therefore one made upon the return of the writ of habeas corpus, it follows that, if the return is good in law, and its truth in fact established, the Judge of the High Court can only change the custody of the child under the general powers of the old Court of Chancery or under the jurisdiction specially conferred on him under sec. 27. . . .

A child of tender years has no religion of its own, nor is the question of its religion considered a pressing one, in view of its age: Re Dickson Infants (1888), 12 P.R. 659. It cannot properly be designated a Protestant or a Roman Catholic child. . . .

But I am quite unable to see what bearing sec. 28 can have as applied to the provisions of the preceding section, 27, sub-sec. 4. By the latter, the Judge of the High Court Division can inquire "whether the child is being brought up in a different religion from that in which the parent has a legal right to require the child shall be brought up;" and he can make such order as he may think fit. If sec. 28 is intended to control the discretion of the High Court Judge, then the power to make such order as he may think fit is meaningless. If it applied, the Judge would be bound to change the custody, whether he thought fit or not. If sec. 28 is read as meaning children of Protestant or Roman Catholic parents, then, as it applies till the child is sixteen years of age, it would deprive the latter of any right to have its views regarded, notwithstanding sec. 28, sub-sec. 5, as the prohibition is expressed in absolute terms.

The two sections, I think, point in two different directions the later one as preventing a child with religious views (see on this Re Faulds, 12 O.L.R. at pp. 258-9), or if of some religious persuasion, from being put, under the statutory machinery, into a foster home or committed to the care of a society contrary to its religious desires, and as conferring a right upon the child which is a personal one. The earlier section recognises the parent's legal right in all cases, including those coming under sec. 28, as overriding the wishes of the child, except where the Judge of the High Court, in his discretion, either after or without consultation with the child, settles its religious custody.

In this case the child is being brought up by Protestants, in a religion different from that in which the father on his application says he desires him to be brought up. It would not matter, therefore, it seems to me, whether he were in the foster home at his own wish or under the committal order. The parent has, under sec. 27, the right to insist on his wishes being considered, and the burden is cast upon the Judge either to give effect to that right or in his discretion to refuse to yield to it.

In the case in hand my brother Middleton has exercised his discretion, and we are asked to review it. That he had the power to make the order appealed against cannot be doubted, both under the earlier general jurisdiction vested in the Court and by the statute under discussion. And, in view of the age of the child, "the Court has absolute power" over him. See per Lord Cottenham in Warde v. Warde, 2 Ph. 786. This case was followed and approved by Mowat, V.-C., in Re Davis (1871), 3 Ch. Chrs. 277, a case of a girl of seven years old. In In re McGrath, [1893] 1 Ch. 143, the Court of Appeal state the rule of law to

be that an infant child is to be brought up in its father's religion unless it can be shewn to be for the welfare of the child that this rule should be departed from, and add: "The welfare of the infant is the ultimate guide of the Court." . . .

[Reference to The Queen v. Gyngall, [1893] 2 Q.B. 232; In re Newton, [1896] 1 Ch. 740; In re O'Hara, [1900] 2 I.R. 232; Re Faulds, 12 O.L.R. 245; Re Davis (1909), 18 O.L.R. 384; Re Young (1898), 29 O.R. 665.

While I cannot find any case in which the sections in the English Act which are similar to ours have been construed, I think the principles in the cases cited are entirely applicable

I have heard no reason adduced which, to my mind, impeaches the discretion exercised by my brother Middleton; and, as I wholly agree with his views as to the welfare of the child, upon the facts properly before him, I think the appeal must be dismissed with costs.

DECEMBER 4TH, 1913.

*RE BILLINGS AND CANADIAN NORTHERN R.W. CO.

Railway—Expropriation of Land—Compensation and Damages—Arbitration and Award—Evidence of Value—Injurious Affection—Interference with Access—Highway—Possibility of Closing—Injury by Railway Previously Constructed—New Situation Created by Second Railway—Determination of Extent of Area Affected—Percentage of Depreciation—Injury from Smoke, Noise, and Vibration—Title to Land—Res Judicata.

Appeal by H. B. Billings from an award of arbitrators of the 28th December, 1912, fixing the compensation of lands taken by the railway company for their railway.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and D. J. Macdougall, for the appellant.

E. D. Armour, K.C., and A. J. Reid, K.C., for the railway company, the respondents.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by HODGINS, J. A.:— . . . The evidence on value given on behalf of the respondents was not brought within the rule laid down in Re National Trust Co. and Canadian Pacific R.W. Co., ante 221.

The comparison made by Shaw, of Montreal (p. 217), is to an unidentified location on the Island of Montreal. That by Vanhorne, of Toronto, while definite as to its position in Toronto (p. 238), lacks any value on account of the total absence of comparison as to the pressure of population, the conditions of the locality, and the method of treatment that will be required to cross the Canadian Pacific track and 150 feet more (p. 240) purchased alongside by the Canadian Northern and its effect on the adjacent land. In short, no foundation of similarity is made except that two railways, side by side, exist in these places. Davis, of Ottawa, gives as an illustration a property known as Hurdman's farm, the second farm from the Billings property. But this is not otherwise identified, nor is any evidence given of similarity of conditions or location. This detracts greatly, in my opinion, from the value of the evidence of these witnesses, which is not helped by statements that crossing four lines of railway would not increase the danger (Davis, p. 235), and that the coming of the second railway track creates no damage to the property from severance, that being attributable to the first track, which was laid in 1854 (Shaw, p. 229; Davis, p. 230; Vanhorne, p. 238). I do not find that Vanhorne gave evidence that the injurious affection spread only a short distance from the railway. Shaw did so state, but that opinion is his alone.

The appellant's witnesses base their views chiefly on a comparison of the property in question with that owned by the Keefers at Rockcliffe, which is said by two witnesses to be similar in many respects, but without the disadvantage of the railway track. The evidence of the other expert witnesses upon the same side is opinion evidence only, consisting of deductions drawn, as is the case with Shaw and Vanhorne, from their observation and experience as real estate operators. The value to be given to this class of evidence, or its want of value, is dealt with by Mr. Justice Sedgewick in William Hamilton Manufacturing Co. v. Victoria Lumber and Manufacturing Co. (1896), 26 S.C.R. 96, 108; and in Re Tviet and Canadian Northern R.W. Co. (1912), 25 W.L.R. 188. . . .

The price paid by the respondents to C. M. Billings of $1,425 per acre for lands contiguous to the Canadian Pacific Railway, while that price includes damages caused by the operation of the respondents' railway alongside his property, cannot be dis-

regarded, and is a direct piece of evidence as to value. The sale or option to Rogers also comes directly within the decision of Dodge v. The King (1906), 38 S.C.R. 149, as indicating the market value. This was in 1910, and was at the rate of about $860 per acre. The appellant, H. B. Billings, sold five acres in the neighbourhood to the respondents for $3,500 per acre. The valuation placed upon the property before the coming of the railway extend from $2,000 to $3,500 per acre, and after from $1,000 to $2,800, or a difference of from $700 to $1,000 per acre. The arbitrators who agree in making the award, in their written opinion speak of the property as very attractive and undoubtedly well situated for suburban residential purposes.

They have, however, determined the case as if the interference with access were the only element of damage proved, and have confined that to the thirteen acres upon which stands the Billings homestead. They have refused compensation for injury caused by smoke, vibration, and noise. It is quite true, as the two arbitrators say, that the fifteen-foot strip in itself is a quite inadequate way to serve the whole 163 acres, regarded as a possible residential property. Any encroachment upon it would, therefore, be a very serious matter; and what the respondents have done is to take a section of it, where their railway comes, so that if the appellant had to depend upon it for ingress or egress, that way is barred.

I am unable to understand why this taking deprives the appellant only "of so much of this means of access as he has customarily used for a distance of ninety feet (i.e., only about two feet in width), and why this deprivation, limited to the customary use, is alone given effect to, and only attributed to the homestead property of thirteen acres, and not extended to the lands lying between it and the railway and extending to the north thereof, which are much closer to this means of access.

The whole fifteen feet has been taken; and whatever use it could be put to, or was available for, and not only that which was customarily used in connection with the homestead, should be paid for.

If the appellant had never used it, but had farmed the 150 acres, seeking an outlet by the north for his produce to some customer or way station, that would, it seems to me, form no answer to the proposition that access by this strip was most useful to this property when put on the market, as being a more direct way to the city of Ottawa. It gave an additional market value to the whole property, or the part served by it. See per

Bowen, L.J., in Ford v. Metropolitan District R.W. Co. (1886), 17 Q.B.D. at p. 28.

It cannot be finally determined upon the evidence given whether Billings avenue is or is not a public highway It is so treated by Mr. Justice Middleton in Canadian Northern R.W. Co. v. Billings (1912), 3 O.W.N. 1504, at p. 1506; but I do not understand him to have adjudicated upon that point. . . . There is a strong probability that that avenue cannot be closed by the Canadian Pacific, and that probability was properly taken into consideration by the arbitrators. See Re Gibson and City of Toronto (1913), 28 O.L.R. 20. But equally so should the possibility that it may be closed be a factor in their consideration of the appellant's claim for damages.

But they have dealt with it not as a matter of probability or possibility, but upon the basis that it must forever remain open: a view which deprives the appellant of something he is entitled to urge in his favour. See Re Cavanagh and Canada Atlantic R.W. Co. (1907), 14 O.L.R. at p. 530, per Riddell, J.

But, even if it be a public highway, its use cannot be as advantageous as if the strip in question were added to it and used with it; and the expropriation of the fifteen feet, in my judgment, deprives the appellant of a valuable right, even though its complete enjoyment depends partly upon the consent of C. M. Billings. He apparently is willing to give that consent, on terms dealing with future developments. See Holt v. Gas Light and Coke Co. (1872), L.R. 7. Q.B. 728.

The right to compensation for interference with access or its being rendered less convenient or more dangerous is discussed in the cases referred to in O'Neill v. Harper (1913), 28 O.L.R. 635, and also dealt with by my brother Middleton in Re Myerscough and Lake Erie and Northern R.W. Co. (1913), 15 Can. Ry. Cas. 168, 4 O.W.N. 1249.

I agree with Hr. Hogg (the dissenting arbitrator) that the coming of the first railway created a situation upon which the advent of the second railway operated. . . . The locality had adjusted itself to the consequences of the first invasion; and the owner of the property is entitled to other and different damages in the present arbitration.

