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COURT OF APPEAL.

OCTOBER 30TH, 1909.

BERKINSHAW v. HENDERSON.

Contract—Formation of Company—Oral Agreement between Corporators before Formation—By-laws—Unanimous Approval of Shareholders—Omission of Term in Written Agreement—Evidence—Statute of Frauds.

Appeal by the plaintiff from the judgment of a Divisional Court, 12 O. W. R. 919.

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

Strachan Johnston, for the plaintiff.

E. E. A. DuVernet, K.C., and W. B. Raymond, for the defendants.

OSLER, J.A.:—I have scrutinised the evidence with some care in the light of the full discussion it received during the argument of the appeal, and am of opinion that the view taken of it in the Court below as expressed by the Chancellor is the right one.

Even if it be competent for individuals to contract an agreement which, after the incorporation of a company, will have the effect of controlling the statutory rights and powers of its members, and the management of its affairs in the manner prescribed by law and by the terms of its charter, such an agreement ought to be proved in the clearest and most satisfactory way, and should not readily be inferred from conflicting accounts of oral statements made many years ago.

The fact that the by-laws of the company—probably invalid, and now repealed—contained provisions looking to unanimity of action on the part of the directors and shareholders, carries no weight as evidence of the pre-existing agreement relied on between the plaintiff and the defendant Henderson, when it is considered that they were framed upon some model which already contained such provisions. It is impossible to say that they derived from an agreement rather than from the model or that the idea of unanimity was not for the first time given expression to in them.

MEREDITH, J.A.:—This case is not one in which it can be said that everything, or indeed very much, depended upon the veracity of the witnesses, and, therefore, much upon their demeanour in the witness-box. It may, I think, be taken for granted that none of them intentionally said that which was untrue. The transaction took place a good while ago; and I have no doubt that the discrepancies in the testimony may be fully accounted for by the effect of that lapse of time upon memories not unwilling to be swayed by self-interest—perhaps the normal condition. The truth is rather to be found in the writings, the surrounding circumstances, and the probabilities of the case. The onus of proof was upon the plaintiff; proof of an extraordinary agreement; and I agree with the Judges of the Divisional Court in their conclusion that that requirement cannot be said to have been satisfied, having regard to all of the testimony and the circumstances of the case.

The agreement alleged is one that ought to have been evidenced in writing, and one which ordinarily would have been; yet it was not, although a comprehensive writing was prepared, and executed, setting out terms upon which the parties were to carry on the business and interests each was to have in it.

Upon this short ground the appeal should, I think, be dismissed.

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

OCTOBER 30TH, 1909.

RE SMITH AND HILL.

Mines and Minerals—Mining Claim—Dispute—Status of Disputant—Licensee—Decision of Commissioner—Right of Appeal—Mining Act of Ontario—Discovery—Abandonment.

An appeal by H. A. Smith from an order or decision of the Mining Commissioner, brought directly to the Court of Appeal

by leave under sec. 151 (4) of the Mining Act of Ontario, 8 Edw. VII. ch. 21.

The dispute related to a mining claim in the township of Lorrain, recorded in the office of the Mining Recorder on the 7th January, 1908, by one Montgomery, the holder of a mining license. In the application, after describing the parcel and referring to the situation of the discovery post, it was stated that the discovery was made on the 21st December, 1907, and the claim was staked and the lines cut and blazed on the claim on that day.

On the 23rd May, 1908, Montgomery, being still the holder of a mining license, transferred all his interest in the claim to Hill, who was the holder of a mining license. This transfer was filed in the Recorder's office on the 12th June, 1908. On the 28th June, 1908, an application for the staking of a claim on the same location was filed in the Recorder's office on behalf of Smith, and on the same day a dispute of Hill's claim was filed on behalf of Smith under sec. 63 of the Act, which had come into force on the 14th April, 1908.

The Recorder, acting under sec. 130 (2) of the Act, transferred to the Commissioner, with his consent, the questions raised by these proceedings for his decision.

The Commissioner decided in favour of Hill, and, a new trial being directed (see 12 O. W. R. 1258), again decided in favour of Hill, whereupon Smith appealed.

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

G. T. Blackstock, K.C., and C. C. Robinson, for the appellant.

G. H. Watson, K.C., and J. L. McDougal, for the respondent.

Moss, C.J.O.:—The first question for consideration relates to Smith's status to dispute Hill's claim and to appeal to this Court. . . In Re Cashman and Cobalt and James Mines Limited, 10 O. W. R. 658, and Re Munro and Downey, 19 O. L. R. 249, the rights of the parties were governed by the Mines Act, 1906, as amended by 7 Edw. VII. ch. 13. In this case, while those enactments apply to the discovery, staking, etc., made or alleged to be made by Montgomery, the Mining Act of Ontario is applicable to all the subsequent proceedings, and reference must be made to its enactments when dealing with the question of status. The language is not the same as in the former enactments, some of the changes probably owing their origin to the Cashman case. Sec-

tion 63 of the Mining Act of Ontario seems to place it beyond doubt that a dispute alleging that any recorded claim is illegal or invalid in whole or in part may be filed by any licensee without his being entitled or claiming to be entitled to any right or interest in the lands or mining rights; though, if he claims on his own or some other person's behalf to be entitled to be recorded for or to be entitled to any interest, the dispute must so state. In this case the Commissioner dealt with the matter in the first instance, and not by way of appeal from the Recorder, and it would seem to follow that an appeal would lie from his decision under sec. 151. The same right would appear to exist now, if not previously, even when the decision is upon an appeal from the Recorder. It must be taken as proved or not really open to dispute that Smith and O'Hara, who filed the application and dispute, were licensees, and therefore entitled on that ground to dispute Hill's claim and to maintain this appeal against the adverse decision of the Commissioner. But, in so far as Smith claims the right to dispute as a person entitled to be recorded as the owner or holder of a right or interest as upon a discovery followed by staking, etc., no case has been made to entitle him to such a position.

On the 17th June, 1908, on which day Smith . . alleges that he discovered valuable mineral and staked out the claim upon the lands described in it, the same claim was under staking and record as a mining claim filed by Montgomery, duly transferred for valuable consideration to Hill, and upon it men in Hill's employ were then actually engaged in working.

The onus being upon Smith to shew, if he could, that valuable mineral in place had been discovered by him . . on land open to prospecting (sec. 35), he could only do so in this instance by shewing that Hill's claim had lapsed, been abandoned, cancelled, or forfeited (sec. 34); and in this respect he has wholly failed. . . . Nor upon the evidence can there be any reasonable suggestion of a lapse. . . .

The lands comprised in the claim were, therefore, not lands open to prospecting under sec. 35. . . .

I perceive much difficulty in holding that the mere adoption by a licensee of valuable minerals taken out by another licensee in the course of working upon a claim at a time when he is still working it, and claiming a right to do so, can be turned into a discovery sufficient to lay the ground-work of a claim for the benefit of the adopter. . . .

[Reference to Cranston v. English Canadian Co., 1 Martin's Mining Cases 394; In re McNeil and Plotke, 13 O. W. R. 14.]

The Commissioner was justified in concluding that upon the evidence adduced it would be very unsafe to find against the validity of Montgomery's claim. . . .

Appeal dismissed with costs.

OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., concurred; MEREDITH, J.A., giving his views in writing.

OCTOBER 30TH, 1909.

McKINNON v. HARRIS.

Trusts and Trustees—Land Alleged to have been Purchased by Defendant as Trustee for Plaintiff—Parol Evidence to Establish Contract—Insufficiency—Statute of Frauds—Failure of Proof—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of the trial Judge in favour of the plaintiff in an action for a declaration that the defendant was a trustee of certain property for the plaintiff and for specific performance of an agreement to convey the property to the plaintiff. The facts in evidence were similar to those in Goldstein v. Harris, 12 O. W. R. 797, decided by the Court of Appeal on appeal from the judgment of MABEE, J., and affirmed by the Supreme Court of Canada.

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

G. H. Watson, K.C., for the defendant.

A. B. Morine, K.C., for the plaintiff.

MEREDITH, J.A.:—The Goldstein case was decided upon its facts, and so is not a case binding upon any Court in any other case; this case must, therefore, be determined upon its facts, even if the result be so unfortunate and discreditable to the administration of justice that in two cases, in which there is no sort of substantial difference in their facts, there should be diametrically opposite judgments. There is no such means of escaping any such possible result as that which in Australasian, etc., Co. v. Smith, 14 App. Cas. 321, was said to be proper, that is, a new trial of the two cases together.

