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HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. DECEMBER 6TH, 1913.

HARKER v. TOWN OF OAKVILLE.

Parties—Third Parties—Motion to Set aside Third Party Notice—Death by Electric Shock—Action for Damages against Municipal Corporation Supplying Electric Light—Claim for Relief over against Telephone Company—Crossing of Wires—Measure of Damages—Rule 165.

Appeal by the Bell Telephone Company of Canada, third parties, from an order of the 21st October, 1913, made by the Master in Ordinary, sitting for the Master in Chambers, dismissing the appellants' motion to set aside the third party notice served upon the appellants, in an action for damages for the death of a person killed by an electric shock in a house in Oakville, to which electric light was supplied by the town corporation, the defendants.

H. A. Burbidge, for the appellants.
D. Inglis Grant, for the defendants.

LENNOX, J.:—I think the judgment of the learned Master in Ordinary is right.

I cannot see that the very strenuous argument of counsel for the appellants that they cannot be brought in, because there is no right of contribution between joint tort-feasors, has any application. The defendants and the appellants did not act in concert; there was no intentional wrongdoing by anybody; and the act complained of at worst resulted from involuntary negligence.

The defendants in effect say to the appellants: "If we are liable, it is because you, by crossing your wires with ours, forced us to become your agents in carrying the high voltage current

complained of into the premises of our customer; the act complained of, as between you and us, is your act, not ours, and we are entitled to relief over against you." This is a case of two or more persons alleged to be subject to a common liability other than for fraud or other wilful tort: Johnston v. Wild, 44 Ch.D. 146. Unlike the cases of Wade v. Pakenham (1903), 2 O.W.R. 1183; Miller v. Sarnia Gas Co. (1900), 2 O.L.R. 546; Parent v. Cook, 2 O.L.R. 709, 3 O.L.R. 350; and Wilson v. Boulter (1898), 18 P.R. 107—where the claims were divergent, or the measure of damages or the principles governing the assessment varied—here, if anything, it is one culminating wrong, the third parties alleged to be the most important link in the chain of liability, the same inevitable measure of damages (although, if assessed by different tribunals, they may not measure the same), and to be assessed upon the same principles.

I have used the word "alleged" advisedly, because a defendant, no more than a plaintiff is, is not called upon to prove his claim in Chambers: Pettigrew v. Grand Trunk R.W. Co., 22 O.L.R. 23. Rule 165 (Rules of 1913) says: "Where a defendant claims to be entitled," etc. The Rule provides a substitute for an action, and is intended to prevent multiplicity of actions, and the scandal arising from contradictory results based upon the same facts. If the defendant apparently has a bonâ fide claim, of a character covered by the Rule, there is no right to try this claim either as to fact or law in Chambers. He proceeds, as a plaintiff does, at the peril of costs. Other considerations arise, of course, if it is clear beyond argument that the defendant cannot have a legal claim. The Rule is remedial and should receive a liberal interpretation. In construing it, sec. 57 of the Judicature Act, and particularly sub-sec. 7 of that section, should be kept in mind, and as far as possible made effective.

I entirely agree with Mr. Justice Riddell when he says in Swale v. Canadian Pacific R.W. Co., 25 O.L.R. 492, at p. 500: "I am convinced that the Con. Rule has been given quite too narrow an application, and hope that the matter may receive full consideration in an appellate Court." In the same case, Mr. Justice Middleton, sitting in a Divisional Court, said: "The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff."

The defendants appear to be acting in good faith; they set up a claim which may prove to be valid; they ask to have it tried now; it is a convenient time; the plaintiff does not object; and the Rule, in my opinion, is intended to cover such a claim.

The third party will have 8 days to enter an appearance.

The motion will be dismissed with costs to the plaintiff and defendants in the cause.

LENNOX, J., IN CHAMBERS. DECEMBER 9TH, 1913.

TILL v. TOWN OF OAKVILLE.

Parties—Joinder of Defendants—Cause of Action—Connected Transactions—Joint Liability—Doubt as to which Defendant Responsible for Death of Plaintiff's Husband—Alternative Claim—Rule 67.

Appeal by the defendants the Bell Telephone Company of Canada from an order made by the Master in Ordinary (sitting for the Master in Chambers), on the 21st October, 1913, dismissing the appellants' motion for an order striking their name out of the action as defendants and all allegations in the statement of claim against the appellants, on the ground that they were improperly joined as defendants, or for an order requiring the plaintiff to elect against which of the defendants she would proceed, and for other relief.

The action was brought against both defendants to recover damages for the death of the plaintiff's husband by an electric shock from the wires by which a current for the supply of electric light was conducted by the defendant municipal corporation into the houses of citizens, but said to have been caused by the wires of the defendant company crossing the electric light wires.

H. A. Burbidge, for the appellants.

D. Inglis Grant, for the defendant municipal corporation.

M. H. Ludwig, K.C., for the plaintiff.

LENNOX, J.:—It cannot prejudice the defendant company that there will be a chance at the trial of throwing the liability upon the defendant corporation, and the converse may be said of the corporation. A plaintiff who has a bonâ fide claim against

somebody should not be forced into experimental actions to discover where the liability rests, unless the joinder of parties is clearly unauthorised. The statement of claim here is not all that could be desired, but it is more specific than the points of claim held to be sufficient in the Houlder case, hereinafter referred to. It is quite clearly to be gathered from the plaintiff's statement that she claims to have a cause of action (a) arising out of a series of occurrences with which both defendants are alleged to be connected, (b) for which one or other of these defendants is responsible, (c) or for which they are jointly liable, and that (d) she is in doubt as to who is responsible for the damage.

The last point is perhaps the clearest, because, from the very nature of the circumstances shewn, it must remain uncertain until the trial who put in action the destructive agency which killed the plaintiff's husband; and this point is conclusive of the plaintiff's right to join the defendants upon the express authority of Con. Rule 192, now Rule 67. See also Symon v. Guelph and Goderich R.W. Co., 13 O.L.R. 47. If there is a joint cause of action, of course the plaintiff has a right to join the wrongdoers: Hinds v. Town of Barrie, 6 O.L.R. 656, and the Symon case, which shews too that the right against one may be founded upon contract and the other be independent of it. And upon the prominent question, namely, as a series of connected transactions for which one or other of the defendants are liable, the law seems to be now clearly established that the plaintiff has a right to prosecute a joint action. See Compania Sansinena de Carnes Congeladas v. Houlder Brothers and Co., [1910] 2 K.B. 354, following Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q.B. 504, and Buller v. London General Omnibus Co., [1907] 1 K.B. 264, and expressly recognising Child v. Stenning, 5 Ch. D. 695.

It was understood upon the argument that I need not deal with the question of particulars, and the motion is disposed of without prejudice to a motion later on. The defendants the Bell Telephone Company will have eight days for delivery of a statement of defence.

The appeal is dismissed with costs.

LATCHFORD, J. DECEMBER 9TH, 1913.

WRIGHT v. ANCIENT ORDER OF UNITED WORKMEN.

Life Insurance—Proof of Death of Assured—Disappearance—Efforts to Trace—Lack of Tidings for Nine Years—Presumption of Death—Action—Application under 2 *Geo. V. ch.* 33, *sec.* 165, *sub-secs.* 5, 6—*Costs of Action.*

Action to recover the amount of an insurance on the life of Judson A. Wright, who had disappeared and had not been heard of since 1904.