I think the case should be dealt with upon the footing that the interference with access affects not only the thirteen acres upon which the Billings homestead stands, but a portion of the neighbouring lands as well. The extent to which this injurious affection may reach is in dispute; but I think the dissenting arbi-

trator, Mr. Hogg, has not unfairly stated the area affected as 25 instead of 13 acres.

The value of this 25 acres is taken by him at $1,200 per acre, and while, upon the whole of the evidence, I think that a larger sum might have been allowed, I do not think it would be right to increase it beyond that figure, in view of the price paid by the respondents to C. M. Billings for the land, and damages caused by the operation of the railway, and of the option price. The value put by the two arbitrators upon the Billings thirteen acres is $17,000 or about $1,375 per acre, but I have no means of knowing whether that includes the value of the buildings as well.

The percentage of depreciation is more difficult. If the view of the majority of the arbitrators is, for the reasons I have given, too low, the percentage adopted by Mr. Hogg is not, I think, too high, considering the fact that he deems only a comparatively small portion of the 163 acres to be affected. . . .

With regard to the compensation claimed for injurious affection by reason of smoke, noise, and vibration, it is clear that allowance should be made for these drawbacks, so far as they depreciate the value of the lands in question. . . . I do not see why the noise and vibration and smoke occasioned by the hauling of a long train across this strip should not be an element in the injurious affection of the remaining lands, though the vibration is not attributable wholly to the part of the train then on the strip, and though the engine emitting smoke has passed beyond it. . . .

[Reference to Cowper Essex v. Local Board for Acton (1889), 14 App. Cas. at p. 161; Horton v. Colwyn Bay and Colwyn Urban Council, [1908] 1 K.B. 327; Rex v. Mountford, [1906] 2 K.B. 814; Canadian Pacific R.W. Co. v. Gordon (1908), 8 Can. Ry. Cas. 53.]

I think that the compensation with regard to smoke, noise, and vibration should be allowed as affecting that part of the lands which lie in reasonable proximity to the railway while any part of the train is passing over the strip in question.

The arbitrators have properly declined to go into the question of title as between the appellant and Rogers: Great Northern and City R.W. Co. v. Tillett, [1902] 1 K.B. 874. Nor is this Court bound to pronounce upon the effect of the will of Charles Billings, dealing with the fifteen-foot strip, nor the position of his sons with regard thereto. The railway company's notice of expropriation deals with the fifteen-foot strip as private pro-

perty, and it is in fact res judicata as between these parties by the judgment of Mr. Justice Middleton in Canadian Northern R.W. Co. v. Billings, supra.

All the arbitrators are men of eminence in their profession, and have exceptional means of knowing the locality and environment of the lands here in question; and their respective views have been so expressed as to be of great value in deailng with this case. In reversing to some extent the decision of the majority, so far as they have, in the view I have taken, omitted to allow for some elements of damage, it is not unreasonable to regard the opinion of the third arbitrator, who does give weight to these considerations, as the limit to which any variation should go—although I think a larger amount would not, upon the evidence, be unreasonable. I would, therefore, adopt his figures as to damage for interference with access. But I do not think that, while damage from noise, vibration, and smoke can be allowed for, it can be treated as affecting the whole twenty-five acres lying to the east of the Canadian Pacific. All that can be given is the damage occasioned by the operation of the railway, in the sense I have indicated, over the strip in question. So far as I can measure that, only about half the amount of acreage allowed by Mr. Hogg would be affected. Apart from that I would adopt his view of the percentage of damage on this head.

In the result, the award should be amended by striking out the amount given for injurious affection of the thirteen acres, and by inserting in place thereof the amount of $8,810, made up as follows:—

Injurious affection, having regard to interference with access to 25 acres	$6,500
Injurious affection of 12½ acres in proximity to railway as stated, 15 per cent. on $15,000....	2,250
	$8,750
To these amounts the sum awarded for land taken should be added	60
Making the total	$8,810

The respondents should pay the costs of the appeal.

Award varied.

DECEMBER 4TH, 1913.

*SWALE v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Goods—Sale of, to Pay Charges—Negligence of Auctioneers Employed by Carriers—Conversion of Goods—Third Parties—Remedy over—Bill of Lading—Exceptions—Railway Act, secs. 345, 346—"Owner's Risk"—Involuntary Bailees—Independent Agent or Contractor—Consent of Owner to Sale.

Appeal by the defendants and the third parties from the judgment of LENNOX, J., 4 O.W.N. 884, in favour of the plaintiff; and appeal by the third parties from the judgment in favour of the defendants for relief over against the third parties.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. Laidlaw, K.C., and J. Bicknell, K.C., for the appellants in both appeals.

W. M. Hall for the plaintiff, respondent.

Shirley Denison, K.C., for the defendants as respondents in the appeal of the third parties.

MEREDITH, C.J.O.:—The appeal was argued upon the question between the defendants (the railway company) and the third parties (the auctioneers).

These goods, for the conversion of which the action was brought, were deliberately sold by auction to pay certain charges against the goods.

The case was argued only upon the question of the liability of the railway company if the goods had been lost or converted.

We are of opinion that the judgment is right, and that the appeal upon that branch of the case should be dismissed.

It can be put on the paper to have the other branches of the case argued, if the parties desire it.

HODGINS, J.A.:— . . . The objections urged against the judgment are that the railway company are relieved from liability by: (1) exceptions in the bill of lading; (2) by the fact that, by secs. 345 and 346 of the Railway Act, in the events that happened, the goods were at the owner's risk; (3) that the goods were

*To be reported in the Ontario Law Reports.

in the railway company's hands as involuntary bailees, and as such the company are not liable for want of reasonable care, and that inability to deliver is negligence, not conversion, and the railway company did not convert; (4) that the goods were handed over for sale to an independent agent, for whose acts and defaults the railway company are not responsible; (5) that the company are absolved from liability by the plaintiff's consent to the sale by the third parties for a larger sum than the railway company had, under secs. 345 and 346, the right to sell for.

(1) No doubt the cases cited shew that the exceptions in the bill of lading would protect the railway company if the goods had been lost by negligence in transit. But all parties agree that what was shipped at Liverpool was delivered to the third parties for sale, though in respect to damages the shipment of all the goods claimed is not admitted. The transit then had been at an end for over twelve months, as it ceased on delivery at "the station nearest to Toronto," where the goods remained subject to order. The consignee was bound to take the goods away within twenty-four hours after arrival, and his refusal or neglect to receive the goods put an end to the transit: Grand Trunk R.W. Co. v. Frankel (1903), 33 S.C.R. 115. The expressions used in the bill of lading, if read irrespective of the purpose of the document, are wide enough to cover some elements in the case in hand, if the third parties had been in the service of the railway company. The goods were to be forwarded, subject to the exceptions and stipulations expressed below, per railroad and (or) water to the station nearest to Toronto and at the aforesaid station delivered to order of—— or to his or their assigns." The exceptions cover "breakage and pilferage (sic) . . . whether any of the causes or things above-mentioned or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence of the owners . . . officers . . . or other persons whomsoever in the service of the shipowners or railway company while on board said ship . . . or otherwise howsoever for whose acts they would otherwise be liable." Further it is provided that "the master, owners, or agents of the vessel or railway company shall not be liable for any goods which is (sic) capable of being covered by insurance:" as to which St. Mary's Creamery Co. v. Grand Trunk R.W. Co. (1904), 8 O.L.R. 1, seems in point. There is also a provision relieving from liability against "any claim, notice of which is not given in writing before the removal of the goods."

I think that the purpose of the bill of lading is satisfied when the transit is complete, except as to any rights of lien or absolution from claims not promptly made. The case of Mayer v. Grand Trunk R.W. Co. (1880), 31 C.P. 248, is distinguishable. . . . But I cannot see that the conditions apply after the carriage is accomplished, and where, therefore, the new relation of warehouseman or involuntary bailee arises, coupled with the right to realise under secs. 345 and 346. . . .

(2) Section 345 enables the railway company to detain the goods, which, during detention, are at the owner's risk. If the words "at owner's risk" should apply during the period of sale, then they can only so apply while the goods are in the possession of the company. If they are handed to an agent to sell, they are either still, in law, in the company's possession, in which case the company's liability, whatever it is, attaches, or they are out of the company's possession and so the section does not apply. But, for the reasons stated under number 3 (infra), I think that the words "at the risk of the owners" do not make the case different from the position in which the default of the plaintiff in not paying the tolls and taking delivery left the matter.

(3) The position of the railway company after the transit ends seems to be that of an involuntary bailee, with the obligation of reasonable care, as well as an obligation to deliver the goods when the consignee comes for them, or, as it is elsewhere out of the company's possession, and so the section does not consequences of delay arising from causes beyond its control. And, if the goods, without its fault, were stolen or accidentally destroyed, the bailees would not be liable: Grand Trunk R.W. Co. v. Frankel (1903), 33 S.C.R. 115; Walters v. Canadian Pacific R.W. Co. (1887), 1 Terr. L.R. 88; Hough v. London and North Western R.W. Co., L.R. 5 Ex. 51. But it is not suggested that while in the railway company's possession the loss occurred. Their employing a responsible agent is not negligence. But inability to hand over the proceeds and the balance of the unsold goods is the breach of a statutory duty, and can only be excused by such circumstances as would absolve the agent. So that it seems to me the question is not whether there was conversion by the railway company, but whether the railway company are liable for the acts of their agents if those acts amount to such negligence as would make liable bailees such as the railway company were, or would constitute conversion.

"Owner's risk," in the circumstances which happened, seems to imply much the same idea as underlies the responsibility of an involuntary bailee. "Owner's risk" is said in Dixon v.

Richelieu Navigation Co. (1886), 15 A.R. 64, to protect from all liabilities except wilful neglect or misconduct; and this corresponds to the obligation of reasonable care and to the exception of liability in matters arising beyond the involuntary bailee's control or without his fault as stated above. And, if the employment of an auctioneer results in loss, the test is, I think, the same as if the railway company themselves sold by auction.