But there is really nothing in this case to justify any different findings from those which were finally reached in the Goldstein case. Going over the case, as independently as possible of any

impressions made in dealing with that case, my conclusion is that the judgment appealed against cannot stand.

The evidence is conflicting; the only disinterested testimony is against the claim; the great delay, and other circumstances, make strongly against it; and there is not a scrap of evidence in writing in support of it, although it appears that there should have been some, however slight or important it might be, if the plaintiff's wife's testimony is true.

The case seems to be just one of those which made the passing of such enactments as the Statute of Frauds necessary. . . . That Act is not to be repealed by any Court; if, by merely alleging fraud in one form or another and swearing to it, such enactments can be rendered of no effect, it was idle to have passed them. It would be very regrettable if, by an invented false charge of fraud, the Court should be called upon to treat the case as if there were no such enactment and determine it upon the weight of evidence only—making it only necessary to make a charge of fraud to wipe out an Act passed for the very purpose of preventing fraud and perjury. . . .

[Reference to Campbell v. Dradborn, 109 Mass. 130, 143, 145; Lance's Appeal, 112 Pa. St. 45.]

But, even if that statute had never been passed, the commonest precaution would require something more than a mere weight of testimony to support a claim of this character, something corroborative in evidence not subject to question as to its truth. In the face of the statute and the fact, which almost every one knows, that such contracts ought to be evidenced in writing, a very clear case should be made.

In this case, as in most cases of the kind, I ask myself: 1. Is the claim supported by probability? 2. Is it supported by evidence in writing, in any form? 3. Is it supported by any indisputable facts? 4. Is it supported by disinterested testimony. 5. Is the parol evidence quite satisfactory and convincing? And, after hearing all that was urged by counsel in support of the claim, and a careful consideration of the report of the trial, I am obliged to answer all these questions in the negative. . . .

I find no great difficulty in interfering with the conclusions of the trial Judge, because I cannot but think he has treated this case as if it were one of mere weight of testimony, and not as one in which the intervention of the statute, as well as the reasons for its enactment, required more than that. The case was not argued before him, and I do not find, in anything said at the trial, any indication that these things were at the moment present to the mind of any one concerned in the trial.

I will allow the appeal and dismiss the action.

Moss, C.J.O., and Osler, J.A., were of the same opinion, for reasons stated in writing.

Garrow and Maclaren, JJ.A., also concurred.

October 30th, 1909.

GORDON v. MATTHEWS.

Assignments and Preferences—Assignment for Benefit of Creditors —Separate Liability of Partner—Right of Creditor of Partnership to Rank on Estate of Partner with Individual Creditors —R. S. O. 1897 ch. 147, sec. 7—Election.

Appeal by the defendant from the judgment of a Divisional Court, 18 O. L. R. 340, reversing the judgment of Mulock, C.J. Ex.D., and declaring that the plaintiff was entitled to rank upon the insolvent estate of Duncan Meyers in the hands of the defendant ratably with the individual creditors of Meyers, the plaintiff's claim being upon a promissory note given in payment for goods supplied to a firm of which Meyers was a member.

The note was signed by the firm and by Jacobs and Meyers, the two partners, in their individual names.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

G. C. Gibbons, K.C., for the defendant.

R. S. Robertson, for the plaintiff.

Osler, J.A.:—I am not prepared to hold that, even were the note to be strictly regarded as the joint note of the firm and the partners, it would not be sufficient to support proof against the separate estate of each partner, as each of them, subject to the right to have his co-makers added as defendants, might be sued alone upon such a note; and proof of the joint contract would support a judgment against him, as he could not get rid of his own liability simply by proving that other persons also were liable. But, however this may be, I am of opinion that the note we are dealing with is to be considered the joint and several note of the partnership and the individual members. Had it been signed by three distinct persons, it would prima facie have imported a joint

contract only. But, signed as it is by the firm and also by each partner of the firm, though commencing "we promise," etc., the case Ex p. Harding, 12 Ch. D. 557, 564, is strong to shew that it imports a joint and several contract . . . Leake on Contracts (1906), p. 302. . . .

Then we have here the case of an assignor owing a debt both individually and as a member of a partnership upon the same note. The claim in respect of the partnership liability must, by sec. 7 of the Assignments and Preferences Act, rank first upon the estate—the partnership estate—by which it was contracted; and the claim in respect of the individual liability, by the same section, upon the estate—the individual estate—by which it was contracted. Neither can rank upon the other, or, as I may describe it, the opposite, estate, until after the creditors of that other have been paid in full, that is to say, as the individual creditor of Meyers the plaintiff cannot rank on that indebtedness against the partnership estate until the partnership creditors are paid, and vice versa. Whether, as holder of the contract of each, the section puts the plaintiff to his election against which estate he will rank, is not in this case necessary to decide (see Ex p. Hovey, L. R. 7 Ch. 175, under the Imperial Bankruptcy Act of 1869), for he has by the pleading expressly elected to rank against the individual estate, and nothing that he did in proving his claim against the partnership estate estops him from doing so, as, even if bound to elect, he might do so at any time before the declaration of a dividend: Robson on Bankruptcy, 7th ed., p. 727; Ex p. Bentley, 2 Cox Eq. 218.

Appeal dismissed with costs.

MEREDITH, J.A., stated reasons in writing for the same conclusion.

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

OCTOBER 30TH, 1909.

ROSS v. CHANDLER.

Partnership—Cheque Payable to Firm—Indorsement and Deposit by Partner in Bank to Credit of another Firm—Liability of Bank to Partner Deprived of Proceeds of Cheque—Discount of Cheque—Absence of Negligence—Bona Fides.

Appeal by the plaintiff from the order of a Divisional Court (13 O. W. R. 247) affirming the judgment of RIDDELL, J., 12 O.

W. R. 341, dismissing the action, which was brought to compel the Imperial Bank of Canada to pay into Court, to the credit of a firm of Ross McRae & Chandler, the sum of $56,251.27, being the proceeds of a cheque in its favour which had been placed by the bank to the credit of a new firm of McRae Chandler & McNeil, of which the plaintiff was not a member.

The cheque was in payment of work done by Ross McRae & Chandler, as contractors for the construction of a railway in the province of Quebec. The plaintiff had not been attending personally to this contract, and said that he expected his partners, McRae and Chandler, when they received this cheque, to pay the accounts due by the firm and give him his share of the profits. Chandler indorsed the cheque in the name of the firm, adding his own signature. He then indorsed it in the name of the new firm, again adding his own signature, and gave it to the bank with instructions to place the proceeds to the credit of the new firm in the account which he had arranged to open with them. The bank immediately placed the full amount of the cheque to the credit of the new firm, and forwarded it for collection to the Bank of Montreal at Montreal, on which it was drawn. The plaintiff did not question the right of Chandler to indorse the cheque.

The trial Judge found that there was no negligence on the part of the Imperial Bank and that "no possible imputation of fraud or unfair dealing, wilful blindness, or any impropriety," could successfully be made against the manager of the bank with whom the arrangement was made.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

G. F. Shepley, K.C., for the plaintiff.

J. Bicknell, K.C., and F. R. MacKelcan, for the defendants the Imperial Bank of Canada.

H. E. Rose, K.C., for the defendants McRae and Chandler.

Maclaren, J.A.:—So far as Capital and Counties Bank v. Gordon, [1903] A. C. 240, has any bearing upon the present, I think it tells against the plaintiff instead of in his favour. It shews that the bank in the present case became the holders of the cheque for value as soon as they placed the amount to the credit of McRae Chandler & McNeil, and that they collected the money from the Bank of Montreal on their own account and not as agents for that firm. . . .

It was also urged upon us that the plaintiff was entitled to succeed on the ground that the Imperial Bank did not become holders

in due course of the cheque. The facts shew, however, that all the requirements of sec. 56 of our Bills of Exchange Act were fully complied with. The cheque was complete and regular on its face, was not overdue, had not been dishonoured; the bank took it in good faith and for value, and when it was negotiated the bank had no notice of any defect in the title of the person who negotiated it.

It was conceded that Chandler had a perfect right to indorse the cheque for the firm of Ross McRae & Chandler. It thereupon became payable to bearer, and, when handed over to the bank and placed to the credit of the new firm, the bank became the holder for value: Ex p. Richdale, 19 Ch. D. 409; Royal Bank v. Tottenham, [1894] 2 Q. B. 715; Capital and Counties Bank v. Gordon, [1903] A. C. at p. 245. . . .