A. R. Bartlet, for the plaintiff.
A. G. F. Lawrence, for the defendants.

LATCHFORD, J.:—Judson A. Wright, a carpenter, the husband of the plaintiff, became, in 1886, a member of the fraternal society known as the Ancient Order of United Workmen. In 1897, being then 43 years of age, he left the county of Essex and went first to Manitoba, then to other western Provinces of Canada, and thence to various places in the United States. He was in the city of Chicago in February, 1904. During his wanderings he wrote from time to time to his wife and the eldest of the five young children he had left in Canada, manifesting in such of the letters as have been preserved a warm and constant affection. His last letters indicate that he was broken in health and incapable of earning even a precarious living. He had spent three nights in the municipal lodging house at 12 and 14 South Jefferson street. Only for one more night would even that shelter be afforded him. He was poorly clad, hungry and weak, he says, but sober, and promised to be sober to the end that he doubtless felt to be not far off. His son, who had at an early age taken the absent one's place as head of the family, had on previous occasions responded to appeals from his father for relief; and would have done so again when the last call was made, had he not been himself on the point of moving the family from Windsor to Chicago, whither his employers had transferred him from Cleveland. As soon as the family reached Chicago, they sought out the father at the addresses he had given. The only information they obtained was that he had hired with a lumber company to work in "the

South.'' The assistance of the detective department of the city was secured, and many but unavailing efforts were made to find some trace of Wright. A suggestion that possibly he might have worked on the World's Fair buildings at St. Louis in 1905 was followed by inquiries there, but again without result. Knowing of his father's preference for the West, the son had advertisements published in many of the newspapers of Western Canada and the United States, but failed to obtain any information whatever.

The assured has not been heard of for a period of nearly 10 years. The plaintiff, by paying all the dues and assessments which her husband would have been liable for if living, has kept him in good standing in the defendant Order; and, on proof of his death, is entitled to the $2,000 for which his life was insured.

From the letters before me, intended but for his wife and children, it is manifest that, whatever his weakness may have been, he was of a very affectionate disposition. He says that he loved them with heart and soul, and no one can read his words without being impressed by his sincerity. Having regard to fondness for his wife and children, the advantages he had obtained from his communications with his eldest son, his physical condition when he wrote his last letter on the 1st February, 1904, and the fact, established in evidence, that he has not since been heard of, I am satisfied that the presumption of his death has been established, and direct that judgment be entered in favour of the plaintiff for $2,000.

The defendants have acted throughout in a spirit of fairness, and the plaintiff might have moved under 2 Geo. V. ch. 33, sec. 165, sub-secs. 5 and 6, for a declaration which would have the same effect, if made, as this judgment. I therefore think it is not a case for costs.

BRITTON, J. DECEMBER 9TH, 1913.

McARTHUR v. McLEAN.

Contract—Transfer of Money and Security to Relative—Promise of Relative to Leave by Will to Infant Children of Transferor—Death of Relative Intestate—Action by Children against Executor—Corroboration—Enforcement of Contract—Interest—Costs—Payment of Infants' Money into Court.

Action brought on behalf of infants by their next friend to recover the sum of $4,500, in the circumstances mentioned in the judgment.

The action was tried without a jury at Walkerton.

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

C. J. Mickle, for the defendant McLean, administrator of the estate of Sarah McLean, deceased.

Arthur Collins, for the defendant Christina McArthur, the mother of the infant plaintiffs.

BRITTON, J.:—The plaintiffs are the infant children of John Alexander McArthur and Christina McArthur; and Christina McArthur was the daughter of the late Alexander McLean, who died on the 15th March, 1911. Christina was the only surviving child of Alexander McLean, and letters of administration to his estate were granted to her on the 26th April, 1911. Alexander McLean left him surviving (besides his daughter) one sister, viz., Sarah McLean, and two brothers, John and Neil. Sarah died suddenly, intestate, and the defendant John McLean took out letters of administration to her estate. She was about 60 years of age at the time of her death. The wife of Alexander McLean died in 1876, or 1877, and at his request his sister Sarah went to his home and continued there as his housekeeper until his death. She was not well off financially. She was disappointed, and so expressed her feeling, that her brother had not provided for her by will. She stood in the place of mother to the then child Christina, and there was love by each for the other.

Christina McArthur says that, desiring to make her aunt Sarah feel at ease in regard to her maintenance and support during her life, on or about the 8th June, 1911, she made the arrangement with her aunt that she, Christina, would give to the

aunt Sarah $2,500 in money and would assign to her a mortgage, viz., a mortgage made by one Sparrow to the late Alexander McLean, upon which for principal and interest there was about the sum of $2,000 unpaid, upon the condition that Sarah McLean would by will give and bequeath the sum of $4,500 to the children of her—Christina McArthur. It was made perfectly clear by the evidence that the money was paid over, and the mortgage was transferred; but Sarah McLean did not make her will—she died intestate. No other consideration for the payment of the money or the transfer of the mortgage was proved.

The evidence of Christina McArthur was corroborated, and I find the agreement set up proved. If a gift of the money and mortgage is suggested, the onus would be upon the defendant McLean to establish it. It was not established, but negatived. The money and mortgage were not, in my opinion, payment or settlement of any claim by Sarah against the estate of her brother. The only intimation of any such claim, by Sarah, was that she felt sure a will would be found, and, if found, it would contain a bequest to her of $2,000. In conversation with her niece Christina, Sarah spoke of being entitled to a wife's share, as she had in place of a wife kept the home and cared for the child, and she apparently thought her brother worth about $6,000, one-third of which would be the $2,000 that her brother had, in her opinion, named in a will.

That Sarah would be willing to bequeath all she got from Christina to Christina's children, is extremely probable, for the only others were her brothers, both elderly men of large means, and unmarried. The plaintiffs are entitled, in my opinion, to maintain this action. The mother, however, is a party defendant, and will be bound by the judgment in this action. She consents to be made a party plaintiff if necessary.

The judgment will be for the plaintiffs for $4,500, with costs payable out of the estate.

The defendant McLean, without delay, gave the statutory notice requiring the plaintiffs to establish their claim, so I think that no interest should be allowed.

The amount of $4,500, less solicitor and client's costs, if any, to be paid into Court for the plaintiffs—infants—to be invested as Court moneys, and paid out to them as they respectively attain the age of 21 years.

BOYD, C. DECEMBER 9TH, 1913.

*GRAMM MOTOR TRUCK CO. v. FISHER MOTOR CO.

Trade Name—Company Making and Selling Motor Trucks—Advertising under Company's Name—Use of Similar Name by Rival Company—Failure to Shew Superinduced Secondary Meaning—Passing-off—Confusion from Use of Name—Distinctive Word—Descriptive Word—Injunction.

Action to restrain the defendants from using the word "Gramm" in their business as descriptive of motor trucks sold by them in competition with the plaintiffs.