(4) I do not see how the handing over of these goods to an independent contractor—if an auctioneer can be so called—can alter the railway company's position. The Railway Act, enabling the railway company to sell, does not require the employment of a licensed auctioneer, though it may be that in Toronto the municipal by-law does not permit any one who has no license to sell by auction. But the authority for sale and the right to sell by auction are both given in dealing with matters obviously necessary to the carrying on of the business of a railway company, and, therefore, are valid and cannot be qualified even by Provincial authority: Grand Trunk R.W. Co. v. Attorney-General, [1907] A.C. 65. And, as the railway company are charged with the duty of paying over, not merely what their agent may account for, but the surplus itself, and of delivery to the owner of so much of the goods as remain unsold, I think that they cannot shoulder this responsibility on to another, and compel the respondent to look to him, unless the latter has so acted as to require him so to do, especially as the employment of an auctioneer does not necessarily involve parting with the custody of the goods. I can find no case, and none was cited, where an auctioneer has been treated as an independent contractor under similar circumstances. The view generally taken of his position is that of an agent for the vendor, and, in signing a sale agreement, agent to that extent for the purchaser. . . .

In view of the provisions of secs. 345 and 346, the employment of an auctioneer seems to fall within a well-understood exception to the rule that the employment of a competent and independent contractor to do work frees the principal from liability for the negligence of the contractor or his workmen. The exception is, that where the work intrusted to the independent contractor involves the performance of a duty which is incumbent upon the person by whom the work was so intrusted, the principal remains liable. In this case the duty of sale and accounting is upon the railway company, to enable it to recover its charges, and there is a duty to perform it in such a way as to realise as much as possible for the consignee. The right to sell is purely statutory, and would be unlawful if not authorised by

the Railway Act. The sale can only be pursued in the way and with the consequences attached to it by secs. 345 and 346; and the company is bound to see, within the limits I have mentioned, that no acts of negligence on the part of the agent cause damage to the owner of the goods.

The company must sell; they are the only ones who can sell, and the agent's services are merely the machinery by which they effect the sale.

(5) By the bill of lading the railway company are given a lien on the goods not only "for the freight and charges herein" but "for all payments made and liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods."

It was stated that there was evidence of consent to the employment of the particular auctioneers. The respondent realised that a sale was inevitable, as she could not pay the freight and charges, and she does not question the right of the railway company to retain the amount for which they had a lien by virtue of the bill of lading, and probably could not do so. See Porteus v. Watney (1878), 3 Q.B.D. 504.

It was also urged that the respondent had received part of the goods before sale without the railway company's consent; that she bought at the sale, and removed the goods she bought; and that she afterwards received directly from the third parties some of the goods left after the sale. If, by so doing, he in any way lessened the responsibility of the railway company, they should have the right to urge this, as well as any matter not already argued affecting the amount for which the company would be liable, and also to shew consent, if they can, to the employment of the auctioneers. It may be that the third parties, and not the railway company, are directly responsible to the respondent for part of the damages; and it should also be open to the respondents to contend that the third parties should, as to that, be added as defendants, even at this late date, if power so to do exists at this juncture.

MACLAREN and MAGEE, JJ.A., concurred.

Appeal upon one branch dismissed.

DECEMBER 5TH, 1913.

*LINDSEY v. LE SUEUR.

Author—Preparation of Biography—Access to and Use of Private Documents—Express or Implied Contract—Undertaking as to Character of Work—Breach of Moral and Legal Obligation—Use of Information Obtained—Injunction—Damages.

Appeal by the defendant from the judgment of BRITTON, J., 27 O.L.R. 588.

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

W. N. Tilley, for the appellant.

I. F. Hellmuth, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts):—The issue of fact . . . presented is a simple one, viz., whether, as the appellant alleges, access to and the use of the documents were given to him untrammelled by any condition as to the use to which he should put them, or, as the respondent alleges, upon an agreement, express or implied, that they were to be used only for the purpose of writing a life of Mackenzie which would depict him as one of the "Makers of Canada," or, if not upon such an agreement, they were obtained by a false representation by the appellant of his attitude towards Mackenzie, and the concealment of facts which, had they been disclosed, would have resulted in his being denied access to the sources of information which were placed at his disposal by the respondent. . . .

My brother Britton does not, in terms at least, find that there was an agreement, express or implied, on the faith of which the respondent permitted the appellant to have access to and the use of the Mackenzie collection, that use should be made of them only for the purpose of writing a life of Mackenzie for the Morang & Company series which would depict him as one of the "Makers of Canada," but seems to base his judgment on the fraudulent representations and concealment of facts which the respondent alleges.

*To be reported in the Ontario Law Reports.

In my view, the proper conclusion upon the evidence is, that there was such an agreement, expressly made or to be implied from what took place between the parties and from the nature of the transaction into which they were entering.

The appellant, as I have said, admits in his pleading "that the documents were shewn to him and finally placed in his custody and possession . . . for the purpose of obtaining therefrom such information as he might deem it proper to avail himself of for his said work," i.e., the book he had undertaken writing for the Morang series; and, but for the qualification which he attaches to that admission—"and full authority and permission was given to the defendant—. . . to make such use of the said papers as he might deem proper, without any limitations, restrictions, or terms"—he practically admits all that is necessary to establish the appellant's case against him.

It appears to me to be clear that, if the appellant was given access to and the use of the documents for a particular purpose, as he admits he was, there is necessarily an implication that they are not to be used for any other purpose. If, therefore, the purpose was, as I think it is proved that it was, that he should write a life of Mackenzie which would so depict him that he would rightly take a place in the Morang series as a "Maker of Canada," it was an implied term of the arrangement between him and the respondent and Charles Lindsey, that he should not make use of the documents for any other purpose; and, inasmuch as the work which he has written does not so depict Mackenzie, but depicts him as a "puller down," the appellant was, in my opinion, entitled to the relief which the judgment has given him.

It may be said that a "puller down" is not necessarily not a "Maker of Canada," and in that I agree, for one who pulls down that which ought not to be left standing, in order that he may replace it by something better, is, in the best sense of the term a "maker," but that is not the sense in which the appellant described Mackenzie as a "puller down."

If the documents had been intrusted to the appellant, as he alleges, without any terms being imposed as to the use to which they should be put, good taste, at least, would have required that, when he found that he could not honestly write of Mackenzie as a "Maker of Canada," he should have given to the respondent, or destroyed, the extracts and copies he had made, and refrained from making use of the information which he had been afforded by the respondent; but, having obtained that

access upon the terms upon which, in my opinion, he had obtained it, it was, I think, not only his moral duty, but also his legal duty, to have done so.

If I am right as to the terms upon which the appellant obtained access to and the use of the Mackenzie collection, it follows, I think, that he may be restrained from committing a breach of his agreement; and the respondent is entitled to have the copies and extracts made from them delivered up to be destroyed, because the appellant threatens to use them in breach of his agreement.

It was argued that there is no precedent for the granting of such relief. If that be the case, I am prepared to make one, unless in doing so some principle of law would be violated, and there is none that I am aware of, or that has been brought to the attention of the Court by the able counsel who argued the case for the appellant.

If the appellant intended to use the documents themselves for a purpose inconsistent with that for which he had obtained them and they were intrusted to him, I apprehend that there can be no doubt that it would be proper that he should be restrained from doing so; and I can see no reason why, if that is the case, he should be at liberty to accomplish the same purpose by using, not the documents themselves, but copies of or extracts from them which he has made.

It may be that, if the appellant's work had been accepted by Morang & Company, the respondent would not have been entitled to complain; but, as it was not accepted, that question does not arise; nor is it necessary to consider what rights, if any, as between him and the respondent, the appellant would have had in that case to publish it in any other form than as part of the Morang series of "The Makers of Canada."

The case at bar falls, I think, within the principle upon which such cases as Williams v. Williams (1817), 3 Mer. 157, Morison v. Mowat (1851), 9 Hare 241, Lambe v. Evans, [1893] 1 Ch. 218, Laidlaw v. Lear (1898), 30 O.R. 26, Amber Size Co. v. Menzel, [1913] 2 Ch. 239, and Ashburton v. Pape, [1913] 2 Ch. 469, were decided.

With regard to the jurisdiction, the exercise of which the respondent has invoked, it was said by Turner, V.-C., in Morison v. Mowat, 9 Hare at p. 255: "That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have, indeed, been assigned for the exercise of that jurisdiction. In some cases it has been referred

to property, in others to contract, and in others again it has been treated as founded on trust or confidence—meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation to perform a promise on the faith of which the benefit has been conferred. But, upon whatever grounds the jurisdiction has been founded, the authorities leave no doubt as to the exercise of it."

Having come to this conclusion, it is unnecessary to express any opinion as to whether the judgment of my brother Britton may not be supported on the ground upon which, if I have correctly apprehended his reasons for judgment, it rests, and I must not be understood to have formed a contrary opinion.

Appeal dismissed with costs.

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. NOVEMBER 29TH, 1913.

SMITH v. WALKER.

Pleading—Specially Endorsed Writ of Summons—Appearance and Affidavit of Defence—Absence of Election by Plaintiff to Treat Endorsement and Affidavit as Record—Statement of Defence not Delivered within Ten Days—Service of Joinder and Notice of Trial—Setting aside—Validating Subsequent Delivery of Defence—Account — Reference—Costs—Rules 56, 112, 121.

Appeal by the defendant Walker from an order of HOLMESTED, Senior Registrar, in Chambers.

M. Grant, for the appellant.
J. E. Jones, for the plaintiff.

KELLY, J.:—The plaintiff began this action by a specially endorsed writ. The defendant Walker entered an appearance; and he filed the affidavit as to defence required by Rule 56. The plain-

tiff did not make the election provided for by clause 2 of that Rule, nor did the defendant deliver a defence within ten days after appearance (Rule 112). After the expiration of the ten days, the plaintiff served a joinder of issue and notice of trial, following which a statement of defence was delivered. An application by the defendant Walker to Mr. Holmested, Senior Registrar, in Chambers, for an order to strike out the joinder of issue and notice of trial, was refused, on the ground that, after the filing of the affidavit required by Rule 56, a defendant cannot, even though he file no further statement of defence, be treated as in default of defence, and that the defence is practically, in the eye of the Court, in the form of an affidavit like an answer under the old Chancery practice. The defendant Walker appealed from the order of refusing his motion.

I think that the view taken by the Registrar was not correct. The effect of the Rules in question is, that the defendant, in the circumstances here, had the right, within the time specified in Rule 112, to deliver a defence; and, when he failed to do so, the plaintiff's right was to treat him as in default, and to move for judgment accordingly. The Rules referred to do not contemplate or authorise the course adopted by the plaintiff.