It would not have been sufficient in this case that the Imperial Bank were guilty of negligence in dealing with the cheque as they did to enable the plaintiff to recover. It would be necessary for him to go further and to prove bad faith. The trial Judge, who saw and heard the witnesses, found that the good faith of Mr. Hay, the manager of the bank, was not only above suspicion, but that there was not any negligence. A careful reading of the evidence makes the same impression on my own mind. There appears to be nothing to suggest that Mr. Hay had any suspicion that anything was wrong or that he refrained on that account from asking questions or making further inquiry.

Appeal dismissed.

OSLER, J.A., not without doubt, agreed in the result, saying that it could not clearly be inferred from the evidence that the trial Judge's finding of good faith was wrong.

MEREDITH, J.A., also agreed in dismissing the appeal, giving written reasons.

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

OCTOBER 30TH, 1909.

LESLIE v. McKEOWN.

Negligence—Personal Injuries—Careless Driving — Findings of Jury—Evidence—Judge's Charge—Appeal.

Appeal by the defendant from the judgment at the trial in favour of the plaintiff, upon the findings of a jury, in an action

for damages for personal injuries to the plaintiff, upon a street in the city of Toronto, by reason, as he alleged, of the defendant's servant, driving the defendant's horse and carriage, negligently running into the plaintiff and causing the injury.

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

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

N. F. Davidson, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—This case is one in which, upon the evidence, reasonable men might find that the plaintiff's injury arose from his own negligence, or from the negligence of the defendant's groom, or that it happened without negligence being reasonably attributable to either of them—just one of those accidents which will happen, and for which no one can be properly adjudged liable, so long as nothing more than ordinary care is exercised, and no more than that is imposed as the legal duty, towards one another, of those making a lawful use of the highways.

The case was not put to the jury thus; but they were impressed with the view of the learned Judge that it depended upon the accuracy of the testimony of the witnesses on the one side or the other, which testimony was referred to in a manner that gave the plaintiff much hopeful satisfaction with corresponding depression on the other side.

There were, however, no objections of a substantial character, in these respects, made to the charge; and the jury found for the plaintiff upon evidence which could not have been properly withdrawn from them.

The finding of the jury was, substantially, that, when the plaintiff was in such a position that it was dangerous to him to do so, the groom whipped the horse, accelerating its speed, so as to cause the collision; and that he was negligent in doing so, because he ought to have seen the plaintiff, and, foreseeing the result, have abstained from accelerating the speed until the plaintiff had passed on.

The finding is contrary to a good deal of the testimony, but is in accord with some of it; and the weight of the evidence was a question for the jury.

There is, therefore, no proper means of interfering with the verdict, whether it does or does not commend itself to one's mind.

Appeal dismissed with costs.

OCTOBER 30TH, 1909.

PAQUETTE v. RIDEAU SKATING CLUB.

New Trial—Verdict for Defendants—Setting aside—Restoration by Court of Appeal — Negligence — Evidence—Question for Jury.

Appeal by the defendants from an order of a Divisional Court setting aside the judgment of ANGLIN, J., at the trial, upon the findings of a jury, in favour of the defendants, and directing a new trial. The action was brought by the widow and administratrix of Alphonse Paquette to recover damages for his death from injury sustained by him when repairing an electric light in the defendants' rink, by reason (as alleged) of a boy skating against the ladder on which the deceased was standing.

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

G. F. Shepley, K.C., and W. Green, for the defendants.

W. Nesbitt, K.C., and M. Lockhart Gordon, for the plaintiff.

OSLER, J.A.:—No proper ground was shewn for granting a new trial. It may be conceded that there was some evidence of negligence, and that, if the jury had found for the plaintiff, their verdict could not have been disturbed. But the question was, on the evidence and charge, wholly one of fact. The charge was not objected to in any particular dealing with the legal position of the defendants in respect of their duty to persons lawfully on their property, and it was open to the jury to find that, under all the circumstances disclosed, the defendants were not negligent in omitting to keep the two intruding skaters off the rink. That is the view they took of the evidence. Why should their finding be disturbed? Was it perverse or unreasonable? I think not. It seems to me the ordinary case of evidence warranting a verdict either way; surely the unsuccessful party must in such a case be able to point to something like a mistrial or perverse or unwarrantable conduct on the part of the jury, in order to attack a verdict for his opponent: Metropolitan R. W. Co. v. Wright, 11 App. Cas. 152, 156; Cox v. English, etc., Bank, [1905] A. C. 158; Toronto R. W. Co. v. King, [1908] A. C. 260.

Appeal allowed and judgment dismissing the action restored.

MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., concurred; MEREDITH, J.A., stating reasons in writing.

OCTOBER 30TH, 1909.

AUERBACH v. HAMILTON.

Summary Judgment—Rule 616—Appeal — Leave to Amend and Counterclaim—Terms—Variation on Further Appeal—Costs.

Appeal by the defendant from an order of a Divisional Court varying an order of CLUTE, J., made upon application of the plaintiff under Con. Rule 616, awarding judgment against the defendant for $2,446.55 and costs.

The Divisional Court directed that, upon payment into Court within 10 days of the amount of the judgment with interest from its date, the judgment be set aside and the defendant be allowed to amend his statement of defence and to file a counterclaim therewith.

When the application was made to CLUTE, J., pleadings had been delivered and the defendant examined for discovery. There was nothing in the statement of defence or in the depositions to warrant the conclusion that the defendant had a good defence on the merits, or had disclosed such facts as might be deemed sufficient to entitle him to proceed to trial. There was a clear admission in the defendant's depositions of the salient allegations of the statement of claim and a failure to shew any valid or substantial defence.

Accompanying the appeal to the Divisional Court was an application to let the defendant amend his defence and file a counterclaim and proceed to trial. This was supported by an affidavit made by the defendant, and answered by an affidavit of the plaintiff.

The Divisional Court did not conclude that the order of CLUTE, J., was wrong, but thought that a case had been shewn for letting the defendant in to defend and meet the plaintiff's claim by counterclaim; and they made the order appealed from accordingly.

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

J. W. Bain, K.C., and F. R. MacKelcan, for the defendant.

R. U. McPherson, for the plaintiff.

MOSS, C.J.O., said that the whole matter had come to be one of terms, and that in such a case the terms ought not to extend beyond what might be reasonably necessary for the protection of

the plaintiff pending the final disposition of the action; otherwise they might amount to a denial of justice to the defendant.

Upon consideration of the whole case the Chief Justice thought justice would be done by allowing the judgment to stand for the protection quantum valeat of the plaintiff; the defendant to be at liberty, upon payment of the costs of the application for judgment and the appeal to the Divisional Court, to amend his statement of defence and to file a counterclaim as he may be advised; the costs of this appeal to be costs in the action; in the event of the defendant failing to comply with this order, the appeal to be dismissed with costs.

OSLER, J.A., was of the same opinion, referring to Jacobs v. Booth's Distillery Co., 85 L. T. R. 262 (H. L.); Sheppard v. Wilkinson, 6 Times L. R. 13 (C. A.); Mersey S. S. Co. v. Shuttleworth, 11 Q. B. D. 531 (C. A.); Yearly Practice, 1909, pp. 118, 119.

GARROW, J.A., concurred.

MEREDITH, J.A., and RIDDELL, J., also considered that the matter was one of terms, but thought it was one so much in the discretion of the Divisional Court that their order ought not now to be set aside, though the defendant should have leave to give security for, instead of paying into Court, the debt.

MEREDITH, J.A., also expressed the opinion that in matters of mere practice, and especially in matters of discretion, no encouragement should be given to appeals to this Court.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. OCTOBER 28TH, 1909.

BRADLEY v. BRADLEY.

Contract — Services to Near Relation — Implied Right to Remuneration — Quantum Meruit — Statute of Limitations — Promise of Widower not to Remarry—Public Policy—Moneys Expended—Voluntary Expenditure—Absence of Request.

Appeal by the plaintiff and cross-appeal by the defendant from the judgment of the Judge of the County Court of Essex (sitting for ANGLIN, J.), delivered on the 19th March, 1909.

The plaintiff, an unmarried woman and a sister of the defendant, sought to recover for services rendered to the defendant as his housekeeper and for money alleged to have been expended by her on his behalf.