H. E. Rose, K.C., for the plaintiffs.
A. W. Anglin, K.C., and R. C. H. Cassels, for the defendants.

BOYD, C.:—The plaintiffs conceived the design of starting a company in Canada for the supply of commercial motor trucks for the carriage of goods. A connection was formed with the Gramm Motor Company of Lima, Ohio, United States, and the plaintiff company was incorporated under the name it bears in November, 1910. Gramm was the name of a man who had planned the construction of a motor truck distinct from other like trucks, called by the names of their designers, in the United States. He was a member of the American company, and also joined the Canadian company as shareholder and director. The use of his name was sanctioned by him, and also the subsequent use of the same word for the purpose of a registered trade mark in July, 1913. The course of business of the plaintiffs was not manufacturing trucks, in the strict sense of the term, nor did they bring in machines as a whole, but they procured from the American company and elsewhere, as found convenient, separate parts, and assembled them together in their Walkerville premises, and put them on the market as finished products. The parts in each machine ran into the hundreds, and it is said that this making-up of the constituents is the most important part of the business. In the get-up of the motor truck various changes are being made by those in the business from year to year, and the plaintiffs are said to have developed many variations and improvements in the method of combination which differentiates the Gramm motor as made by them from the original American Gramm motor, as well as from those which are called "Gramm-Bernstein," now turned out in the United States by a

*To be reported in the Ontario Law Reports.

new company called by that name, formed in July, 1912, of which the first designer, Gramm, is now a member. The motor truck was a new thing in this country in 1910, and to establish a business required a good deal of advertising to bring it into the public eye. This task the plaintiffs undertook; and they have for three years expended about $20,000 in advertising, and have also in that time introduced, as has been said, various changes in the motors they "manufacture" as a result of these years' experience. The result of the evidence is, that they have established a recognised business for the sale of motor trucks in Canada, under the trade name "Gramm," and that this word has become and is associated with the Walkerville business of the plaintiffs. Apart from one or two isolated instances of the Gramm motor from the United States being brought into Canada, the plaintiffs are the first dealers who have held their ground and supplied motor trucks for Canadian use to the practical exclusion of the American trade. The trucks made by them have a distinctive character and reputation in Canada, and are generally known as the Gramm Motor Trucks.

The evidence fails, in my opinion, to shew that the words "Gramm truck" in this country means a truck of the Gramm type, no matter by whom made or by whom sold. The word "Gramm" has here acquired no such superinduced secondary meaning. . . .

Confusion is sure to arise and has arisen when two rival machines are put on the same market, one called the "Gramm" motor and the other the "Gramm-Bernstein" motor. This difficulty has arisen from what the defendants attempted to do at the last exhibition in Toronto, and their display of the compound name was stopped by interim injunction. I am now asked to make this permanent. The defendants, i.e., the individual incorporators, had applied to the plaintiffs to be taken into their company at Walkerville, and, being refused, they became incorporated as the Fisher Motor Company, and started business opposite the plaintiffs' place of business in Walkerville, and gave themselves out as being entitled to sell the Gramm motors. The alleged justification is because an arrangement has been made with the Gramm-Bernstein Company by which supplies for assembling motor trucks from the American company are being procured by the defendants, and they obtained one of the Gramm-Bernstein completed machines to exhibit in the defendants' name at the last exhibition, as above stated. The witness Fisher, president of the de-

fendant company, said that ultimately they intended to use the name "Gramm" on a name-plate for the truck "manufactured" by them, and admitted that he had an eye on the plaintiff company. . . .

For a year the plaintiffs had an arrangement to get supplies from the American Gramm-Bernstein Company, after the former American Gramm company had gone out of existence, but the advertising was all along with reference to the Canadian Gramm company, and that was the distinctive catchword used, of which the defendants are willing to reap the benefit.

Evidence was given and it is common experience that when you have a compound or hyphenated word the tendency is to use only part of it, and usually the first part, especially if it is shorter than the latter part. I agree with what the witnesses say, that the use of "Gramm-Bernstein" in advertising motor trucks will breed confusion to the disadvantage of the plaintiffs, and that thereby the new-comers will interfere certainly with the trade of the older company.

I would note that Mr. Gramm is not in any way connected with the other company, and that they have no right to use his name as against the plaintiffs.

The case falls within the authority of Kingston Miller & Co. Ld. v. Thomas Kingston & Co. Ld., 29 R.P.C. 289, and also within Lloyd's v. Lloyd's (Southampton) Ld., 29 R.P.C. 433.

As the defendants have no right to use the name "Gramm" (as a personal name), I think that they should be enjoined from the use of it in labelling and advertising and selling their motors.

As to prohibiting the use of the leading word in a company's name, see Facsimile Letter Printing Co. Ld. v. Facsimile Typewriting Co., 29 R.P.C. 557. A case cited in Sebastian on Trade Marks, 4th ed., p. 260, may be usefully referred to—Shaver v. Shaver, 54 Iowa 208.

It has not appeared needful to discuss the registered trade mark obtained by the plaintiffs: enough has been proved as to the trade name to justify the intervention of the Court. The name "Gramm" was the badge selected by the plaintiffs by which the motor trucks dealt in should be identified with the company. The business of the plaintiffs was to select or procure the component parts and set up thereout the complete vehicle with various modifications and improvements which resulted in a distinct product that was extensively advertised,

and so became generally known in Canada in connection with the name "Gramm." This was a new line of business of recent growth, and there has been no such lapse of time and length of user as is required to transform a distinctive word into one merely descriptive of a motor truck generally.

The plaintiffs are entitled to judgment for the injunction asked, to restrain the defendants using the word "Gramm," as indicated, in their business; the defendants to pay the costs of litigation.

HOLMESTED, REGISTRAR, IN CHAMBERS. DECEMBER 10TH, 1913.

WOOD v. WORTH.

Writ of Summons—Service out of the Jurisdiction—Motion to Set aside—Rule 25(*e*), (*f*), (*g*)*—Irregularities—Failure to Point out in Notice of Motion—Rule* 219*—Conditional Appearance—Effect of.*

Application by the defendants Hortwitz and Zoller to set aside an order allowing the issue of a concurrent writ of summons for service out of the jurisdiction, the notice of the writ, and the copy and service thereof on the applicants.

Featherston Aylesworth, for the applicants.
H. E. Rose, K.C., for the plaintiffs.

THE REGISTRAR:—On the argument of the motion several alleged irregularities in the proceedings were pointed out, but it is a standing rule that he who would object to proceedings on the ground of irregularity must himself be regular. Rule 219 expressly requires that a notice of motion to set aside proceedings for irregularity must specify the irregularity complained of and the objections intended to be insisted on. This the notice of the present motion fails to do; and, therefore, the defendants do not appear to be in a position to rely on mere irregularities.

Then as regards the merits of the motion. It appears that Mr. Pickup's affidavit, on which the order for service out of the jurisdiction was based, by some mistake omitted in par. 3 to include the name of the defendant Zoller; but it appears from the statement of claim and the endorsement on the writ that Zoller,

equally with the other defendants, is a necessary party to the action against the company and Wagner, who are within the jurisdiction.

The action is to restrain the present applicants from parting with certain shares they are alleged to hold in the defendant company; to restrain the defendant company from paying them any dividends on such shares; and to have it declared that these applicants are not the rightful holders of such shares; and, therefore, they are proper and necessary parties to the action under Rule 25 (f) and (g). But they are also proper and necessary parties and entitled to be sued out of the jurisdiction on the ground that the action is founded on a tort committed in Ontario, and the case, therefore, is within Rule 25 (e).

It appears to me, therefore, that the defendants are properly suable in this Province, and that (apart from the irregularities referred to) the order was properly made.

The motion is, therefore, refused. The costs to be in the cause to the plaintiffs, who appear to have rather invited the motion by the way they conducted their proceedings.