The defendant's appeal is, therefore, allowed. If necessary, I validate the delivery of the statement of defence (see Rule 121); but, as a condition thereof, and to obviate delay in bringing the matters in issue to trial, there should be a reference to the Junior Local Judge at Goderich to dispose of the whole matter. The pleadings shewed that the matters involved were largely matters of account, which could be readily disposed of in that manner. In the circumstances, there will be no costs.

MEREDITH, C.J.C.P., IN CHAMBERS. DECEMBER 1ST, 1913.

*REX v. BORIN.

Liquor License Act—Magistrate's Conviction for Keeping Liquor for Sale upon Unlicensed Premises—Boarding-house—Intoxicating Liquors Purchased by Boarders—Irregularities in Procedure—Failure to Take down Evidence as Required by Statute—Absence of Right of Appeal—Motion to Quash Conviction—Lack of Reasonable Evidence to Support—Amending Act, 9 Edw. VII. ch. 82, secs. 19, 27—Having Unreasonable Quantity of Liquor on Premises.

Motion by Pasquale Borin for an order quashing her conviction by a Police Magistrate, upon the information of James O'Brien, for keeping liquor for sale contrary to the Liquor License Act.

R. L. McKinnon, for the applicant.
J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.C.P.:—In this case no one concerned seems to have made any effort to follow at all closely that procedure which the Legislature has plainly said should be taken; much laxity on all hands was permitted; the accused was charged with a double offence, keeping liquor for sale and selling it, but apparently without objection: the plain provisions of the Act of 1909, 9 Edw. VII. ch. 82, sec. 19, regarding the manner of taking evidence, were quite disregarded. Again, apparently without objection, no direct evidence seems to have been given that the liquor in question was intoxicating; and no attempt seems to have been made to prove, directly, any delivery to the accused, or at her house, of the greater part of the liquor in respect of which she was convicted: the formal conviction drawn up and returned to this Court, upon this motion, included, in the one charge and conviction, the two offences of keeping for sale and selling; but subsequently another conviction was made out, and returned, for the one offence of keeping for sale only. . . .

As my judgment, to be pronounced upon this motion, is not based upon any irregularity in the form of the proceedings leading up to the conviction, or in the conviction itself, it might be

*To be reported in the Ontario Law Reports.

thought that these things are quite immaterial; but that is not so; in dealing with the evidence, it must be borne in mind that it has not been taken and authenticated in the manner expressly, and carefully, prescribed by the Legislature, and so it is left open to the applicant to call in question, as she does, its accuracy. Treating the irregularity in this respect as one not in itself vitiating the conviction; treating the statutory provisions on the subject as not imperative, but directory; the irregularity may be still not altogether immaterial; it may have some indirect weight. And this, too, may be said of other irregularities. It is the duty of the Court to see that the accused has had a fair trial; and especially so when the only remedy for unfairness lies in a motion such as this, a right to appeal being denied to the accused, though given to the informer if the Attorney-General for the Province so directs.

I do not give effect to any of the objections to the conviction based upon any irregularities; the accused made no objection to any of them at the time, and does not now seem to be in any way substantially prejudiced by them, except perhaps in the manner of taking the evidence: I give effect directly to the contention made on behalf of the applicant that there is no reasonable evidence to support the conviction. . . .

There was evidence of two lots of beer being found in the accused's boarding-house, when the house was searched by the license inspector and the police constables; indeed, it is admitted that this liquor was there at that time; but the accused's son and two of the boarders testified that that beer was the property of these boarders, bought for them and paid for out of their own money; and the magistrate has not discredited that story; indeed, his conviction is based upon the assumption that it is true; as also that it is a fact that they placed this beer in the two different places where it was found, as they had testified to.

The conviction is based upon two grounds: (1) "The mere fact of the defendant having upon her premises that amount of liquor constitutes an offence under this Act;" and the magistrate adds that "lodging-house keepers are not permitted to have upon their premises any liquor, even though it belongs to the boarders, which," he says, "seems to me a rather harsh provision." This view is evidently based upon sec. 27 of 9 Edw. VII. ch. 82; but that enactment relates not to liquor which *is* upon the person's premises, but to liquor which such person *has* upon the premises; and there is no finding that the accused ever, in any manner, had the liquor in question; the contrary is indi-

cated in the assumption of the Police Magistrate that it was placed, and kept, by the boarders, in the several and respective places in which it was found.

Whatever may be the full extent of the meaning of this legislation, it cannot be stretched enough to cover the case of liquor which has not been found to belong to or ever to have been in the possession or under the control of the keeper of the boarding-house in which it was found—who, in this case, it may be added, is a widow, not having the personal management of the house, but leaving that to her son, who was not found to have had any possession of or control over the beer, and it has not been found that, if the accused had had that quantity of beer on the premises, it would be an unreasonable quantity, as he has found in regard to the other quantity now to be mentioned.

The other, and perhaps the main, if indeed not the only, ground upon which the conviction is eventually based is (2), that, beside the two dozen bottles of beer belonging, one dozen each, to these two boarders, there were "six dozen of ale, two quarts of whisky, and one bottle of wine delivered at the defendant's premises on that day, which is, in my opinion, an unreasonable amount; and I, therefore, find the defendant guilty."

The only testimony upon which this finding is based is thus taken down by the Police Magistrate:—

"William Howard, sworn: clerk in Harding's liquor store: seven or eight dozen of East Kent were sent to 142 Alice street on Saturday. There were four deliveries to that house Saturday. There were also two quarts of whisky, one of Chianti, and, I think, a bottle of gin.

"Cross-examination: I don't know whether any of it was ordered by defendant. It is common for respectable people to order two or three dozen of ale for their own use.

"Re-examination: I don't know who pays for the liquor; it is given to drivers."

That witness has upon this motion made an affidavit, which, having regard to the irregular manner in which the evidence was taken by the Police Magistrate, is, I think, quite admissible. . . . The statements made in this affidavit* are really no more than might well have been assumed from the brief notes of the evidence of this witness, as taken down by the Police Magistrate, coupled with common knowledge of the duties of shop clerks.

I cannot think that, having regard to all that this witness has

*The affiant stated that he did not know whether the liquor ordered was delivered or not.

now said, there is any reasonable evidence in it to support the second finding of the Police Magistrate, which I have read, and no other witness has said a word upon the subject; though 142 Alice street is where the accused's boarding-house is kept.

The best evidence available ought to have been given by the prosecutor: the worst evidence only, if indeed it can be called evidence at all, was given: the best evidence would have been that of the porter who delivered the goods, if they ever were delivered; and the next in order would have been that of him who sold the goods, of which sale, in the ordinary course of business, there would be some entry or other evidence in writing. I can find no excuse for the prosecutor failing to give the better evidence, or some explanation why it was not given, even if that explanation made against his case.

It really comes down to this: the accused is convicted and sentenced to a fine of $100 or three months' imprisonment, on the evidence of a parcel clerk that the liquors in question were put up in parcels addressed to her place of residence, and upon that only.

I cannot but hold that there was no reasonable evidence that the accused ever had on the premises in question these liquors, except a bottle of Italian wine (when purchased does not appear) which she admitted she had for her own use, and in regard to which the prosecutor repudiates any attempt to support a conviction. The careful search of the premises which was made, failed to discover any of these liquors; though it discovered the boarders' two dozen bottles of beer, notwithstanding their efforts to conceal them; efforts quite natural in them, although they may have been well within the law in having it, because being foreigners and illiterate men they would not know the fine distinctions of the law, and would naturally be distrustful and secretive in the face of the liquor license laws and all their punishments.

It may be that many who are guilty of infractions of those laws escape punishment; it may be that the applicant is embraced in that category; but that is not the question; it is a much lesser evil that the guilty sometimes escape than that the innocent be sometimes punished: the main thing is, that no one shall be convicted upon suspicion alone, no matter how strong it may be: that only those who are duly proved to be guilty, in accordance with the provisions of the law, shall be punished.

The conviction must be quashed.

MIDDLETON, J., DECEMBER 1ST, 1913.

FRITZ v. JELFS.

Solicitor—Police Magistrate Practising as Solicitor—Action for Inducing Wrongful Eviction—Absence of Malice—Findings of Jury—Official Assistance in Eviction—Failure of Plaintiff to Establish Case—Misconduct—Costs.

Action for damages for inducing or aiding in the wrongful eviction of the plaintiff and his family from premises in the city of Hamilton of which the plaintiff was tenant.

The action was tried before MIDDLETON, J., and a jury, at Hamilton, on the 22nd October, 1913.

L. E. Awrey, for the plaintiff.

F. R. Waddell, K.C., for the defendant Green.

S. F. Washington, K.C., for the defendant Jelfs.

MIDDLETON, J.:—On the answers of the jury I dismissed the action as to Green; the liability of Jelfs has now to be determined.

Mrs. Bell was tenant of a house in Florence street, Hamilton. On the 7th May, 1912, she sublet certain rooms to the plaintiff for one month, for $10. The plaintiff and his wife and son moved in, and proved most undesirable tenants. Mrs. Bell made up her mind to get rid of them. Her landlord threatened to determine her tenancy unless she rid herself of such offensive subtenants. She was a woman in humble circumstances and quite unversed in law. On the 6th June, she gave the plaintiff notice in writing that the rent would be $20 per month in advance. No money was paid till the 15th June, when the plaintiff paid and Mrs. Bell received $5, Mrs. Bell signing a receipt for $5 for one half month "from June 7th to June 21st." Mrs. Bell expected the plaintiff to vacate by the 21st, but on the 20th, finding that he had no such intention, she went to the office of the defendant, who is Police Magistrate for the City of Hamilton.

Mr. Jelfs as magistrate had no concern in the matter, but he is allowed to practise as a barrister and solicitor. He does not carry on a general practice, but advises many who consult him, without any fee or reward. I have before this commented upon the difficult position in which those who occupy public

office and at the same time carry on a private practice must often find themselves, and this case affords another striking example of the dangers attendant upon the system.

In all that Mr. Jelfs did I am quite satisfied that there was no intentional wrongdoing; but, like all who permit themselves to be placed in situations of delicacy and peril, his conduct in unguarded moments was such as to indicate the danger of the situation and to invite adverse comment.