The defendant's wife died on the 28th August, 1895, leaving two children, one 4 years and the other 21 months old. The plaintiff, at the defendant's request, took up her residence with him. She alleged that, in consideration of her doing so and taking care of the household and children, he agreed to provide her with a comfortable home for her life, and that he promised he would never re-marry. The plaintiff also alleged that, relying on those promises, she moved to where the defendant lived, and performed the duties of the defendant's household until the 15th January, 1908, when the defendant remarried and ceased to support the plaintiff. She claimed remuneration for her services and also $1,160 alleged to have been expended for the defendant's household expenses and dressing his children.

The defendant denied the agreement to remain unmarried, and said that if made it was void; he set up the Statutes of Frauds and Limitations, and alleged that, if any moneys were expended by the plaintiff, they were so expended voluntarily and without request on his part.

The County Court Judge found in favour of the plaintiff for $5 a week for 6 years or $1,530; he also found that she had expended $700 at least for the benefit of the defendant, but voluntarily and without request on his part. The Judge directed judgment to be entered for the plaintiff for $1,530.

The plaintiff appealed in order to have the amount allowed increased, and the defendant appealed on the ground that nothing should be allowed.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

R. F. Sutherland, K.C., for the plaintiff.

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

The judgment of the Court was delivered by MACMAHON, J.: —That there was no agreement that the plaintiff should be paid wages for her services is explicitly stated by the plaintiff herself. . . . . She relies on the verbal statement made by the defendane to her that she would have a home for her life, and that he had insured his life for her benefit for a sum sufficient to support her in the event of his death, and that these were some of the induce-

ments on which she acted when assenting to take charge of his household. . . . The defendant did not contradict the plaintiff's statement that he had told her that he was well insured for her benefit.

[Reference to Mooney v. Grout, 6 O. L. R. 521; Murdoch v. West, 24 S. C. R. 305; Richardson v. Garnett, 15 Times L. R. 127; Walker v. Boughner, 18 O. R. 448; Johnson v. Brown, 13 O. W. R. 1212.]

The plaintiff was relying on the alleged promise of the defendant that he would not marry again, in which case she would have a home during her life with the defendant, unless he predeceased her, and in that event the insurance on his life which he had promised her would enable her to live in comfort after his death.

As to the promise of the defendant not to marry again, it was merely an expression of intention. . . . Had there been an agreement . . . it would have been void on the ground of public policy. . . . In Pollock on Contracts, 7th ed., p. 531, it is said "that a contract by a widow or widower not to marry would probably be good," citing Scott v. Tyler (1788), 2 Bro. C. C. 432. . . . There is not a word . . . which supports the statement in Pollock. In Law v. Peers, 4 Burr. 2225, . . . it was held that a contract in general restraint of marriage was void; Shep. Touch. 132; Jones v. Jones, 1 Q. B. D. at p. 282.

As a representation of an insurance having been effected by the defendant for the benefit of the plaintiff, and that she would have a home during her life with the defendant, was acted upon by the latter in taking charge of the household, I consider that she is entitled, on the authority of the above cases, to hold the verdict given on a quantum meruit for the last six years of her service.

As to the moneys said by the plaintiff to have been expended by her . . . the trial Judge was, I consider, perfectly right in disallowing that part of the plaintiff's claim.

Appeal and cross-appeal both dismissed without costs.

DIVISIONAL COURT. OCTOBER 28TH, 1909.

WEBB v. BOX.

Landlord and Tenant—Illegal Distress—R. S. O. 1897 ch. 342, sec. 18 (2) — Damages — Double Value of Goods—Costs — Counterclaim—Set-off.

Appeal by the plaintiff from the judgment of TEETZEL, J., in an action for an alleged illegal and excessive distress for rent, tried

without a jury. The trial Judge gave judgment for the plaintiff for $464.50, the appraised value of the goods, and for the defendants for $300 on a counterclaim; and directed the two amounts to be set off pro tanto and the balance with $75 costs to be paid to the plaintiff.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

C. A. Masten, K.C., and W. R. Wadsworth, for the plaintiff.

G. S. Kerr, K.C., and J. C. Makins, for the defendants.

The judgment of the Court was delivered by BOYD, C., who said that the action was based on R. S. O. 1897 ch. 342, sec. 18, sub-sec. 2, which is, with slight verbal variations, taken from the Imperial statute 2 W. & M., sess. 1, ch. 5, sec. 4. The English statute says the owner "shall and may" recover double value; the Revision is simply "may," and it is argued that this gives discretion or latitude as to what shall be recovered—that is, it shall not be more than double the value, but it may be less. . . . . Reading secs. 9 and 10 of 2 Edw. VII. ch. 13, as to the consolidation of these Imperial Acts, it is only where the provision of the revised version is not in effect the same as the original that a difference is to be supposed in their legal operation and effect. The pruning of expletives or of superfluous words is not meant to work a change in the effect of the statute. I regard the English and Canadian cases expository of the statute before its adoption in the province as still binding. . . . Had the case been before a jury, they would be instructed to find the value of the goods and then to give double the value, and the like instruction should be observed by any other tribunal of trial.

Then it is contended that there is power to reduce the double value to the single value or otherwise by reason of the provision of the Judicature Act, sec. 57 (3), enabling the High Court "to relieve against all penalties and forfeitures." . . . That would be to repeal by adjudication what the legislature has distinctly provided for, not so much in the way of penalty as to afford protection to tenants against unwarrantable seizures and sales of property to the great detriment of the tenant's rights. . . . [Reference to Stanley v. Wharton, 9 Pri. at p. 310].

Then as to the costs, they were not in the position of ordinary costs of litigation; they are fixed by the statute itself. And the discretionary power given by the Rules of Court relating to the imposition of or dispensation from costs is not exercisable in re-

gard to costs given by statute: Reen v. Gibson, [1891] 1 Q. B. 660.

The right to recover the double value extends not only to the landlord, but to the officers and bailiffs engaged in the illegal proceedings: Hope v. White, 17 C. P. 52; so that the judgment should be varied as to all the defendants.

The correct practice is observed by Mr. Justice Cave in Potter v. Bradley, 10 Times L. R. 445, where in a case under the statute he gave judgment for double the value of the goods with costs and judgment for the defendant on a counterclaim with costs.

The amounts recovered by the parties respectively (using the figures of the trial Judge to ascertain the double value) for debt and costs may be set off and payment made according to the result. Costs of appeal to plaintiff.

DIVISIONAL COURT. OCTOBER 28TH, 1909.

WHITEHORN v. CANADIAN GUARDIAN LIFE INSURANCE CO.

Life Insurance—Payment of Premium—Default—Days of Grace—Extension by Conduct—Waiver.

Appeal by the plaintiff, the widow of Harry Whitehorn, deceased, from the judgment of the County Court of Wentworth dismissing her action to recover $250 upon a policy of insurance on the life of the deceased.

The defence was that the policy was on condition that the plaintiff should pay the annual premium quarterly on the 1st days of March, June, September, and December, and that, in breach thereof, the plaintiff did not pay the quarterly premium which fell due on the 1st September, 1908, whereupon the policy lapsed, and became and was on the date of the death of the deceased null and void.

Another defence was that the policy was subject to a further condition, that grace of one month from actual date of the premium would be allowed for payment, and should the payment not be made within the days of grace, the policy was to become void, but it might be revived within 12 months, on production of evidence of continued good health and the payment of overdue premiums, and that the premium due 1st September not being paid within a month thereafter, the policy became void, and was not afterwards revived by production of the required evidence, etc.

The defendants in the correspondence took the position that the policy lapsed for non-payment on 1st October, 1908, and had not been reinstated.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

J. G. Farmer, for the plaintiff.

S. F. Washington, K.C., for the defendants.

BOYD, C., delivering the judgment of the Court, said that he agreed with the conclusion of the County Court Judge that the defendants, by their practice, through their agents, with the knowledge and consent of the superior officers, took money whenever it was given to them, whether the 30 days of grace were up or not, on premiums, but were not to issue the official receipt till after the whole premium was paid. . . . The Judge, however, decided against the plaintiff on the single point that the plaintiff had no reason to suppose that, if any part of the premium was not paid within the 30 days, and death occurred before the premium was paid, the right of forfeiture was waived. . . .

I think the fair reading of the evidence shews that the woman made all reasonable exertions to pay the 10 cents (the premium), but was frustrated by the action or inaction of the company. The agent Swan was to return for the 10 cents; he came when the family was out, though the money was under the butter dish waiting for him; the plaintiff sought out the place where he was supposed to be next Saturday, before the death, but did not find the agent, nor could find out where he had gone. On Monday 2nd November, after the accident to the deceased, the plaintiff's daughter tendered the 10 cents to Swan, but he refused to take it. . . . If the agency of Swan was ended, it was only fair to notify the insured as to whom or when payments were to be made, but this was neglected to the plaintiff's detriment. . . .