The applicants, in the alternative, applied for leave to enter a conditional appearance. According to the English practice, a conditional appearance is merely allowed for the purpose of enabling the defendant to apply to set aside the writ, because, if he entered an absolute appearance, he would waive the right to object to the jurisdiction. If, within a limited time, the motion to set aside the writ is not successfully made, the appearance automatically becomes an absolute appearance. There is nothing in the Rules to indicate that the practice thereunder is to be otherwise. Here the applicants have moved to set aside the writ, and failed; and there appears, therefore, to be no reason for allowing them to enter a conditional appearance.

LENNOX, J., IN CHAMBERS. DECEMBER 10TH, 1913.

LEONARD v. CUSHING.

Writ of Summons—Service out of the Jurisdiction—Contract—Sale of Goods—Place of Payment—Rule 25(e).

Appeal by the plaintiffs from an order of HOLMESTED, Senior Registrar, in Chambers, setting aside an order of a Local Judge allowing the plaintiffs to issue a writ of summons for ser-

vice upon the defendants out of the jurisdiction, and setting aside the writ and the service thereof.

Featherston Aylesworth, for the plaintiffs.
Glyn Osler, for the defendants.

LENNOX, J.:—Rule 25 (Rules of 1913) provides: "(1) Service out of Ontario of a writ of summons . . . may be allowed wherever:— . . . (e) The action is founded . . . on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario."

There is a contract in writing, and under its express terms the goods were shipped to the defendants at Edmonton, Alberta, the plaintiffs being at the expense of carriage to that point. Certain payments were made; and the plaintiffs, claiming to recover the balance, were allowed to proceed under the Rule quoted, by order of the Local Judge of this Court at London. This order and the writ issued and the service effected were set aside by the order of the Registrar of this Court, sitting as Master in Chambers. From this order the plaintiffs appealed.

With great respect, I am of opinion that the learned Registrar erred in setting aside the order of the Local Judge. The "breach" upon which the action is founded is non-payment. If the contract provides, either in terms or by implication, for payment outside Ontario, then the order appealed from is right. The contract is not explicit; but it is argued that, as delivery was to be made at Edmonton, and part of the money was to be paid upon delivery of the machinery, and "the balance in two equal payments in thirty and sixty days from the delivery of the machinery," this means that the plaintiffs have to accept payment at Edmonton. I do not think so. I cannot think that either of these expressions, "upon delivery" or "from delivery," performs any office beyond simply defining the time at which payment is to be made. Upon the reading of the contract the place of payment is left absolutely at large. The result, the contract being silent, is, that the debtor must seek out his creditor. The defendants must get the money into the hands of the plaintiffs in London—no posting or depositing or other act falling short of this will discharge them. The converse was the case in Comber v. Leyland, [1898] A.C. 524. There, all that the debtor was to do was by the contract to be done outside the jurisdiction of the Court in England; and hence, as Lord Halsbury pointed out, the debtor there had not to seek out his creditor in England

—he had to do just what the contract provided; but the Lord Chancellor also enunciated the principle which is to govern here, namely, "that where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that, wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country;" and Lord Herschell, at p. 529, points out that the place of performance may be expressly or impliedly provided for by the contract. The importance of this case, however, is, that it expressly recognises and reinstates the decisions of the English Court of Appeal in Bell & Co. v. Antwerp London and Brazil Line, [1891] 1 Q.B. 103, and The Eider, [1893] P. 119, both of which go to shew that, when a plaintiff is entitled to require payment to be made in this Province, and it is not made, he is entitled to sue out a writ and serve it, under the provisions of Rule 25.

The order appealed from will be set aside with costs. The defendants will have 10 days to appear.

MIDDLETON, J., IN CHAMBERS. DECEMBER 10TH, 1913.

RE FARRELL.

Infant—Appeal to Privy Council—Representation of Infant Litigant—Counsel Fee—Advance—Suitors' Fee Fund—Practice—Guardian ad Litem.

Motion by the guardian ad litem of an infant, upon the consent of the other parties interested, for an order sanctioning an advance of $2,000, or such smaller sum as should prove sufficient, to enable counsel to be retained and the infant to be duly represented upon a pending appeal to the Judicial Committee of the Privy Council.

J. R. Meredith, for the applicant.

MIDDLETON, J.:—It is proposed to have the advance made out of the funds of the estate in the first instance, but the proviso is made that, if the appeal is successful, then the amount of advance made shall be reimbursed to the trust company from the Suitors' Fee Fund.

My own view being that this order would not be a proper one, I have consulted some of my brethren, and we all agree. Where, in litigation, an infant is in the position of a defendant or respondent, according to the well-settled practice of our Court the adverse litigant, no matter what the result, must in the first instance pay the costs of the guardian ad litem of the infant. He may, if the case is proper, be allowed to add them to his own, and so recover them over; but they are in the first instance treated as a necessary part of the disbursements of the successful litigant. The effect of the order sought would be in an indirect way to relieve the present appellant from this obligation.

The Suitors' Fee Fund is established for the purpose of affording a fund which may be resorted to, if necessary, for the protection of infants or lunatics or their property; but it is not intended that it should be used in ease of adverse litigants, nor is the fund established to meet the ordinary expenses incident to securing the due representation of infants in litigation.

If in this case it is necessary for an advance to be made to retain counsel, so that the infant's interest may be adequately represented upon the appeal, it may well be proper for an advance to be made in the first instance from this fund to enable the guardian appointed by the Court properly to discharge his duty; but this must be regarded as an advance to be refunded if and when the amount is recovered in the ordinary course of litigation. To sanction the order now sought would create a precedent resulting in the speedy depletion of the fund in question, and so frustrate the real object aimed at in its establishment.

FALCONBRIDGE, C.J.K.B. DECEMBER 10TH, 1913

WARDHAUGH v. WISEMAN.

Husband and Wife—Separation Agreements—Release of Dower—Registration—Resumption of Cohabitation—Declaration of Cancellation of Agreements and Release—Action against Administratrix—Corroboration—Costs.

Action for cancellation of certain agreements of separation and a release of dower and for a declaration of the plaintiff's rights as the widow of Alexander Wardhough, deceased.

E. D. O'Flynn, for the plaintiff.
E. G. Porter, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B.:—The plaintiff is the widow of Alexander Wardhaugh, and the defendant is the administratrix of his estate and effects. The plaintiff was married to the said A. W. in 1887. They lived in Belleville as husband and wife for about five years, when the said A. W. became addicted to the use of intoxicating liquor, and the plaintiff and the said A. W. executed a deed of separation bearing date the 26th May, 1892.

About two years afterwards, the said A. W., having promised to abstain from the use of intoxicants and to lead a better life, induced the plaintiff to live with him again. The plaintiff gave up a business she was carrying on for herself, and joined A. W. and his business, which was carried on successfully by both of them.

About the year 1900, A. W. again commenced the drinking habit, and treated the plaintiff with cruelty, so that she took proceedings for her own protection in the Police Court. She also brought an action for alimony. Her statement of claim was delivered on the 17th November, 1902. That action was settled, and a new deed of separation was executed by the husband and wife, which bore date the 22nd November, 1902, in which the agreement for the settlement of the action is set out in extenso. The sum of $600 was paid to the plaintiff in pursuance of the terms of the settlement. She also contemporaneously executed a release of dower, which release was registered in the registry office on the 15th December, 1902.

After all these events and agreements, he again sobered up and lived properly and induced her to return and live with him, agreeing to burn all the papers and take care of her. He joined the Baptist Church; taught a Sunday school class; became a member of the Y.M.C.A.; and for some years led an exemplary life; and the two lived together until the time of his death, which took place suddenly on the 8th March, 1912.