The woman told her story. The man in occupation of her rooms would neither pay rent nor vacate. This was enough, and Mr. Jelfs wrote the letter which is the cause of all his trouble. The printed heading sufficiently indicates the mental confusion incident to his position. The law permits him to be a barrister and solicitor as well as Police Magistrate, but the law expects him to keep his official position and private business apart. Yet the letter is headed with the municipal arms and motto, "I advance in Commerce, Prudence, and Industry," and proceeds:—

George Frederick, Jelfs.
Barrister, Solicitor, etc.
Police Magistrate.
Telephone: House No. 1239.
Office No. 136.

Central Police Station,
Hamilton, Ont.,
20 June, 1912.

Mr. Fritz,
127 Florence.

Sir:—

Mrs. Bell has given you notice to quit the rooms occupied by you. You are not entitled to any particular notice. If you do not leave by Saturday I shall have to assist Mrs. Bell in forcibly ejecting you.

Yours etc.,
GEO. FREDK. JELFS.

This was given to Mrs. Bell with the idea that the sight of it would be enough, and that Fritz, his wife, son, and a bulldog that accompanied the family, would quietly fade away, and Mrs. Bell's troubles would be over. Mr. Jelfs was quite mistaken. Mr. Fritz was by no means unskilled in certain branches of the law, and held it and magistrates in a contempt that suggests familiarity. He knew all about implied terms arising from overholding and receipt of rent, etc., and that a tenancy from month to month could not be ended by a magistrate's

letter, and he so intimated to Mrs. Bell. She then went back to the magistrate, and he feared that the situation was more complicated than appeared, and put her off, promising to send a detective to investigate. He did instruct a detective; this one handed the task over to another, and that one went, saw, and forgot to report, and the magistrate heard no more of the matter till the trespass alleged had been committed.

On the 27th June, Mrs. Bell decided on action, and Fritz, his son, and his bulldog being away, and only the wife, a comparatively harmless woman being in the castle, Mrs. Bell called her sympathetic friends and neighbours to her aid, and proceeded to remove the furniture from the house and to place it in the road. While this was being done with all possible diligence, Mrs. Fritz went to seek her husband; and, Mrs. Bell's courage failing, she telephoned to the police station, and two constables were sent to prevent a breach of the peace. The magistrate had no knowledge of this, and cannot be responsible for their conduct.

The jury have found that the defendant sent the letter and the detective, and that he was responsible for the sending of the police, because "by his letter he implied that Mrs. Bell would have his official assistance in the eviction of the tenant Fritz." This is not enough, as the uncontradicted evidence is that he did not have anything to do with sending them. Beyond this, the whole eviction was the act of Mrs. Bell, and the constables really took no part in it.

Other questions and answers are as follows:—

4. Did the defendant Jelfs induce Mrs. Bell to evict the plaintiff from the house in question? A. Did not induce, but he encouraged her to evict the plaintiff.

5. If so, did he do so (a) in order to injure the plaintiff? A. No. (b) Or to procure some indirect advantage to himself or others? A. No.

6. Was the defendant Jelfs, in all that he did, acting in good faith and without malice? A. No.

7. If you think he acted maliciously, why do you think so? A. Because he wrote the letter of June 20th on the official letter head of the Police Magistrate's office without first inquiring into the plaintiff's rights.

The first two questions were submitted on the lines of those submitted in Huttley v. Simmons, [1898] 1 Q.B. 181. The following questions were put because I did not regard the second question as covering all possible grounds upon which an act may be regarded as malicious.

The jury seem to have been much impressed with the impropriety of the letter in question, and I agree with them, but this is not enough to create liability.

The eviction was the act of Mrs. Bell, and Jelfs did nothing more than advise her, and, to use the language of the jury, he "encouraged her to evict the plaintiff." In evicting as she did, she was guilty of a breach of contract; and, on the findings of the jury, the defendant not only advised but encouraged that breach and acted improperly in so doing, as he failed to make any due inquiry into the plaintiff's rights. The abuse of his official position by placing in Mrs. Bell's hands the letter in question, couched in language which seemed to imply "that Mrs. Bell would have his official assistance in the eviction," cannot increase his liability, as that assistance was not in fact given.

I have come to the conclusion that what was done here falls short of what is necessary to create liability.

Without justification, to persuade or procure another to break his contract is, no doubt, an actionable wrong. This implies an active interference for the purpose of bringing about a breach of the contract. The distinction is between interested inducement and disinterested advice. All that was done by the defendant was free from any intent to injure the plaintiff or to secure any undue or indirect advantage.

Then there remains the question, not necessary to decide, as to the existence of justification. Does the fact that the defendant is a solicitor, and that he did no more than advise Mrs. Bell, relive him from liability? In giving this advice he acted without malice, but without making due inquiry; he might be liable to an action at the suit of Mrs. Bell, but I cannot see on what principle he can be made liable to the plaintiff. Any indirect or improper motive, anything amounting in law to malice, would, no doubt, make the solicitor liable; but, in the absence of malice, the duty to advise would afford a complete answer. See Read v. Friendly Society of Operative Stonemasons, [1902] 2 K.B. 732; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A.C. 239; and comments on these cases in 19 L.Q.R. 116; Brauch v. Roth, 10 O.L.R. 284.

Had the action been based upon an abuse by the defendant of his official position, other questions would have arisen. The plaintiff has throughout disclaimed this possible line of attack.

The action fails; but, to mark disapproval of the defendant's conduct, costs should not be given.

BRITTON, J. DECEMBER 1ST, 1913.

LAMBERTUS v. LAMBERTUS.

Life Insurance—Wife Made Beneficiary by Name—Death of Wife—Remarriage of Insured—Right of Second Wife Surviving Insured, in Absence of Further Designation.

Action by the widow of Christopher Lambertus to establish her right to moneys arising from an insurance upon the life of her husband.

M. G. Cameron, K.C., for the plaintiff.
Charles Garrow, for the defendants.

BRITTON, J.:—A certificate was issued by the Catholic Mutual Benefit Association on the 31st December, 1892, upon the life of Christopher Lambertus, for $1,000, payable to his wife "Bridget Lambertus." Bridget Lambertus died, and Christopher married a second wife, who survived her husband and who now brings this action. Christopher died on the 27th March, 1913. The Act of 1913, amending the Insurance Act, was not passed until after the last-mentioned date, and so cannot affect any question arising in this action.

The plaintiff signed an order upon the association for payment of this money to the executors of her husband. The executors received the money, but afterwards paid the money into Court, pursuant to an order dated the 9th October, 1913. By this order the executors were discharged from this action; and the only question is, whether or not the plaintiff is entitled to the money.

I am not able to distinguish the case from the cases of Re Lloyd and Ancient Order of United Workmen, ante 5, 29 O.L.R. 312, and Re Kloepfer, ante 133; and must, therefore, find for the plaintiff.

The judgment will be for a declaration that the proceeds of the certificate or policy now in Court belong to the plaintiff, and that payment should be made of the same to her.

Consider that the estate was not large, and that the plaintiff gets $1,500 by the will of her husband, the judgment may well be without costs, if the case goes no further, notwithstanding the correspondence between the solicitors in regard to the same.

MEREDITH, C.J.C.P. DECEMBER 1ST, 1913.

STEVENS v. MORITZ.

Vendor and Purchaser—Agreement for Sale of Land—Whole Agreement Contained in Written Memorandum—Terms of Sale and Purchase—"Balance to be Arranged by Mortgage" —Incomplete Agreement—Dismissal of Action for Specific Performance—Costs as if Point Raised as Question of Law before Trial—Demurrer.

Action by the vendor for specific performance of an agreement for the sale and purchase of land.

The action was tried before MEREDITH, C.J.C.P., without a jury, at Guelph, on the 25th November, 1913.

C. L. Dunbar, for the plaintiff.

H. Guthrie, K.C., for the defendant.

MEREDITH, C.J.C.P.:—The complete absence of the word "demurrer" from the legal vocabulary of the present day, is, doubtless, the result of giving a dog a bad name: a demurrer was a commendable time-saving and cost-saving proceeding; but it was also put to highly technical time-losing and cost-increasing uses, and thus came into such bad repute that even the name seems to have become unbearable, and was obliterated; and yet its better part still remains under a new name, and ought always to remain, by whatever name it may be called, though "demurrer" still holds the mind, whatever the tongue may say. And that this case ought to have been heard upon demurrer, speedily and inexpensively, instead of being, in the first instance, brought down to trial, involving much delay, much greater cost, and an unfortunate conflict of testimony between equally highly reputable fellow-citizens, I consider obvious; so obvious that I would not have mentioned it except that it may be necessary to do so in dealing with the question of costs.

At the close of a hard-fought trial upon a question of fact, involving such a conflict of testimony as I have mentioned, it turns out that there is a vital preliminary question to be considered: a question which might, and ought early in the action, to have been raised and determined under that practice which is now the equivalent of a general demurrer. If the demurrer were held to be good, the action was ended; otherwise the parties

would be obliged to go to trial; so that, plainly, it was not the better course to bring all questions down to a trial, where, after all, the demurrer must be considered, and, if given effect to, render all the proceedings upon the other question worse than useless.

The question raised upon the demurrer is, whether, admitting all that the plaintiff alleges as to the extent of the agreement entered into respecting the sale and purchase of the land in question, there is an enforceable contract for the purchase of it.

There is no dispute as to the facts on this branch of the case: the whole agreement, it is said on both sides, is contained in the writing in question, and so no question under the Statute of Frauds can be raised; there is nothing that is not in writing; and the single question is, whether that writing contains all the essentials of an enforceable agreement for the sale of land.

This question is further simplified, too, by the fact that the only point in it is, whether the want of any definite agreement as to the terms of payment of that part of the price of the land to be secured by a mortgage upon it renders the agreement unenforceable because incomplete.

That the omission is an omission of an essential part of a contract, I can have no doubt; and, if so, how can there be specific performance? Specific performance of what? Of what in respect of the mortgage? It must be of something the parties had never agreed upon. It must in that respect be a court-made contract, not the contract of the parties.

It does not follow that, if the plaintiff cannot have specific performance in this case, no one can have specific performance in any case in which the parties have not expressly agreed upon all the details of the sale; that is far from being so; much may be tacitly agreed upon; and the law sometimes covers terms which need not be expressed. But where essential things are not provided for, expressly or tacitly or otherwise, there is not a completed agreement; there is not an enforceable contract.