The proposition and attitude of the company is that the policy lapsed or became avoided for non-payment at the end of the 30 days of grace, i.e., 1st October. Why then was 45 cents on account of the premium received and carried into the books of the company as a good payment on 24th October? The receipt is expressed to be on account of policy 2375, and the company by its dealing is, I take it, estopped from saying that it was not then a current policy, and that the money was not received on a good subsisting contract of insurance.

I read the evidence as giving the insured a reasonable time to complete the payment of the whole premium by handing in the 10 cents, and that such an engagement remains operative though death ensues. There was a departure from the terms of the policy in this, that more than 30 days' grace was given—in fact one might well conclude that if payments were being made by driblets it would be enough if the whole was made up during the currency of the quarter. If the strict right to forfeit at the expiry of the calendar month of grace was waived, I do not think that the company could, of its own motion and without specific warning, revive that right afterwards for non-payment of a small balance. . . .

[Reference to Redmond v. Canadian Mutual Aid Association, 18 A. R. 335; Dilleber v. Knickerbocker Insurance Co., 76 N. Y. 567; Black v. Allan, 17 C. P. 240, 248; Manhattan Life Insurance Co. v. Hoclyle, 8 Ins. L. Jo. 226.]

Altogether I hold that the plaintiff is entitled to recover the full amount of the policy, $250, with costs below and in appeal.

BRITTON, J., IN CHAMBERS. OCTOBER 29TH, 1909.

KELLY v. ROSS.

Security for Costs — Libel — Newspaper — Order of Master in Chambers Refusing Security—Affirmance by Judge in Chambers—9 Edw. VII. ch. 40, sec. 12 (4)—Appeal to Divisional Court—Leave Refused.

Application by the defendant for leave to appeal to a Divisional Court from the order of FALCONBRIDGE, C.J.K.B., in Chambers, ante 48, dismissing an appeal from the order of the Master in Chambers, dismissing a motion for security for costs made by the defendants in this action.

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

W. R. Wadsworth, for the plaintiff.

BRITTON, J.:—The action is one for libel, and, in my opinion, any appeal from the order in question is expressly prohibited by statute.

Section 15 of ch. 68, R. S. O., is as follows: "An order made under sec. 10 by a Judge of the High Court granting or refusing security for costs in an action for libel contained in a newspaper

shall be final, and shall not be subject to appeal; and when the order is made by a local Judge the same may be appealed from to a Judge of the High Court sitting in Chambers, whose order shall be final and shall not be subject to appeal." This section is re-enacted almost verbatim in sec. 12, sub-sec. 4, ch. 40, 9 Edw. VII. (O.)

It was argued:—

(1) That it is only an order granting security that cannot be appealed from, and the judgment of my brother Riddell in Robinson v. Mills, 19 O. L. R. at pp. 172, 173, was cited as authority for that proposition. I do not so read or interpret my brother's decision.

(2) That, even if there is no appeal from the decision of a Judge of the High Court given on appeal to him from a local Judge, there may be an appeal from the decision of such Judge of the High Court given on appeal from the Master in Chambers. I cannot give effect to this contention. If the Master in Chambers has jurisdiction in the first instance to entertain an application for security for costs, it was not intended to give, and in my opinion the law does not give, to either party any greater right of appeal than if the application was to a local Judge.

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

DIVISIONAL COURT. OCTOBER 29TH, 1909.

FINN v. GOSNELL.

Appeal — Report of Referee — Findings of Fact—Costs—Claim under Contract — Set-off — Reduction of Claim — Scale of Costs—Jurisdiction of County Court—Form of Pleadings—Appeal as to Costs.

The plaintiff sued for $453 alleged to be due to her for work done under a contract or contracts made between E. L. Finn and the defendant, the plaintiff claiming by assignment from the assignee of E. L. Finn.

The defendant, after a denial, said that E. L. Finn made default under his contract, whereby the defendant suffered $500 damages; that he had laid out in completing the contract all the balance of the money to which E. L. Finn would have been entitled on completion of his work; and by way of set-off and counterclaim the defendant claimed: (1) $436.06 for moneys spent by defend-

ant in completing the work; (2) $500 for damages by reason of the default of E. L. Finn.

At the trial a reference was directed "to take all necessary accounts and make all necessary inquiries as to the matters in question in this action;" it was also ordered "that the costs of this action and of the said reference shall be in the discretion of the said referee, and shall be taxed and paid as he shall direct;" and that "the party by whom any amount shall be found by the referee to be due do pay to the party to whom such amount shall be found due the amount which the referee shall find to be payable after the confirmation of the referee's report."

The referee found that the defendant was entitled to a certain set-off, but disallowed two items, viz., $62.50 for the money paid to one Barber and $10 for money paid for bolting the house. The referee allowed the plaintiff $170 and costs on the High Court scale.

Upon appeal by the defendant, MULOCK, C.J.Ex.D., varied the report by allowing the $62.50; no costs of the appeal were allowed.

The defendant appealed to a Divisional Court upon the $10 item and also as to the disposition of the costs; the plaintiff cross-appealed upon the item of $62.50.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

F. Arnoldi, K.C., for the defendant.

W. J. Elliott, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J., who said, as to the $10 item, that the bolting of the house was necessary beyond any question, but there was no evidence requiring the referee to find that the damage was caused by any negligence or any act of Finn, and the appeal as to that item failed.

As to the $62.50, that was a sum which the defendant paid to one Barber for supervising the work which was done. There is no contract upon the part of the plaintiff's assignor to pay for a servant of the defendant supervising the work, and there is no evidence upon which it can fairly be found that this expense was due to any fault of the contractor. The referee saw the witnesses, and where it is a matter of the credit to be given to the witnesses . . . according to the well established practice in Ontario, the Master is the final judge of the credibility of these witnesses: Booth v. Ratté, 21 S. C. R. 637, 643; Fawcett v. Winters, 12 O. R. 232; Winter v. Pilling, 9 Q. B. D. 736; Hall v. Berry, 10 O. W. R. 954,

955. The appeal of the plaintiff as to the $62.50 should be allowed. The result will be that the referee's findings will be restored as far as the amount is concerned.

Then as to costs. Gates v. Seagram, 19 O. L. R. 216, in the Court of Appeal, has made it clear that the form of the pleadings may be disregarded. It, therefore, appears that here the plaintiff had a claim in excess of the jurisdiction of the County Court, but that the defendant had a set-off which, upon being allowed, reduced the amount below the maximum County Court jurisdiction. In that case Furnival v. Saunders, 26 U. C. R. 119, shews that before the Judicature Act the action could not have been brought in the County Court. See also Osterhout v. Fox, 14 O. L. R. 555; Cutler v. Morse, 12 P. R. 594, 595. So that, even if this award of costs is appealable, the judgment of the referee is right. Whether an appeal lies at all, I express no opinion.

The report of the referee will be reinstated with costs before the Chief Justice and in this Court—including costs of appeal and cross-appeal.

MULOCK, C.J.Ex.D. OCTOBER 30TH, 1909.

FORD v. CANADIAN EXPRESS CO.

Malicious Prosecution and Arrest—Action in Respect of two Distinct Prosecutions—Findings of Jury on one Branch only—Judgment — Fresh Trial on the other Branch — Absence of Reasonable and Probable Cause.

Action for damages for malicious prosecution and false arrest.

On a certain day a man presented himself at the defendants' Toronto office with a written order purporting to be signed by White & Co., a business firm in Toronto, requesting the company to deliver to the bearer for the firm a book of express orders, which was accordingly done, the man giving to the defendants a receipt in the name of White & Co. for the book. Shortly thereafter it was discovered that the order was a forgery, and that White & Co. had nothing whatever to do with the transaction. Suspicion was cast upon the plaintiff by reason of a supposed similarity in his handwriting to that of the forgeries. Genuine samples of his writing, together with the forged documents, were shewn to an expert, who said there was a resemblance in some respects, but declined to give an opinion unless he were permitted to take the papers home and study them; this opportunity was not afforded him. Mitchell,

the local agent of the defendants, swore to an information charging the plaintiff with having forged one of the express orders issued from the book in question. Thereupon the plaintiff was arrested on the 29th August, 1908, and kept in custody, bail being refused, until the 4th September, when he was admitted to bail. Subsequently the same expert was asked to make a report, which he did, stating that, in his opinion, the plaintiff was not the forger. Thereupon the Crown withdrew the charge of forgery. On the same day Mitchell swore to another information charging the plaintiff with theft of the book of orders; a warrant was issued, the plaintiff was arrested, admitted to bail, tried at the Sessions on the charge of theft, and found not guilty.