For some time before his death, the said A. W. had again relapsed into dissipation, but the plaintiff remained with him and assisted him in his business, and was living with him as his wife at the time of his death, aforesaid. She now asks for a declaration that the said agreements of separation, and the release of dower, should be cancelled as null and void, and that she is entitled to rank against the estate of the said A. W. as his widow.

Mr. Porter does not controvert the proposition that a separa-

tion deed is, ipso facto, put an end to for all further purposes if the parties subsequently become reconciled and return to cohabitation (Lush on Husband and Wife, 3rd ed., p. 463 et seq.); but he relies on the release of dower, which, he contends, is on a different footing, being under seal and for good consideration.

I am of opinion that the second agreement and the release of dower should be read together and treated as one transaction. The husband promised her to burn all the papers, and she thought he had done so. She is an illiterate woman and signs with her mark. She is corroborated sufficiently by Mr. F. E. O'Flynn and by Mrs. Pope. The former gentleman, a practising solicitor, narrates a curious incident, characteristic of a certain class of client. He says that the husband and wife did not remain apart a month after the agreements of November, 1902. O'Flynn had acted for A. W., and had drawn the release of dower. O'Flynn saw them together, and Wardhaugh wanted O'Flynn to throw off his costs, as he, Wardhaugh, had "taken his wife back and the papers were of no use." O'Flynn refused to forgo his costs, whereupon Wardhaugh became quite angry.

I think, therefore, she is entitled to the declarations she asks for, but in the winding-up of the estate she must be charged with the $600 which she received in November, 1902, without interest. I have not overlooked the fact that she says that she put $700 of her own money into the building which forms part of his estate, during the years "he was good." That was, of course, in their minds when the settlement of November, 1902, was made.

Costs to both parties out of the estate, those of the defendant as between solicitor and client.

MEREDITH, C.J.C.P. DECEMBER 12TH, 1913.

*RE RENNIE INFANTS.

Life Insurance—Infants' Shares of Money Payable by Benevolent Society—Surrogate Guardian—Application to be Appointed Trustee to Receive Moneys for Infants—Ontario Insurance Act, 2 Geo. V. ch. 33, secs. 171, 175, 176, 177, 178—Ontario Insurance Amendment Act, 3 & 4 Geo. V. ch. 35, secs. 10, 12—Infants Act, 1 Geo. V. ch. 35, sec. 20—Notice to Society and Official Guardian.

Application by the guardian of two infants for an order appointing him trustee and authorising him to receive from a benevolent society certain insurance moneys to which the infants were said to be entitled.

The application was made ex parte, and was heard by MEREDITH, C.J.C.P., in the Weekly Court at London, on the 20th September, 1913.

J. MacPherson, for the applicant.

MEREDITH, C.J.C.P.:—The father of these infants, being a member of a benevolent society, was entitled to, and held, a "benefit certificate," under which $3,000 was made payable to his wife, at his death; she died, and, after her death, he died; leaving the applicant, and these two infants, his and her only children, and heirs at law and next of kin, them surviving.

It is said that the society is ready and willing to pay the money, and has paid one-third of it to the applicant, who is of age; and who has obtained, in the proper Surrogate Court, letters of guardianship of the two infants, whose ages are 19 and 17. Security seems to have been given, upon the application for the letters of guardianship, for the proper application of the money in question.

This application is made ex parte; and is said to be made because the society contends that, as the law now is, the money cannot properly be paid over to such a guardian, but can properly be paid over only to a trustee appointed by this Court, under the provisions of the statute (the Ontario Insurance Amendment Act, 1913) 3 & 4 Geo. V. ch. 35, sec. 10.

*To be reported in the Ontario Law Reports.

In support of the application it was testified, by the applicant, that the money was payable at the assured's death to him and the two infants; that a new certificate was issued after the mother's death, making the money payable to them; but no such certificate is produced; probably the statement is innocently incorrect; under the certificate produced the money is payable to the mother only. However, she having died before the assured, and he having then died also, without, it is said, but is not testified to, having made any other disposition of the money, it would seem—if what is said, but not testified to, be true—that the three children are entitled to it in equal shares, under the provisions of the statute (the Ontario Insurance Act) 2 Geo. V. ch. 33, sec. 178, sub-sec. 7, as amended by 3 & 4 Geo. V. ch. 35, sec. 12.

Prior to the enactment 3 & 4 Geo. V. ch. 35, sec. 10, legislation had given to such a guardian, as well as "to the executors of the assured," expressly the right to be paid such infants' moneys: 2 Geo. V. ch. 33, sec. 175. It also gave power to this Court to appoint a guardian of infants entitled to such money, to whom it might be paid; requiring, however, that such a guardian should give security to the satisfaction of the Court for the faithful performance of his duty and for the proper application of any money he might receive. Guardians appointed by the Surrogate Court are also required to give security: Infants Act, 1 Geo. V. ch. 35, sec. 20.

By the latest enactment on the subject—3 & 4 Geo. V. ch. 35, sec. 10—the expressed right to pay such moneys to the executors of the assured, or to a guardian appointed by a Surrogate Court, or by this Court, contained in the principal enactment, was repealed, and re-enacted giving the right to be paid, in such a case as this, to a trustee appointed by this Court, on an application of the widow of the assured, or of the infants or of their guardian, only, without, as far as I have seen, expressly requiring that security be given by such a trustee, although previously expressly required in the case of a guardian appointed by this Court. As the whole legislation which has been mentioned was evidently intended to be a rather comprehensive code of provincial insurance law in Ontario, and in view of the repealing and re-enacting of 2 Geo. V. ch. 33, sec. 175, in part, it should be deemed that the Legislature intended to exclude executors, and such a guardian as the applicant is, from the right to be paid such moneys, and to make them payable in such a case as this—as it is said that the society owing the money in

question contends—to a trustee appointed by this Court and to such a trustee, or in the absence of such a trustee, into Court only. . . .

My conclusion, then, is that now a guardian is not entitled to receive such moneys; that only a trustee, under sec. 171 or under the amended sec. 175, is. I speak, of course, of a guardian appointed in this Province; a guardian appointed "by a Court of foreign jurisdiction" is provided for in sec. 177; and I also, of course, except a guardianship of the widow of the assured, whose case is liberally dealt with in sec. 175.

Then, should the applicant, on this application, be appointed a trustee under the amended sec. 175, and so empowered to receive the insurance money in question?

It seems plainly enough to have been and still to be the intention of the Legislature, in this legislation, that, as a general rule, the money should be paid, not into Court, but to some one in trust for the infants. Power to pay into Court is expressly given—sec. 176—but only if there is no person competent to receive the money. No evidence is afforded by the legislation of any intention to make this Court an investing institution of the insurance money of those who are not in law capable of receiving and investing it themselves, the contrary rather is indicated.

But much care must be taken that the interests of those who are not in law capable of managing their own affairs should not be imperilled, more than can be helped, in the exercise of any of the powers of this Court respecting their moneys. . . .

I would not make any order in this case without notice to the society; the money is not payable—according to the only certificate produced—directly to the infants; if they are entitled to it it is because of the legislation contained in sec. 178, which, however, gave to their father, after their mother's death, power to defeat such right, under the same section, by a declaration that the money should go to some one else. There is no evidence that there was no such disposition of the money by him; the evidence is that the existing certificate is expressly in favour of the children; and that seems to be a mistake.