The fact that delivery and payment are generally concurrent acts cannot apply, because, expressly, in this case, payment is to be of only about one-quarter of the price, the "balance to be arranged by mortgage bearing six per cent. interest."

It is plain, from that which is expressed, that neither party was to be at liberty to fix the mode and time of payment under the mortgage. That was to be "arranged" by the parties; and was a thing of substance, of very considerable importance, about which there might be wide differences of opinion; even eventually an inability to agree upon them.

The subject was discussed recently, in the case of Reynolds v. Foster, 4 O.W.N. 694; and so I shall not now say anything more upon the subject which would be but a repetition of that which was in that case said.

On this ground the action will be dismissed, and the defendant may have his costs of it, limited, however, to such only as relate to this branch of the case, and which would have been incurred if the speediest mode of bringing this question alone up for consideration had been taken.

The other branch of the case involves several questions of considerable difficulty, such as the relationship of the witness Oates to the parties in the transaction; whether any misrepresentation respecting the land was made by him; and, if so, what would be the effect of it; questions which need not now, and so, as I think, ought not now, to be considered; nor anything further said upon the subject except this: that there was nothing in the demeanour of any of the witnesses which in itself would incline me to discredit him or her.

BOYD, C. DECEMBER 1ST, 1913.

CAIRNS v. CANADA REFINING AND SMELTING CO.

Nuisance—Vapour and Dust from Smelter—Special Injury to Plaintiff—Loss of Animal—Damages—Costs — Injury to Public Generally — Attorney-General — Injunction — Evidence.

Action for damages and an injunction in respect of an alleged nuisance.

The action was tried without a jury, at Barrie.

A. E. H. Creswicke, K.C., for the plaintiff.

M. B. Tudhope, for the defendants.

BOYD, C.:—A public nuisance is distinguished from a private nuisance only in this, that the latter is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation; though it may be injurious to a greater or lesser degree as to different people within the area affected. The case is put by way of illustration (and pertinent to the present con-

troversy) by Kindersley, V.-C., in Soltau v. De Held (1851), 2 Sim. N.S. 133, 142: "Take the case of the operating of a manufactory in the course of which volumes of noxious smoke or of poisonous effluvia are emitted. To all persons who are at all within the reach of these operations it is more or less objectionable, more or less a nuisance in the proper sense of the term. . . . To those who are nearer it may be a greater inconvenience than it is to those who are more remote from it, but still to all who are within the reach of it, it is more or less a nuisance."

Such is the present case as to the operation of this smelter for silver ore in the town of Orillia: its operation in the way of emitting or exhaling smoking vapour and fumes are liable to affect more or less prejudicially all persons living or owning property in that neighbourhood.

This is a case of alleged public nuisance, in regard to which the plaintiff takes individual action, on the ground of particular damage. That means that he must prove some grievance of his own which is other and beyond that suffered by the general community in the vicinage.

In the case of a common ground of complaint from a public nuisance, e.g., injury to trees or vegetation or to human comfort by the distribution of noxious vapours, the law does not permit each individual to bring his action for relief. The proper person, in such cases, is the Attorney-General, representing the community affected.

Though the pleadings in the action take a wide range, the material complaint is, that vapour emitted from the defendants' smelter is injurious to the life of animals, by reason of which the plaintiff has suffered the loss of a cow. That is a tangible deprivation of property, which, if proved, is capable of being estimated in money, and in that respect this action is maintainable.

The evidence proved, as I find, that there had been an excessive discharge of vapour from the defendants' works in 1912, and more or less deposit of arsenical dust upon the plaintiff's premises and his vegetables, such as corn and the like; and these, being fed to the cow, occasioned her death from arsenical poisoning. The analysis of the internal parts of the animal and the expert's evidence established this result. It is true that other animals are proved to have died in that neighbourhood in that year, but no examination was made as to the cause; and, though I may conjecture the cause, I do not judicially pass upon it. Nor is it necessary so far as the plaintiff is concerned and his item of damage. The evidence leads to the conclusion that the

discharge from the vents of the smelter has been so greatly minimised by the introduction of improved modern methods as to do away with any substantial ground of complaint. This was the outcome of the partial destruction of the plant by fire and its enforced replacement in the early part of this year.

So far as the evidence touches on other topics, such as the dwindling and dying of trees and bushes and the tainted atmosphere, the plaintiff has suffered no injury or no special damage which would justify his separate action. For himself he gives evidence that there was some smell from the stuff that came from the smelter, which he describes as "nauseating like the smell of a cow's breath." His wife's account is, that the smell affected her eyes, nose, and throat, and that they were almost suffocated at night. This refers to 1912, and it does not appear that such a state of things existed when action was taken in August, 1913. Other witnesses speak of the smell in curiously diverse ways, but this line of evidence as a whole only goes to shew a general cause of complaint, with no particular danger to any individual.

The plaintiff had no trees or shrubs and grew nothing on his place. Owners of other lots spoke of trees and bushes dying and dwindling; but proof is lacking as to the real cause in these instances. It may be that the cause is attributable to the vapour or powder discharged from the smelter, but some affirmative proof by testing or otherwise should have been given. Other witnesses are called for the defence—and some of them living closer to the smelter than the plaintiff—who say that their vegetables, bushes, and fruit trees have sustained no injury whatever. One cow was seen grazing near-by, and there is no complaint as to animals suffering this year.

The plaintiff's wife also complains that she washed her face once last year in rain-water that was gathered in a barrel from the roof, where the dust is said to have drifted with the wind, and that her face became blotched and impled. The sediment in the barrel was afterwards analysed and found to contain about one grain of arsenic to about 44 gallons of water. Dr. Rogers (called for the plaintiff) was unable to say what would be the effect of this kind of water on the human body.

The evidence took a very wide range, but was lacking in pointed application as to the precise nature of the dust deposited and as to the precise nature and origin of the smells, i.e., whether from arsenic or from some combustible used in the process; but the general impression left on my mind was that, if the situation continued as it was in 1912 in the working of the smelter, there would be a sufficient case made for an injunction; but the

matter should be brought before the Court at the instance of the Attorney-General as for a public nuisance. The area said to be injuriously affected is all around the neighbourhood of the smelter in the town of Orillia, and if the smelter is carelessly handled or gets out of good repair, so that noxious fumes or vapours are sent forth, the health and comfort and conditions of life as to animal and vegetable existence in that locality would suffer to a material extent.

Having regard to the constitution of the suit and to the failure of the plaintiff to prove any special damage except as to the cow, and having further regard to the evidence of the defendants that no appreciable damage can or will result from the smelter as now equipped and operated, unless it be the result of accident, I arrive at the same conclusion, after consideration, as I expressed at the close of the evidence and the argument, viz., that the plaintiff should recover damages to the extent of $80 for the cow, with costs of action on the lower scale and no set-off; but as to the injunction no order is made. This disposition of the main matter, however, to be without prejudice to further litigation in that respect, should circumstances justify it.

HOLMESTED, REGISTRAR, IN CHAMBERS. DECEMBER 2ND, 1913.

MUNN v. YOUNG.

Pleading—Statement of Defence—Action Begun by Specially Endorsed Writ—Appearance Entered and Affidavit Filed—Absence of Election by Plaintiff to Proceed to Trial—Delivery of Defence after Lapse of Ten Days from Appearance—Motion to Set aside for Irregularity—Refusal of—Costs—Rules 56, 112, 121.

Motion by the plaintiff to set aside as irregular a statement of defence delivered by the defendant.

M. Wilkins, for the plaintiff.
M. L. Gordon, for the defendant.

THE REGISTRAR:—This action was commenced by writ of summons specially endorsed. The defendant entered an appearance and filed an affidavit disclosing his defence, as required by

Rule 56. The plaintiff did not elect to proceed to trial, as provided by Rule 56 (2). After the lapse of ten days from appearance, the defendant filed a statement of defence. The plaintiff moves to set this aside as being irregular in not having been filed within the ten days limited by Rule 112.

According to the case of Smith v. Walker, decided by Kelly, J., ante 410, notwithstanding that the defendant had filed an affidavit stating and swearing to a good defence, the plaintiff might properly have entered judgment for default of a defence at the expiration of ten days from appearance, because the defendant had omitted to go through the form of filing another defence not under oath; but the plaintiff did not do this; neither does it appear that he took any other proceeding consequent on the defendant's default. In the meantime, while the plaintiff was deliberating how he was to get on with his action, a statement of defence was filed. In ordinary actions a defendant can no more file two defences than a plaintiff can file two statements of claim; but an action begun by a specially endorsed writ is, under the new Rules, an exception to that rule. In such actions a defendant is first required to file an affidavit shewing his defence and swearing to its truth. This, for the purposes of Rule 56, is to all intents and purposes his statement of defence, and he cannot file any further statement of defence, except to set up any matter of defence not disclosed in his affidavit, and even such a statement of defence can only be filed by leave: Rule 56 (5). If, however, the plaintiff does not give notice of trial within five days, then the defendant's affidavit (according to the decision in Smith v. Walker) ceases to be a defence, and the plaintiff can no longer treat it as a defence; and, if he does so, his proceedings will be irregular and will be set aside. And the defendant may no longer treat the affidavit as his defence, but must file an unsworn "statement of defence," which, it is true, may merely reiterate (as does the defence now in question) the matters set out in his affidavit, or may set up any other matters to which he is unable to pledge his oath—otherwise the plaintiff's proper course is to sign judgment for default of defence. Rule 112 provides that the defendant may file a statement of defence or counterclaim within ten days after his appearance; and the question is, whether the defence is irregular because it was not filed within that time.