This action was brought for damages because of these prosecutions.

In submitting the case to the jury, MULOCK, C.J., divided the plaintiff's causes of action into three: (1) in respect of the arrest and proceedings for forgery down to the first remand; (2) in respect of the proceedings from the first remand until the termination of the proceedings for forgery; (3) in respect of the arrest for theft; and he prepared questions applicable to each of these causes of action. By mistake, one sheet of paper, containing 5 questions prepared for the jury, became detached from the others, and only after the jury had been discharged, after having answered certain questions, was it discovered that the paper containing these 5 questions was not taken by the jury to the jury room, with the result that there was no finding in regard to them. They related entirely to the charge of forgery.

As to the cause of action for theft, the jury found malice against the defendants; that the plaintiff was not guilty of the stealing charged; that Mitchell, their agent, at the time he laid the information for stealing, did not honestly believe the plaintiff guilty of that offence; and they awarded the plaintiff $750 damages for the arrest for theft.

H. H. Dewart, K.C., and J. S. Lundy, for the plaintiff.

C. Millar, for the defendants.

MULOCK, C.J., was of opinion that the findings did not warrant a judgment for either party in respect of the prosecution for forgery. The causes of action, however, being entirely separate, the proper course to adopt was to treat the issues in regard to the forgery charges as untried, the plaintiff being at liberty, if he so desired, to go to trial on these two issues. On the answer that Mitchell, who laid the information leading to the plaintiff's arrest for stealing, did not honestly believe him guilty, there was an

absence of reasonable and probable cause, and the plaintiff, if he so desired it, was entitled to judgment at this stage for $750, being the damages awarded in respect of the arrest for theft, and to go to trial on the other issues. The plaintiff was entitled to the costs of the action.

BOYD, C. OCTOBER 30TH, 1909.

McDONALD v. CURRAN.

Fraudulent Conveyance — Intent to Defeat Execution—R. S. O. 1897 chs. 115, 147—Amendment—Unjust Preference—Following Notes or Proceeds — Disposition — Consideration—Bar of Dower — Husband and Wife — Transactions between — Bona Fides.

This action was tried before BOYD, C., and a jury at Toronto. The nature of it is described in the judgment.

G. C. Campbell, for plaintiff.

The defendant Elizabeth Curran, in person.

BOYD, C.:—The action is framed on the theory that the defendant Mrs. Curran received the notes sought to be followed without consideration, and alleges that the same were taken with a view to defeat and delay the plaintiff's execution. The action rests on the Statute of Elizabeth (now ch. 115, R. S. O.) and the clause in pari materia in the Act relating to assignments and preferences by insolvent persons (R. S. O. ch. 147). This action does not attack on the ground of fraudulent or unjust preference, and is not framed as a representative suit, i.e., one on behalf of all creditors: see ch. 147, sec. 10 (3. Application was made to amend by making it on behalf of other creditors, but it would be incongruous on the same record to attack a voluntary acquisition of property as a fraud on the ground of its defeating the plaintiff's execution and also to attack the defendant as a creditor who has obtained an unjust preference. I did not allow the amendment because, as it strikes me, the claim on the ground of unjust preference would only extend to $100 received by Mrs. Curran.

This is the second time that this litigation has been before me: first, in a claim upon the whole transaction of sale of land and goods as between the debtor Curran and the purchaser Horan; and now a claim upon part of the purchase money which was received by Curran's wife in the shape of 4 promissory notes

amounting to $700. The evidence is much the same in both cases; the first action (McDonald v. Horan) failed on grounds disclosed in part in the report 12 O. W. R. 1151, and the second case (this action) has been, on interlocutory application, before Mr. Justice Britton, as reported in 13 O. W. R. 272.

I notice in the report of oral judgment in the former case that my opinion was in favour of the credibility of the wife; she so impressed me in the present trial. I believe that she advanced $200 to her husband in 1902 or 1903, which was paid upon a mortgage on the farm, and that she also advanced him $100. I think it is true that she toiled hard on the place at outdoor and indoor work on account of the physical incapacity of the husband. The parties, I think, all acted (even the conveyancer who drew the deed) on the belief that she was entitled to dower, and she positively refused to sign the deed to Horan unless her claims were recognised: Forest v. Laycock, 18 Gr. at p. 621; Re Vautier, 7 Mans. 291. While the transaction as to the $300 of debt was between her and her husband, the transaction as to the bar of dower in the deed was between her and Horan. The notes did not come to her through her husband, but were made to her and payable to her. The bona fides of the transaction has been affirmed by me in the previous judgment as against Horan, and that, I think, involves the conclusion that the payment, so far as it relates to the assumed right of dower in the wife, is not impeachable under ch. 147. The $400 does not represent money of the husband's which was given to the wife, but it represents what Horan paid to get a deed signed by the wife in respect of her supposed dower.

The other $300 is to be treated as if it were paid or turned over by the husband to the wife, and might be a proper subject of attack under ch. 147, sec. 2, sub-sec. 2. But, so far as regards the $200 which went to relieve a mortgage on the land, the payment cannot be regarded as an unjust preference. The land was to that extent exonerated, and there was no unfairness in recouping the wife to that extent.

There remains only $100 which might be impeachable under the statute. But it is to be remembered that Horan paid in $100 of the $200 before action, and the money cannot be traced, and that the others were cashed by Mrs. Horan before action for $485, as to about $400 of which Mr. Justice Britton granted the injunction. The amount in her possession is now (as she tells us at the trial) reduced to $275.

It is not necessary to attribute any part of this to either the $100 or $200 advanced to the husband; and indeed as to whole

$400 in her hands when the injunction issued, it may be taken to be referable to what Horan paid her for signing the deed.

I do not think that the defendant Mrs. Curran should be imprisoned for having reduced the amount of money in her hands when the injunction was granted, and I do not see my way to grant the relief claimed in the alternative that the money now in her hands should be specifically laid hold of by the Court.

In the result, therefore, it appears to me that the best disposition I can make of this second litigation is to dismiss it without costs.

DIVISIONAL COURT. OCTOBER 30TH, 1909.

TOWNSHIP OF BUCKE v. NEW LISKEARD LIGHT HEAT AND POWER CO.

Highway—Right of Company to Place Poles and Wires on Public Road—Statutory Authorisation—Power of Company—R. S. O. 1897 ch. 200—Municipal Corporation—Injunction—Allegation of Mala Fides.

The plaintiffs alleged that the defendants, without leave or license of the plaintiffs, entered upon a highway in the township and erected and maintained a number of poles and strung wires thereon for the purpose of transmitting electricity to Haileybury from New Liskeard; and they claimed damages for the trespass, and asked for the removal of the poles and wires.

The defendants set up that they were incorporated under the Ontario Companies Act, and had the right to do the acts.

By consent the action was referred under R. S. O. 1897 ch. 62, sec. 24. The referee reported that the plaintiffs should recover $1 for damages for trespass, that the defendants should within 30 days furnish a bond of indemnity to the plaintiffs, and that, in default of such indemnity, the defendants should be restrained from continuing their poles, etc., and that the plaintiffs should have the costs of the action.

The plaintiffs appealed, and upon the appeal MEREDITH, C.J.C.P., struck out the provision as to bond of indemnity, etc., and directed the defendants to remove their poles and wires, and perpetually restrained them from maintaining the same — these orders not to become effective till the 1st April, 1910, unless otherwise ordered.

The defendants appealed to a Divisional Court, upon the grounds: (1) that they had the power—irrespective of any permission or act of the plaintiffs—to place and maintain their poles and wires as they had done; and (2) that the plaintiffs were taking the present proceedings mala fide and in order to compel the payment of an extortionate rental.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

H. D. Gamble, K.C., and F. L. Smiley, for the defendants.

R. McKay, for the plaintiffs.

The judgment of the Court was delivered by RIDDELL, J., who said that the first contention was based upon the proposition that the defendants' incorporation was under R. S. O. 1897 ch. 200, and that conclusion was not supportable. That chapter was intended to provide for the case of persons desiring to form a company for supplying steam, etc., or electricity, etc., for the purpose of light, heat, or power in any municipality—not a company having such broad and general powers as were contained in the charter of this company. (The company were incorporated on the 28th November, 1906, under the Ontario Companies Act, "to acquire and carry on the electric light and power plant at present operated at the said town of New Liskeard . . . by Kalil Farah, to acquire by purchase the water power owned by the said Kalil Farah in the township of Dymond, and to acquire by purchase, lease, or otherwise, and to maintain, utilise, or develop water powers or other powers for the production of electricity, pneumatic, hydraulic, or other power or force for any purpose for which electricity or power can or may be used," and with many other such objects of a very general and non-local character.) That this is so is made perfectly clear by the language of the statute itself, e.g., it is "the municipality" which we find mentioned from time to time—see sec. 3. The legislation comes ultimately from 42 Vict. ch. 24 and 45 Vict. ch. 19. The company then are in the same position as any other company for commercial purposes. They have no right upon the streets or highways without having received legislative sanction, either directly, or indirectly through the action of properly authorised municipal bodies, and that these defendants have not received. . . ."