No order will be made at present. The motion may be brought on again, on notice to or with the consent of the society and the Official Guardian, with some evidence explaining the apparent mistake regarding the purport of the certificate now in force, and with some explanation why payment is desired to the applicant, who has not long since ceased to be an infant in

the eyes of the law; and for what purpose. The amount involved is not insignificant; it is doubtless large in the eyes of those entitled to the money; and so, if safety infringes upon saving, it cannot, or at least ought not to, be helped.

I have retained this case for a considerable length of time in order that I might confer with any of the Judges before whom the recent amendments to the Act might have come up for consideration, and also to obtain all the information possible upon the subject from the Provincial Department of Insurance.

FALCONBRIDGE, C.J.K.B. DECEMBER 12TH, 1913.

ARKLES v. GRAND TRUNK R.W. CO.

Release—Action for Negligence Causing Personal Injuries—Defence of Release under Seal—Payment of Small Sum and Execution of Document Releasing Defendants—Issue as to Validity—Fraud—Undue Influence — Evidence — Finding of Fact of Trial Judge.

Action for damages for personal injuries sustained by the plaintiff by reason, as he alleged, of the negligence of the defendants. Negligence was denied by the defendants, and they also pleaded a release executed by the plaintiff under seal.

The trial was at Owen Sound.

W. H. Wright and J. C. McDonald, for the plaintiff.

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

FALCONBRIDGE, C.J.K.B.:—This is an action for injuries said to have been sustained by the plaintiff owing to the negligence of the defendants. The defendants filed the usual pleadings denying negligence and alleging contributory negligence, and further setting up a release under seal. The plaintiff replied that the release had been obtained by fraud and undue influence on the part of the defendants and their agents, and therefore was not binding upon him.

I proceeded to try the issue on the release first, and reserved judgment thereon, meaning to go on and try the remaining issues with the aid of the jury so that the case would be finally disposed of as far as the trial was concerned. Then counsel for the defendants made an application to put off the trial

until the next jury sittings for the purpose of having an X-ray examination of the plaintiff. This application I granted, on certain terms as to costs to be paid by the defendants.

As I have stated above, I was extremely anxious to dispose of the case once for all, but now, inasmuch as I have a strong view regarding the portion of the case which I tried myself, I conceive it to be my duty to decide that issue before the parties incur any more expense.

The defendants filed a release under seal, the consideration being $40 and payment of hospital fees and of the physician's services in connection with the plaintiff's injuries. The plaintiff is not a marksman, but signs his own name, and he also endorsed two cheques for $20 each, and his wife got them cashed. The cheques themselves say, on their face, "this amount being in final settlement of claim known as number 2731 on the records of the claims agent of this company."

The evidence may be summarised as follows. The plaintiff swears: "I don't mind putting my signature there; I don't remember seeing Heyd" (the Grand Trunk agent at Owen Sound) "at the hospital. I had not consulted a lawyer or made any claim on the Grand Trunk in the hospital. I don't remember getting the money on the cheque." His wife swears that "his memory is not of much account. He would talk with me one day and argue with me the next day that I had not been there the day before." Oscar Arkles, son of the plaintiff, says that "when he was in the hospital sometimes he would know me and sometimes not; he does not remember things. I did know what was in them when I took the cheques to mother. Father told me to take them home to mother." Arthur Little said that he knew the plaintiff and saw him three or four times in the hospital, and that the plaintiff did not recognise him. Samuel Graham knew him a week or two and saw him about two weeks after the accident, and thinks that the plaintiff knew him.

For the defence was called Brown, foreman for Wright & Company. The plaintiff told Brown that he had made a settlement. Brown had warned him not to make any settlement until he went out. Dr. Dow was sent for by Wright & Company. "I never knew there was anything the matter with the man mentally. He recognised me from day to day." (He was 50 days in the hospital). J. G. Heyd, Grand Trunk agent at Owen Sound, says that the plaintiff was certainly sensible enough when he and Shepherd, the claims agent, were there.

Shepherd handed the release to the plaintiff to read, and also read it over to him, and asked him, "Do you understand it?" The answer was: "Yes; I guess it is all up with me now." Shepherd, the claims agent: "I read it to him, and he read it over and signed it. He recognised me. I told him we would not recognise any liability, but were willing to help him out financially. He said, 'Is that the best you can do for me?' And I said 'Yes.' He read the release, and handed it back to me, and I read it over to him, and asked him if he fully understood it. He answered: 'Yes, I understand; it is all up with me' (meaning that that was all he expected to get)." Miss Stella Benton, a remarkably alert and intelligent witness, was the nurse in charge of the plaintiff: during the last two or three weeks "the condition of his mind was all right."

It is not possible for me, upon this evidence, to find that the release was obtained by fraud and undue influence. I find, on the contrary, that the plaintiff fully understood what he was doing, and did accept the sum of $40 in full settlement of the cause of action.

I have consulted the following cases: Doyle v. Diamond Flint Glass Co. (1904), 8 O.L.R. 499; the same case in appeal (1905), 10 O.L.R. 567; Clough v. London and North Western R.W. Co. (1871), L.R. 7 Ex. 27; Johnson v. Grand Trunk R.W. Co. (1894), 21 A.R. 408; Disher v. Clarris (1894), 25 O.R. 493; and finally Gissing v. T. Eaton Co. (1911), 25 O.L.R. 50, which is the last word on the subject.

The action will be dismissed, with costs, if exacted.

LENNOX, J., IN CHAMBERS. DECEMBER 13TH, 1913.

REX v. DAVEY.

Criminal Law—Magistrate's Conviction—Motion to Quash—Evidence — Magistrate's Return—Conclusiveness—Supplemental Statement—Inadmissibility—Judicature Act, 3 & 4 *Geo. V. ch.* 19, *sec.* 63.

Motion by Ezra E. Davey, the defendant, for an order quashing his conviction by the Police Magistrate for the Town of Amherstburg, for the offence of being found upon enclosed lands of another with a sporting implement, after notice not to hunt or shoot thereon.

D. C. Ross, for the defendant.
H. E. Rose, K.C., for the prosecutor.

LENNOX, J.:—It is contended by the defendant that the only evidence against him is the deposition of James Moore. It is not and cannot be denied that this evidence alone will not support a conviction. The prosecution contends that, by agreement at the trial, the evidence in a previous case was to apply in this case. The evidence was taken in shorthand, has been extended, and is returned by the Police Magistrate as the evidence in the case. There is nothing in the evidence to shew that any arrangement was made that the evidence in the earlier case would be accepted in this.

Mr. Ross proposed to fortify his position by filing an affidavit shewing that counsel for Davey refused to accept the earlier evidence as applying in the Davey case. This was strenuously opposed by Mr. Rose, who referred me to Regina v. Strachan, 20 C.P. 182, as shewing that the magistrate's return is conclusive, and that I have no right to go behind it; and, subject to this, Mr. Rose produced a counter-affidavit. The doctrine of the case cited is beyond dispute, I think. The proper application of it to this case is not without difficulty. In the Strachan case the rule was invoked to confine the evidence in the case to the evidence recorded by the magistrate at the trial. Mr. Rose presses this rule of law, but desires me not only to accept the recorded evidence but to supplement it by a voluntary statement made by the magistrate. I do not think that I can do this. If this may be done, where is the matter to end? . . .

Section 63 of the Judicature Act, 3 & 4 Geo. V. ch. 19, is explicit as to what return the magistrate shall make upon a motion to quash a conviction. Within these lines, his return cannot be questioned; outside these limits his statements are extra-judicial and irrelevant.