Rules limiting time for pleading have been interpreted to mean that the pleading may be regularly filed without leave after the time-limit has expired, if in the meantime the opposite

party has not taken any step in the action consequent on the default. Where such a step has been taken, then it would seem that the pleading cannot be filed so as to intercept that proceeding, except by leave and on such terms as may seem proper: Snider v. Snider, 11 P.R. 34; but, where no such proceeding has been taken by the opposite party, then, notwithstanding that the time allowed by the Rules for filing the pleading has expired, it may still be regularly filed without leave: O'Connell v. O'Connell and Sampson v. O'Donnell, 6 L.R. Ir. 470, 471; and in Wright v. Wright, 13 P.R. 268, it was held that it might be so filed, notwithstanding that it had the effect of reopening the pleadings. It seems perfectly clear that a belated pleading can not be treated as a nullity: Graves v. Terry, 9 Q.B.D. 170; Gill v. Woodfin, 25 Ch.D. 707; Gibbings v. Strong, 23 Ch.D. 66; except perhaps where proceedings have been commenced consequent on the default: see Snider v. Snider, supra; though even that is doubtful, because in Gibbings v. Strong, supra, the defendant applied after the time had expired to deliver a statement of defence, which application was refused and no appeal was taken, and the plaintiff set down the action to be heard pro confesso, and on the hearing the defendant again presented his defence which Fry, J., refused to consider; but the Court of Appeal (Lord Selborne, L.C., Lord Coleridge, C.J., and Cotton, L.J.) varied his judgment, Lord Selborne saying: "Where no defence has been put in, then by Order XXIX., R. 10, of the Rules of 1875, the plaintiff may set down the action, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff entitled to. This means that the Court is to exercise some judgment in the case; it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegations in his statement of claim, he appears to be entitled; and, if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. . . . If . . . it contains a substantial ground of defence, the Court will not take the circuitous course of giving judgment without regard to it, and obliging the defendant to apply under Rule 14 to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits."

Under our Rules, the case is quite different, and, notwithstanding that a sworn defence is on the files, a plaintiff is compelled in certain events to ignore it and sign judgment by default; and the defendant is put to the circuitous process of applying to set it aside, as it is very hard to suppose that such a

judgment could, with any regard to justice, be allowed to stand.

The defence in question, having regard to the cases above referred to, is clearly not a nullity, though filed after the time limited by Rule 112; and, in the circumstances in which it was filed, I am of the opinion that it cannot be said to be irregular. The motion, therefore, fails; but, in consideration of the difficulty attending the introduction of a new procedure, I think that the costs of the motion should be in the cause to the defendant.

Rule 121 allows a defence to be filed at any time before a defendant is noted in default, but that Rule applies where a defendant can be noted in default; in the present case, acording to the decision in Smith v. Walker, he could not be noted in default. Rule 121 applies apparently only to actions where judgments cannot be signed, and here judgment could have been signed.

LATCHFORD, J. DECEMBER 4TH, 1913.

TOWN OF WALKERVILLE v. WALKERVILLE LIGHT AND POWER CO.

Municipal Corporations—Electric Light and Power Franchise—Erection of Poles in Lanes of Town—Location of Poles—Consent of Municipal Council—Necessity for—Unreasonable Withholding—Interim Injunction—Refusal to Continue.

Motion by the Corporation of the Town of Walkerville, the plaintiffs, to continue an interim injunction granted ex parte on the 22nd November, 1913, by the Senior Local Judge of the County of Essex, restraining the defendants from completing the construction of their electric line in the alley between Monmouth and Walker roads, in the town of Walkerville.

E. F. B. Johnston, K.C., and J. Sale, for the plaintiffs.
A. W. Anglin, K.C., and J. H. Coburn, for the defendants.

LATCHFORD, J.:—The material upon which the injunction was granted was the writ of summons issued on the 22nd November and an affidavit of Harold R. Hatcher, a member of the municipal council. The writ claims an injunction restraining the defendants from erecting and constructing electric

lines in Walkerville, especially the line between Monmouth and Walker roads, without the permission of the town.

Mr. Hatcher's affidavit sets forth that in 1909 a certain franchise was granted to the defendants for the distribution and sale of electricity in the town of Walkerville, containing provisions that no poles or wires shall be placed along any public street without the consent, by resolution, of the municipal council first had and obtained; but that all wires and poles shall be erected in the lanes of the town, and the location of every such pole shall be subject to the direction and approval of the council. It then states that a line is being erected from the boundary of Walkerville to the distributing station of the defendants, for the purpose of carrying power from Sandwich; that such line is not the ordinary distributing line for the customers of the defendants, and that in several parts of the town poles and wires had been placed in the past by the defendants without the permission of the council.

Mr. Hatcher then says that a by-law has been passed for the submission to the electors of the question whether or not a contract shall be made with the Hydro-Electric Commission for the supply of Hydro-Electric power within the town; and that the "town has under consideration," should such vote be favourable, the desirability of expropriating the plant of the defendants.

Paragraph 6 of his affidavit follows: "That permission was applied for at the meeting of the council held about the 11th November for this line." Presumably "this line" means the line of the defendants, who had previously been erecting their poles without the express direction or approval of the plaintiffs.

At the meeting of the 11th November, the approval of the location of the poles and wires of the defendants was withheld, Mr. Hatcher says, "until after the submission of the question to the people on the 6th December, 1913."

The fact that the defendants, about the 20th November, proceeded, without the permission thought necessary, to erect their poles in the lane, is then stated and is not denied.

The Secretary of the Hydro-Electric Commission informed Mr. Hatcher that to allow the defendants to complete their line would jeopardise the interests of the town, should the Hydro-Electric contract be accepted. . . .

An affidavit filed on behalf of the defendants identifies the by-law granting the franchise, and discloses the fact, not disclosed to the Local Judge, that the defendants had, on the 17th

October, applied for approval of the location of their line on the west side of the lane between Monmouth and Walker roads. The defendants had previously erected a line on the east side, and in their application expressed their intention of removing the existing poles as soon as the new lead was completed.

I regard this application for permission as material, and I greatly doubt that the interim injunction would have been granted, had the Local Judge been informed that the application had been made fully three weeks before the date mentioned by Hatcher. The terms of the franchise held by the defendants do not appear to have been before the learned Judge.

One franchise gave the defendants permission and authority "to transmit, distribute, and sell electricity, and to erect and maintain such . . . poles, wires, etc., as it may require for the purposes of its business . . . subject to the reservations, provisions, and conditions (among others) that no poles or wires shall be placed along any public street without the consent, by resolution, of the council first had and obtained; but all such poles shall, as far as possible, be erected in the lanes of the town, and the location of every such pole shall be subject to the direction and approval of the council."

The works—whether of construction, maintenance, or repair—authorised or required by the by-law "are to be done . . . so as to cause . . . the least possible . . . danger or damage . . . to persons or property."

The company, under its franchise from the plaintiffs, has the right to erect poles and wires for the purposes of its business. It is erecting poles and wires for such purposes. It is not erecting them along a street, but along a lane. In so doing, it may cross a street or streets with its wires; but the consent of the plaintiffs, to be expressed by resolution, is made necessary only in the case of poles and wires erected *along* any public street. It would be impossible, in a town like Walkerville, or in any similar town, to erect an electric transmission line without crossing some streets. This fact must have been present to the minds of the plaintiffs' counsel when the placing of "poles and wires . . . along any public street" was made subject to the condition that the formal consent of the council should be first obtained; while, on the other hand, the erection of poles in the lanes of the town is subject only to the "direction and approval of the council" in regard to the "location of every such pole."

The location or situs occupied by the poles of the defendants in the lanes mentioned in the injunction is the only matter, in the

circumstances disclosed, requiring the sanction of the plaintiffs. That sanction should not be unreasonably withheld. The defendants cannot grant a right, and prevent by undue delay the proper exercise of that right. The application made on the 17th October was a proper request for "direction and approval" of the location of the poles in the lane between Monmouth and Walker roads, and should have been complied with without undue delay. The reasons given for not granting the required consent are unreasonable.

The motion to continue the injunction is refused with costs.

MIDDLETON, J. DECEMBER 5TH, 1913.

WHELAN v. KNIGHTS OF COLUMBUS.

Fraternal Society—Changes in Constitution—Legality—Property Rights not Involved—Absence of Jurisdiction in Court to Entertain Action to Declare Changes Illegal—Stated Case—Costs.

Action for a declaration that the establishment by the defendant society of a "fourth degree" as a branch or offshoot of the society, and the provisions made for the government of the branch, were illegal and beyond the powers of the defendant society.

The action was originally entered for trial at Ottawa, but was, by consent, heard upon a stated case, at Toronto, on the 28th November, 1913.

J. J. O'Meara, for the plaintiff.

D. O'Connell, for the defendant society.

MIDDLETON, J.:—The defendant society is a fraternal organisation, incorporated by an Act of the General Assembly of the State of Connecticut, passed on the 29th March, 1882, and since then several times amended. . . .

The object for which the body is created is partly insurance and partly purely social and fraternal. The corporation is given power to adopt a constitution, by-laws, rules, and regulations, and from time to time to alter, amend, and repeal the same, provided that it shall continue to be governed by the constitution then already in force under a similar authority con-

ferred by earlier Acts, until such constitution, by-laws, and regulations shall have been altered or changed in manner provided by such constitution, etc. Power is given to the corporation to establish subordinate councils, or rather branches and divisions thereof, in any town or city of its State of origin or any other State of the Union or any foreign country.

The constitution provides that the Order shall be governed by a supreme council and State council; and each local body is created a subordinate council, having certain limited powers.

Membership is limited to "practical Roman Catholics," who are initiated, and, according to the original constitution, receive three degrees on passing certain ceremonial rites, the nature of which has not been stated, but which, no doubt, import certain moral obligations.

The Order has a large membership in Canada, but it has never been authorised to transact and does not transact insurance business in this Province, its sole function in Ontario being fraternal, or, as defined by the constitution, "of promoting such social and intellectual intercourse among its members as shall be desirable and proper, and by such lawful means as to them shall seem best."

The plaintiff has been a member of the organisation since the year 1900. He duly paid his initiation fee, $10, and was admitted to the first, second, and third degrees of the order, and has ever since been a member in good standing.

It was deemed desirable by some of those interested in the association to institute what is known as "the fourth degree." This degree was intended to be a select body within the parent association. Rules and regulations relating to this degree were in effect from July, 1902; but new and revised rules were passed relating to it in 1910. Constitutional amendments were made relating to this degree. Under these and under the constitution of the fourth degree, the supreme power and control over the degree is vested in the board of directors of the body, and a board of government for the fourth degree was established, known as the "National Assembly," with subordinate district and local assemblies, each having its own sphere of government and its own officers.

I was told upon the argument that the fourth degree was established for the purpose of inculcating a spirit of patriotism, and that for that reason the membership is, as appears by the constitution relating to the fourth degree, confined to citizens of the respective countries where membership is sought. There

are certain other requirements which make the fourth degree more or less an eclectic body. Upon initiation into this degree a further special fee is required.