We have no concern with the motives of the plaintiffs; when they come to Court, they are entitled to their legal rights, no matter what may be the motive which induced them to assert such rights. . . .

[Reference to Attorney-General v. Sheffield Gas Co., 3 D. M. & G. 311, per Knight Bruce, L.J.]

There is no analogy between this case and Bell Telephone Co. v. Town of Owen Sound, 8 O. L. R. 74, or Re Rowland and Town of Collingwood, 11 O. W. R. 804. In these cases by-laws passed in bad faith were declared ultra vires and invalid; here the municipality ask the Court to enforce a legal right.

Appeal dismissed with costs.

DIVISIONAL COURT. OCTOBER 30TH, 1909.

CLARK v. BAILLIE.

Broker—Pledge of Shares by Customer Buying on Margin—Repledge by Broker—Custom of Stock Exchange — Evidence — Amount Advanced to Brokers not Exceeding Amount Due by Customer—Action for Conversion of Shares—Damages—Interest.

Appeal by the plaintiff from the judgment of MACMAHON, J., 14 O. W. R. 104, dismissing an action against brokers for damages for the alleged conversion of shares.

The appeal was heard by MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

C. Millar and W. C. Mackay, for plaintiff.

I. F. Hellmuth, K.C., and E. G. Long, for defendants.

The judgment of the Court was delivered by MULOCK, C.J., who, after setting out the facts, said the Court assumed it to be the law that the hypothecation of the plaintiff's stocks by the defendants for their own benefit for a large sum of money over and above the amount payable by the plaintiff in order to redeem her stocks, operated as a conversion, but the subsequent action of the plaintiff, whether with or without knowledge of such hypothecation, in accepting delivery of these stocks and selling them, altered her legal position and disentitled her to maintain trover. The stock which was purchased for the plaintiff was delivered to her the moment she demanded and paid for it. Till then she was not entitled to possession. At no time was delivery wrongfully withheld from her, and it is not suggested that she sustained any damage because of the hypothecation of the stocks.

Mr. Mackay, however, contended that upon hypothecation of the stocks by the defendants, there was a conversion, and that, therefore, all the moneys paid by her on account of the purchase money, or a sum by way of damages, is recoverable in an action of deceit. . . .

In a case like the present, where the plaintiff has sustained no damage, the delivery of the stocks to her after their technical conversion, would, I think, have prevented her maintaining trover because of such conversion. . . .

[Reference to Fisher v. Burns, 3 Burr. 1364; Moon v. Raphael, 5 C. B. N. S. 46, 2 Bing. N. C. 314; Gibson v. Humphrey, 1 Cr. & Mees. 544; Stimson v. Block, 11 O. R. 103.]

The cases shew the practice in England to be that, where no damage by the conversion is shewn, the defendant is permitted to bring the property into Court and to tender it to the plaintiff. Here, it has not been shewn that the wrongful acts of the defendants caused any damage to the plaintiff. It would have been competent for the defendants, in an action of deceit, to have set up all the facts, including the delivery of the stocks to the plaintiff, and the absence of damage to her. Such a defence, if established, would, I think, have been an effectual bar to the plaintiff's claim for relief in such an action.

Applying that reasoning here, the plaintiff was not damaged by the hypothecation of the stocks, and there was, therefore, no misrepresentation which gave her a cause of action. The delivery of the stocks to her annulled the effect of their previous technical conversion, and restored both parties to their former positions, thus leaving the plaintiff in debt to the defendants for the unpaid purchase money, which they would have been entitled to recover in an action of debt against her. In paying the amount to the defendants, she was simply discharging a legal liability, and therefore has no cause of action because of such payment. I therefore think the learned trial Judge was right in holding that, in the absence of damage, the plaintiff was not entitled to maintain this action.

She also claimed repayment of interest paid to the defendants in excess of the legal rate. At the commencement of the transactions between the parties there was no agreement as to rate of interest to be charged to the plaintiff, but she had reason to know that the defendants would have to borrow the money, and would themselves be liable for the amounts borrowed on her account. During the continuance of the loan they charged her the rates which they themselves had to pay for her money, together with one-half per cent. by way of remuneration to themselves for their

trouble and responsibility, and they continuously, during the currency of the transaction, rendered to her statements, some of which, on their face, shew the rate of interest (at 6 and at times 7 per cent.) which she was being charged. At no time did she object to these rates, but, on the contrary, from time to time made payments which covered the interest charges, and finally paid the whole amount so claimed. The rates thus charged her being reasonable, her continuing to accept the accommodation furnished to her by the defendants' borrowings on her behalf, her acceptance of the stock without complaint, and her various payments covering the interest charged without objection, are evidence on her part of an agreement to pay the rates charged. I therefore think no injustice has been done to her in the matter of interest, and that no portion of the moneys paid on account of interest is recoverable.

For these reasons this appeal should, I think, be dismissed with costs.

RIDDELL, J. NOVEMBER 1ST, 1909.

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

Contract—Construction—License to Take Water from River for Generating Electricity — Dispute as to Rate of Payment — "Electrical Horse Power"—Sale of Electricity—Rate Proportioned to Vendible Output.

By Act of the Ontario Legislature in 1892, 55 Vict. ch. 8, the defendant corporation was formed and the agreement set out in schedule A. to the Act was approved, ratified, and confirmed, the objects of the company being "to construct, maintain, and operate works for the production, sale, and distribution of electricity and pneumatic power for the purposes of light, heat, and power." The agreement was between the company and the Queen Victoria Niagara Falls Park Commissioners, "acting on their own behalf and with the approval of the Government of the Province of Ontario." The Commissioners granted the company a license to take water from the Niagara river at a certain place, to excavate tunnels, etc., "for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park." The license was for 20 years from the 1st May, 1892, "the company paying therefor at the clear yearly rental of $25,000 during the first 10 years, and for the second 10 years a sum increasing by $1,000 each year, so that the amount for the 20th year was $35,000."

On the 27th November, 1897, the company entered into a contract with the Commissioners, acting as before, and the Niagara Falls Park and River Railway Co., approved by the Lieutenant-Governor in council on the 9th December, 1897.

The Ontario Act 62 Vict. (2) ch. 11 (1st April, 1899), by secs. 35 and 36, permitted the Commissioners to get rid of the restrictions of the agreement of 1892, and to enter into agreements with persons and to take water from the Niagara and Welland rivers for the purposes of enabling such persons, etc., "to generate electricity," etc.

The agreement in question in this action was entered into on the 15th July, 1899, between the Commissioners, acting as before, and the defendants.

Clause 2 is as follows: "The said agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable, is hereby amended by providing that from and after the 1st day of May, 1899, the rent payable under the said agreement, in lieu of that specified in paragraph 4 thereof, shall be up to the 1st day of May, 1949, the sum of $15,000 per annum, payable half-yearly on the same days and times as specified in said paragraph 4 of said agreement, and, in addition thereto, payment at the rate of the sum of $1 per annum for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power up to 20,000 electrical horse power, and the further payment of the sum of 75 cents for each electrical horse power generated and used and sold or disposed of over 20,000 electrical horse power up to 30,000 electrical horse power, and the further payment of the sum of 50 cents for each electrical horse power generated and used and sold or disposed of over 30,000 electrical horse power; that is to say, by way of example, that on generation and use and sale or disposal of 30,000 electrical horse power, the gross rental shall be $32,500 per annum payable half-yearly, and so on in case of further development as above provided, and that such rates shall apply to power supplied or used either in Canada or the United States. Such additional rentals as shall be payable for and from such generation and sale or other disposition as aforesaid to the Commissioners shall be payable half-yearly, at the rate above specified, on the 1st days of November and May in each year for all power sold in the said several half-yearly periods from the day of sale; and, within 10 days after said 1st days of November and May in each year on which such additional rentals shall be payable respectively, the treasurer, or, if no treasurer, the head officer of the company, shall deliver to the Commissioners a verified statement of the electrical horse power generated

and used and sold or disposed of during the preceding half-year, and the books of the company shall be open to inspection and examination by the Commissioners or their agent for the purpose of verifying or testing the correctness of such statement; and, if any question or dispute arises in respect of such return, or if any statement delivered at any time by the company to the Commissioners of the quantity or amount of the electrical horse power generated and used and sold or disposed of, or of the amount payable for such additional rentals, the High Court of Justice for Ontario shall have jurisdiction to hear and determine the same and to enforce the giving of the information required."