The conviction will be quashed with costs. Order protecting the magistrate, if necessary.

LATCHFORD, J. DECEMBER 13TH, 1913.

RE BROWNE.

Will—Construction—Bequest of Residue of Estate to Nephew with Limitation to Named Sum—Intestacy as to Remainder of Residue.

Motion by the executors of Jane Browne, deceased, for an order, under Rule 600, determining a question arising upon the will of the deceased.

J. A. Hutcheson, K.C., for the executors.

G. H. Kilmer, K.C., for Caroline Bolton, one of the next of kin.

LATCHFORD, J.:—Application by the executors for the construction of a provision in the will of the testatrix, an unmarried woman, the residue of whose estate amounts to nearly $4,000.

The clause regarding which the advice of the Court is sought is as follows: "All the rest residue and remainder of my estate not hereinbefore disposed of I give devise and bequeath unto my nephew Travers Gough Browne of Brockville to the amount of $800."

If the bequest is limited to the $800, there will be an intestacy as to upward of $3,000.

It is a well-established rule that the Courts do not favour an intestacy. But it is also the law that effect must be given to the intention of a testator as expressed.

No case parallel to this was cited upon the argument, nor have I been able to find any. In re Nelson (1868), 14 Gr. 199, has some little relevancy. There the testator left two unsigned and undated scraps of paper, on one of which he had written: "I leave the whof (whole) of my property to William Brown, Townhead, Arbuthnot by Fordoun, Scotland, $2,000;" and on the other scrap of paper he had written: "I give Peter Crann $500 for himself." Probate of these unsigned scraps had—wonderful to relate—been granted by a Surrogate Court as the last will of the deceased. The matter came before Chancellor Van Koughnet upon the contention made by the next of kin that the whole of the estate did not pass to William Brown and Peter Crann; but that there was an intestacy as to the residue in excess of the $2,500. The question was not whether the two pieces of paper constituted the will: that had been settled—rightly or wrongly, it mattered not—by the Surrogate Court;

but whether, assuming them to be the will of the deceased, they disposed of all his property. The learned Chancellor asks, "Can I reject the figures $2,000?" and proceeds: "The testator must have meant something by them. They have no meaning, no use, are insensible, unless read as designating the amount of the bequest to Brown." The line "I leave the whof of my property to William Brown" was regarded as a declaration by the testator that he was going to dispose of the whole of his property, but the figures were held to indicate that the testator never executed the intention he had formed. An additional ground upon which the declaration of intestacy as to the residue was based was, that, in the order in which the scraps were granted probate, they were so arranged that the bequest to Crann followed that to Brown. This does not exist in the present case. Had the bequest made by Miss Browne to her nephew been followed by any other bequest, it is manifest that the subsequent legacy would have to be given effect to, and to that extent at least the whole of the residue would not pass to the prior legatee.

In the present case I cannot reject the words and figures "to the amount of $800." They are meaningless, useless, senseless, when not regarded as limiting the general residuary bequest to Travers Gough Browne. I think that they express the limitation to $800 quite clearly. There is an intestacy as to the excess.

There will be judgment accordingly. Costs of parties represented out of the estate—those of the executors as between solicitor and client.

FALCONBRIDGE, C.J.K.B. DECEMBER 13TH, 1913.

HUDSON v. NAPANEE RIVER IMPROVEMENT CO.

Negligence—Death by Drowning of Person Attempting to Cross River—Action under Fatal Accidents Act—Broken Dam—Findings of Jury—"By not having Watchmen"—Other Grounds of Negligence Relied on, not Found, and so Negatived—Voluntary Assumption of Risk—Negligence of Deceased—Dismissal of Action.

Action by the mother and administratrix of the estate of George Hudson, deceased, to recover damages for his death, said to have been caused by the negligence of the defendants.

The action was tried with a jury at Napanee.

E. G. Porter, K.C., for the plaintiff.

W. S. Herrington, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B.:—The defendants were authorised by the statute 29 & 30 Vict. (1866) ch. 84, and amending Acts, to construct and maintain dams and reservoirs for the purpose of improving and increasing the supply of water in the Napanee river; and they erected, amongst others, a dam at Fifth Deep Eau Lake, in the county of Frontenac, which dam penned back water on the said lake for some feet.

It was proved at the trial, and it was manifest from the demeanour of some of the witnesses, that there was a good deal of ill-feeling in the neighbourhood against the company, arising, one witness said, from unsanitary conditions said to have been produced by flooding land which would have been naturally dry. Their original dam went out in 1908; and three years ago the south end of a new structure went out, under circumstances which made it reasonably clear that dynamite or some other high explosive had been maliciously used for the purpose. The defendants offered $500 reward, but no one was apprehended, and the hole was repaired. On the 16th April last it gave way again, as the evidence shews, and as the jury have found, as the result of an explosive. On this last occasion, a large quantity of water was released, and the stream below the said dam became much swollen. About a quarter of a mile down the river there is a bridge, known as McCumber's, forming part of a travelled public highway in the township of Hinchinbrooke. The water overflowed part of the highway and approaches to the said bridge. The plaintiff's son, George Hudson, attempted to cross the bridge and approach, and was carried away by the force of the water and was drowned.

The plaintiff now brings her action, as mother and administratrix of the said George Hudson, claiming that his death was caused by the neglect and carelessness of the said defendants: (1) in erecting and maintaining an improperly constructed and insecure dam; (2) in not taking proper precautions to prevent the said dam from breaking; (3) and, the said dam having broken, in not taking precautions to repair and make safe the highway at places where the stream crossed it.

The evidence completely failed to establish any of these allegations. The dam was properly constructed; and the jury, by finding that the negligence of the defendants consisted "by

not having watchmen,'' negatived any other suggestion of negligence.

At one time a watchman had lived in a house at the dam; and, after his death, on the 14th July, 1912, his widow lived there until the autumn, and the house was burnt by some one unknown about a month after she left, since which time there has been no watchman on the premises. It will be observed that the finding of the jury is ''by not having watchmen.'' The ''a'' before ''watchmen'' has been struck out; therefore, their finding must mean that one watchman must be there day and night. This is not put forward in the statement of claim as an item of negligence unless it is covered by (2).

I think, also, that the evidence shews that George Hudson, who knew of the break in the dam, was guilty of negligence causing the accident, in voluntarily attempting, with knowledge of the risk he ran, to pass the place of danger. The evidence of Mrs. McCumber on this point is as follows: ''I met Hudson a little way south-west of the bridge. He stopped to ask me if that was the right road to Wagarville, and I said 'Yes.' I had seen him driving through some backwater on the highway already. I asked him if he had heard of the dam, and he said 'Yes,' and I said it had gone out by some means last night, and I told him water was running round each end of the bridge, and there were some rails and floodwood at the other side, and I did not know whether he could get through or not. He said he did not mind the rails if the bottom was all right, and I told him it was always hard bottom there where the water was running round. He waited to see how he would get there. He went through the first approach and on the bridge; and, going off the bridge to the approach on the far side, the horse seemed to go right down deep, and the buggy swerved around, and he went out of the buggy and cried out for help.''

In this state of facts, I am of opinion that the plaintiff cannot recover; and I dismiss the action—under all the circumstances, without costs.

McVeity v. Ottawa Citizen Co.—Holmested, Senior Registrar, in Chambers—Dec. 10.