The plaintiff attacks all this, mainly upon two grounds. In the first place, he says that this is an attempt to confine some of the privileges which ought to belong to every member of the Order to certain members only; secondly, that the amendments by which this fourth degree is organised are fundamentally wrong, inasmuch as they hand over to the board of directors and to the different fourth degree legislative bodies certain portions of the legislative and administrative powers which by the constitution are, and ought to remain, vested in the governing bodies of the Order itself.

The defendant society in the first place denies the right of the Court to enter into this controversy at all; relying upon the line of authority of which Rigby v. Connoll, 14 Ch.D. 428, is the leading case.

This contention of the defendant society must, I think, prevail. It is not shewn that any property right is affected; and in the absence of this, the Courts have no jurisdiction.

I listened to the argument on the other question with much interest; and, if it is any satisfaction to those concerned, I may say that I am rather strongly of the view that in what was done there was nothing unconstitutional or improper. I can see nothing to prevent the formation, in a fraternal and social organisation such as this, of a subordinate body or organisation which confines its membership to those qualified by membership in the parent society, and which is practically a self-governing body, subject to some supervision and oversight remaining vested in the parent society.

This matter has come before me as a stated case. The questions submitted in this case do not touch the point upon which the case must be determined, that is, the absence of any jurisdiction in the Court; and I do not think that the Court ought to deal with a matter in respect of which it has no jurisdiction to entertain an action, when that matter is submitted to it in the form of a stated case. The parties thus fail to obtain any answers to the questions submitted, and I think this affords sufficient reason to refuse to award costs.

LATCHFORD, J. DECEMBER 5TH, 1913.

GAGNON v. TOWN OF HAILEYBURY.

Municipal Corporation—Destruction of Ratepayer's House by Fire—Accumulation of Combustible Matter in Highways—Delay of Fire Department in Responding to Alarm of Fire—Statutory Powers and Duties of Corporation—Permissive Powers—Liability.

Action to recover damages for the negligence of the defendants, the Corporation of the Town of Haileybury, whereby the plaintiff's house and stables were destroyed by fire.

J. Lorn McDougall, for the plaintiff.
F. A. Day, for the defendants.

LATCHFORD, J.:—The plaintiff alleges that the defendants negligently allowed grass, weeds, logs, and other combustible materials to accumulate during the dry season of 1913 on the streets of the municipality near the plaintiff's property; and that they were further negligent in unduly delaying to respond to an alarm of fire sent in by the plaintiff, which, if promptly responded to, would have averted the destruction of his house and stables, whereby he sustained a loss of $700.

At the close of the evidence, I expressed the opinion that, upon the facts, as I found them, as well as upon the law, as I understood it, the plaintiff had failed to make out a case. However, I deferred giving judgment, so that the plaintiff's counsel might have an opportunity of submitting authority to support the contention he so vigorously advanced at the time. He now informs me that no such authority can be found. Even had a clear case of neglect of duty by the fire chief been made out, and not merely, as established, a slight error in judgment as to the imminence of the danger, and some delay on the part of the fire department in arriving on the scene, the plaintiff would still be without redress. The defendants had power to clean the streets of grass, weeds, and other materials, but they were not obliged to exercise that power. They had and exercised the right to establish a fire brigade; but here again the statute is merely permissive. No legal obligation rested on the defendants to have their fire department vigilant in protecting the property of the ratepayers from fire. Indeed, had the fire-

men refused, instead of delayed, to respond to the plaintiff's call for their aid, the defendants would not be responsible for the damages which he sustained. It is not a case where a direct tort was occasioned by the firemen acting as servants of the municipality. If the firemen had caused damage to the plaintiff while employed in the performance of their duties, the defendants might be liable, as was held in Hesketh v. City of Toronto (1898), 25 A.R. 449. In that case the plaintiff's son was killed while standing in a public street by the runaway horses of a steam fire engine of the defendants. The jury found that the horses had not been kept under proper control. The maxim respondeat superior was held applicable; but it was at the same time pointed out—Burton, C.J.O., at p. 451—that no private action would lie against a municipal corporation for damages sustained by reason of its neglect to perform a public duty while exercising merely permissive powers.

The question in issue here was recently given careful consideration in the Quebec Court of Review: Quesnel v. Emard (1912), 8 D.L.R. 537. In Quebec, as in Ontario, the power given to municipalities in regard to the organisation of fire companies, is enabling and not obligatory. Mr. Justice De Lorimer, in delivering the judgment of the Court (p. 543), expressed the law in a few words: "Municipal corporations are not obliged to protect property against fire. They have in this regard merely a facultative power, which does not create an obligation the inexecution of which would entail liability in damages for fire losses."

This action is, accordingly, dismissed with costs.

RE DAVENPORT, BOYD V. DAY—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—DEC. 1.

Administration Order—Motion for — Undertaking as to Shares in Estate—Dismissal of Motion—Costs—Executors.]—Motion by the plaintiff for an order for administration of the estate of John Davenport, deceased. The learned Chief Justice said that, upon the defendants Elizabeth Elliott and Ellen Day undertaking to enter into an agreement with the plaintiff that, in the event of any of the three dying before the property is sold, his or her share shall be treated as having absolutely vested on the death of the life-tenant, the motion would be dismissed without costs; the executors to have their costs, as between solicitor and client, out of the estate. H. Guthrie, K.C., for the plaintiff. Grayson Smith, for the defendants.

RE SMITH AND WILSON—LENNOX, J.—DEC. 1.

Vendor and Purchaser—Title to Land—Reference—Appeal from Report—Delivery of Conveyance—Tenants in Common—Joint Owners—Executions—Incumbrances.]—Appeal by the purchaser, in a matter under the Vendors and Purchasers Act, from the report of the Local Master at Ottawa. The learned Judge said that he was satisfied that the finding of the Local Master that the deed from the vendor to the purchaser had not been delivered, was correct. He did not, however, agree with the Local Master that the vendor and purchaser were entitled in equal shares to the equity of redemption in the lands in question, if that was what was meant by the finding that they were tenants in common. They were joint owners, but manifestly not in equal proportions. The several executions were incumbrances upon the interest or share of the vendor. Considerations arose, however, which had not been specifically dealt with by the Master or argued, which would cause trouble and great expense if not disposed of now. The learned Judge, therefore, enlarged the motion until Saturday the 13th December, and forwarded to the clerk of the Court a memorandum of the questions to be taken up. J. E. Caldwell, for the purchaser. W. C. McCarthy, for creditors. C. L. Bray, for the vendor.

CANADIAN PACIFIC R.W. CO. v. MATTHEWS S.S. CO.—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—DEC. 2.

Summary Judgment—Rule 57—Bonâ Fide Dispute, Proper to be Tried—Unconditional Leave to Defend.]—Motion by the plaintiffs for summary judgment under Rule 57 (Con. Rule 603 amended). The action was to recover charges for handling freight at the rate of 40 cents per ton. The defence set up in the affidavit filed on behalf of the defendants was, that the charge was excessive. From the examination of the deponent on his affidavit it appeared that the defendants asserted that the vessel in respect of which the plaintiffs' claim arose was of a special character and in a class by itself; that it was not a bulk freight vessel, but a package vessel; and that for such a vessel, and for cement carried by it, the proper charge was 21 cents per ton, and not 40 cents, as claimed. The learned Registrar said that it appeared to him that there was shewn to be a bonâ fide dispute, proper to be tried, as to whether the plaintiffs were

entitled to 40 cents per ton as claimed, and that it could not possibly be determined on a summary application; and as, according to the defendants' contention, the plaintiffs had been overpaid, no part of the plaintiffs' claim was admitted. The motion was, therefore, refused, with costs to the defendants in any event. G. W. Walrond, for the plaintiffs. J. F. Boland, for the defendants.

ORTON v. HIGHLAND LUMBER CO.—LENNOX, J.—DEC. 2.

Contract—Manufacturing Lumber—Quantity and Price—Extra Payment or Bonus—Counterclaim—Trespass—Payments—Set-off—Findings of Fact of Trial Judge.]—Action to recover the amount alleged to be due for work done under a contract for getting out lumber for the defendants. The defendants had a counterclaim for money paid for trespass committed by the plaintiff in getting timber and for other matters, and also set up payments and set-off. The chief matter in dispute was the claim to a bonus or extra payment of $1 per 1,000 feet of lumber. This the learned Judge determined in favour of the plaintiff. After a careful consideration of the evidence, he arrived at the conclusion that the plaintiff was entitled to recover $1,426.55, with costs. M. B. Tudhope, for the plaintiff. A. E. H. Creswicke, K.C., and A. B. Thompson, for the defendants.

CONNOR v. TOWNSHIP OF BRANT—LENNOX, J.—DEC. 5.

Highway—Nonrepair—Injury to and Death of Person Travelling in Motor Vehicle—Liability of Township Corporation—Evidence—Findings of Fact of Trial Judge.]—Action to recover damages for the death of the plaintiff's husband by reason of the nonrepair of a highway in the township of Brant. The learned Judge found that the highway, at the point in question, was not in such a state of repair as to be reasonably safe and fit for the requirements of that locality; that it had been out of repair for such a length of time that knowledge by the municipality must be implied; that the municipal corporation, through their pathmaster, had actual knowledge of the condition of the road for a sufficient length of time before the accident to enable them to put it in proper repair; that, at the time the automobile

in which the deceased was travelling reached the defective part of the highway, it was travelling at a rate not exceeding twelve miles an hour, and was being properly driven and under the control of Robert Hunter; that Hunter had made all proper adjustments, having regard to the general condition of the road, and the fact that he was descending a grade; and that Hunter was a competent man, and was at the time exercising reasonable care. The learned Judge also said that the evidence of Hunter was given in a frank, unhesitating way; that he was a clear-headed, intelligent man; and his evidence should be accepted as generally reliable and accurate. A careful perusal of his evidence satisfied the learned Judge that, from the time the car jolted over the cut, until it upset and pinned the driver and the deceased Connor under it, Robert Hunter was not mentally fit or physically in a position to control the car, and did not in fact control it, and that this condition was solely due to the shock or jar occasioned by the condition of the highway and the almost overturned condition of the car, as it descended from the highway. The condition of the highway occasioned the driver of the car, and, therefore, the deceased, to be in a position in which he could not help himself; and, therefore, the want of repair was the cause of the casualty. Judgment for the plaintiff for $2,500, with costs. D. Robertson, K.C., for the plaintiff. O. E. Klein, for the defendants.