Pleading—Statement of Defence—Libel—Newspaper—Comment—Justification—Public Interest—Immaterial and Irrelevant Pleading—Striking out.]—The plaintiff moved to strike

out as irrelevant and embarrassing paragraph 5 of the statement of defence in an action for libel whereby, as alleged, the plaintiff was dismissed from an office which he held. See ante pp. 237 and 288. After a careful perusal of the pleadings, the Registrar was of opinion that the objections were well taken. One way of testing the matter would be to assume that all the allegations in paragraph 5 were admitted to be true—would they constitute any defence or justification of the libel? And, applying that test to this paragraph, could it be said that the facts alleged offered any defence or justification? Clearly not: for, admitting that the plaintiff's method of conducting his office was a matter of comment, that furnished no defence. The comment may have been mere idle gossip, without a pretence of justification; and, even if it were well-founded, his method of conducting his office, though bad, would not justify the particular charge complained of by the plaintiff. Then, would the fact that the matter of his employment of experts, without providing for their pay, was discussed by newspapers, be any justification? For aught that was alleged, all such comments may not have had a particle of foundation in fact. The plaintiff may never have had anything to do with experts or their remuneration; but the fact might be true, as alleged in paragraph 5, that the matter had been discussed in the newspapers on the assumption that it was true. Paragraph 5, therefore, seemed to present a wholly immaterial issue. The gravamen of the plaintiff's claim was, that the alleged libel charged him with malfeasance in his office as City Solicitor. How did the fact that other newspapers had discussed the matter, and that public interest had been aroused in the charge, in any possible way justify, excuse, or extenuate the publication of the libel complained of, even if such comments had any foundation in fact, and still less if founded on fiction? Order made striking out paragraph 5, with costs to the plaintiff in any event. J. T. White, for the plaintiff. R. C. H. Cassels, for the defendants.

TORONTO DEVELOPMENTS LIMITED v. KENNEDY—LENNOX, J.—DEC. 10.

Contempt of Court—Disobedience of Injunction Order—Motion to Commit — Adjournment for Personal Service of Order.]—Motion by the plaintiffs to commit the defendant for

contempt of Court in disobeying an injunction order. The defendant was not represented upon the argument. He filed an affidavit which, the learned Judge said, he should never have made. If prepared by a solicitor, his action was highly improper. A litigant should not be allowed to swear to legal propositions which he knows to be false, or which he could not be supposed to understand. The learned Judge was not able to accept the defendant's statement in one paragraph of the affidavit if what the defendant meant to say was, that he did not intend to disobey the order of the Court. The previous paragraphs of his affidavit led to a different conclusion. The defendant was not entitled to much consideration. In a sense he intended to disregard the Court and play the roll of a quasi-civilized outlaw. Technically, however, an immediate order committing him to the common gaol for contempt would not be justified. The defendant was not served with the injunction order made by KELLY, J., on the 28th November, 1912; and the solicitors who accepted service for the defendant advised him only that he was enjoined from cutting or selling sod upon the property. He should not be deprived of his liberty until the case should be made clear against him to all intents. Motion enlarged until Friday the 26th December; and, if the plaintiffs desire, it will then be further enlarged. In the meantime the plaintiffs, if so advised, can have the injunction order personally served, and evidence of any subsequent interference with the property can be given upon this application. If the plaintiffs prefer it, the motion will be dismissed without costs. W. M. Douglas, K.C., for the plaintiffs.

AVERY V. CAYUGA—LENNOX, J., IN CHAMBERS—DEC. 11.

Division Court—Prohibition—Attachment of Debts—Money Deposited in Bank by Unenfranchised Indian—Point Decided by Court of Appeal—Judgment Executed by Payment—Nothing Remaining to be Prohibited.]—Motion by the primary debtor for prohibition to the First Division Court in the County of Haldimand to prohibit proceedings upon the judgment of that Court which was affirmed by the Supreme Court of Ontario, Appellate Division, on the 21st April, 1913: Avery v. Cayuga, 28 O.L.R. 517. LENNOX, J., said that the fact that there had been a trial and lengthy argument, and that there had been an appeal to the Court of Appeal touching the questions now

raised, did not of itself negative prohibition. But a Judge had power only to prohibit subordinate tribunals and persons—no power to prohibit the Court of Appeal; and it would be doing this, in effect, if the order asked for were granted. It was idle to argue that there was only one point before the Court of Appeal, and that it was only decided that the money in the bank might be taxed. The point there was the point again raised here, namely, whether the money in the bank, situate outside the reserve, was money available for payment of the primary debtor's debts, he being an unenfranchised Indian. See the reasons of appeal filed. The Court of Appeal held that the money was garnishable. The learned Judge was asked to hold that it was not, and to prohibit the payment. This went to the root of the whole matter, and he was, of course, bound by the decision.—There was a point taken also about a counsel fee allowed by the trial Judge. This should have been made a ground of appeal, if objected to. The learned Judge did not, at all events, feel called upon to consider this fine point, in view of the fact that the defendant himself, on the 23rd May, gave his cheque in settlement of the suit. There is no prohibition, of course, if nothing remains to be prohibited. The learned Judge was not quite sure as to the facts upon this point, but the cheque was accepted on the day it was issued, and was stamped as paid by the Dominion Bank on the 4th June last. Motion dismissed without costs, other than $5 already ordered to be paid. J. B. Mackenzie, for the primary debtor. The primary creditor was not represented.

MENARY v. WHITE—BRITTON, J.—DEC. 12.

Fraud and Misrepresentation—Sale of Farm—Action by Purchasers against Agent for Vendor—Value and Character of Land—Evidence—Findings of Fact of Trial Judge—Dismissal of Action—Costs.]—An action for damages for false and fraudulent representations whereby the plaintiffs were induced to purchase a section of land in Alberta; tried without a jury at Orangeville. The action was founded upon fraud; rescission of the agreement for sale, dated the 10th June, 1909, with the Stewart-Matthews Company, for whom the defendant was agent, was not asked. The plaintiffs had paid a considerable portion of the purchase-money; and they asked damages because of misrepresentation as to the value and character and

condition of the land. The learned Judge said that, if the representations made by the defendant were not untrue to his knowledge, or if they were not recklessly made by the defendant, desiring them to be acted upon, and not caring whether they were true or false, the plaintiffs could not recover. After briefly discussing the evidence, the learned Judge, in his written opinion, said: "I do not think that there was fraud. I am not able, upon the evidence, to find that all the representations alleged by the plaintiff to have been made by the defendant were in fact made; and I cannot find that the representations actually made by the defendant were either false to the knowledge of the defendant, or recklessly made by him, not knowing or caring whether they were true or false. The facts here are quite different from those in Scobie v. Wallace, 4 O.W.N. 881, 1345, and are more like those in Wilson v. Suburban Estates Co., 4 O.W.N. 1488, 5 O.W.N. 182. The defendant was only agent, but as such he would be liable for any fraud perpetrated by him. . . . The weight of evidence is, that one-half of the section is excellent wheat land; only the quality of one-quarter section could be designated poor, and that quarter is good pasture-land, and has water very valuable to the farm as a whole; the remaining quarter is fair land. Prices in that part of Alberta (section 13, township 11, range 17, west of the 4th meridian) have dropped; but, at the time of the plaintiff's purchase, the price they agreed to pay could not be called excessive. The action will be dismissed, and with costs, save and except costs of commission and evidence taken thereunder. These costs should not be allowed to the defendant." Grayson Smith and A. A. Hughson, for the plaintiffs. C. R. McKeown, K.C., and George Robb, for the defendant.