The dispute which arose was as to the amount to be paid by the defendants under this clause.

The claim of the Commissioners (represented by the Attorney-General as plaintiff) was based upon the assertion that they had no concern with the amount of work done by the electricity nor with anything but the highest rate; they said that after the generation began they were entitled to keep watch, and so soon as the rate of 10,000 horse power was exceeded by one horse power, they had the right to rent or payment at the rate of $1 per annum; as soon as one more horse power appeared in the rate, another dollar, etc. This was to continue, the maximum rate was to be taken and charged for until exceeded by a future rate, and then this larger rate was to be taken as the basis. It made no difference, they said, that any maximum were momentary or not maintained; the defendants, having once developed any horse power, must pay for that horse power, although the generation of electricity should go down ad infinitum. It was the defendants' look-out to see that the maximum rate was kept up once it was attained, and the Commissioners, having furnished the water to generate that power, had no further concern with it.

Sir Æmilius Irving, K.C., C. H. Ritchie, K.C., and C. S. MacInnes, K.C., for the plaintiff.

W. Nesbitt, K.C., A. Monro Grier, K.C., and A. M. Stewart, for the defendants.

RIDDELL, J., examined all the agreements between the parties and the various statutes relating thereto, and gave explanations of many of the terms used (saying, inter alia, that "electrical horse power" meant the rate at which work was done by electricity) and shewed by illustration the practical result of the plaintiff's argument.

On the construction of the contract, parts of his judgment are as follows:—

It was in contemplation of the parties to this business contract that the defendants were to pay an amount proportioned to what they could and did sell; and, since an electrical horse power (or any horse power) cannot be sold, the expression in the early part of clause 2 must receive an interpretation which will give to the words a sensible construction and one in accordance with the object of the contract. "At the rate of one dollar per annum" means at a rate which, if it continued for one year, would be one dollar. For example, if a contract were to pay for any horses over 20 at the rate of $50 per annum for each, it would not mean that, once more than 20 horses were supplied, they must all be paid for for the full year or the period after their first supply, although they were furnished only for a day or a month. So here, I think, once the electricity is being sold and therefore generated so as to give power at a rate greater than 10,000 horse power, it must be paid for at the rate of $1 per annum per extra horse power, so long as the electricity continues, but the contract does not mean that the electricity must continue to be paid for, although the current producing that extra horse power rate should cease the next moment.

. . . .

It is said that, while the amount of electricity used by the defendants is very trifling as compared with what is sold, this may not continue to be the case, and I am, therefore, asked for a declaration as to the true amount upon which the computation is to be based to fix the remuneration. I am of opinion that it is the amount not used by the defendants themselves. . . . It is not the hydraulic power and its equivalent in electricity which forms the basis; it is only so much of that power as produces electricity that can be utilised. . . . It is the vendible output that is charged for. . . .

The action fails—the plaintiff should pay the costs. There will be a declaration as to the meaning of the contract.

RIDDELL, J. NOVEMBER 2ND, 1909.

WHICHER v. NATIONAL TRUST CO.

Contract—Advertisement—Redemption of Bonds—Specific Performance—Mortgage Trust Deed—Breach of Trust—Trustees Acting "Honestly and Reasonably"—62 Vict. (2) ch. 15, sec. 1 (O.)

The Dominion Copper Co., a mining company operating in British Columbia, on the 1st June, 1905, issued bonds to the face

value of $1,000,000 in denominations of $100, $500, and $1,000. These were secured by a mortgage to the defendants of the same date; and the plaintiff became the holder of $10,000 thereof. In May, 1907, the defendants advertised for offerings of such bonds for redemption; the plaintiff offered his $10,000 at 82; the defendants did not accept; they redeemed other bonds, but not those of the plaintiff.

On the 6th November, 1908, the plaintiff brought this action for breach of trust by the defendants as trustees, and (by amendment) claiming specific performance of a contract which he alleged had been made, or damages in lieu thereof.

No charge of collusion, fraud, or other impropriety was made against the defendants, but it was alleged that they had misinterpreted their deed of trust, and were liable as for a breach of their trust.

J. H. Moss, K.C., and C. A. Moss, for the plaintiff.

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

RIDDELL, J. (after setting out the facts and the provisions of the mortgage trust deed):—The plaintiff's claim in contract is put forward thus: The defendants are trustees under all the terms of the trust deed; one of these is that they "from the bonds offered . . shall purchase those bonds which are offered . . at the lowest price;" the advertisement and circular referred to the trust deed, and consequently the advertisement and circular should be taken as though the defendants were expressly promising to buy in accordance with the terms of the trust deed, i.e., the bonds which were offered at the lowest price; that this constituted an offer by the defendants to buy upon the tender at the lowest price; that the plaintiff did so tender; and consequently the defendants are bound.

Such cases as Crandall v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, Johnston v. Boyes, [1899] 2 Ch. 74, Maskelyne v. Slattery, 16 Times L. R. 97, Warlow v. Harrison, 1 E. & E. 295, 317, are cited in support.

No doubt, if this advertisement were to be read as saying, "We ask offerings of bonds, and will buy the bonds which are offered at the lowest price," then, if the offerings of the plaintiff were at the lowest price, the very offering might be considered an acceptance by the plaintiff of a contract offered to him by the defendants: see per Lindley, L.J., in [1893] 1 Q .B. at pp. 262, 263. But there is no such statement made in the advertisement. It is sought to import into the advertisement the terms of the trust deed.

Although Rooke v. Dawson, [1895] 1 Ch. 450, is not conclusive against this view, as there the deed was not mentioned in the advertisement (see p. 486), I do not think that the deed is by implication made part of the advertisement. But, if it were, the direction to purchase at the lowest price cannot mean precisely what the literal meaning of the words is. In the present instance there is an offer of 1,000 at 75; one of 1,000 at 76; one of 1,000 at 77; one of 7,900 at 77, &c. The bonds offered at the lowest price are those included in the offer at 75. It could not be contended that the purchase of the 1,000 at 75 would be a complete exercise of the powers given by the trust. The expression must, in a business document, receive a business interpretation—the meaning can be determined from a consideration of the object for which the power is given. The object is to redeem as many bonds as possible at the cheapest rate, to spend the money furnished by the company in reducing as much as possible the bonded indebtedness of the company. I am of the opinion that the method ultimately pursued by the defendants was unexceptionable from a business point of view, and was in no way a violation of the terms of the deed of trust.

I think the plaintiff fails in contract. If he be held entitled to recover in contract at all, I find that the market price of the bonds at the time of the breach was 75 — his damages will then be $700.

The same considerations will also prevent him from recovering as cestui que trust.

The defendants have in the premises acted honestly and reasonably and ought fairly to be excused for the breach of trust, if there was one: 62 Vict. (2) ch. 15, sec. 1 (O.); Higgins v. Trust Corporation of Ontario, 27 A. R. 423; Smith v. Mason, 1 O. L. R. 594; Henning v. Maclean, 2 O. L. R. 169, 4 O. L. R. 666; Re Village of Markham and Town of Aurora, 3 O. L. R. 609; Dover v. Denne, 3 O. L. R. 664; King v. Matthews, 5 O. L. R. 228; Elgin Loan and Savings Co. v. National Trust Co., 7 O. L. R. 1, 10 O. L. R. 41; Chapman v. Brown, [1902] 1 Ch. 785, especially at p. 805.

I am also of the opinion, as at present advised, that the other provisions in the trust deed protect the defendants, but I do not consider it necessary to pass upon that question.

The action will be dismissed with costs.

FALCONBRIDGE, C.J.K.B. NOVEMBER 2ND, 1909.

BURCH v. FLUMMERFELT.

Deed—Construction—"Children"—Absence of Particular Estate—Title by Possession—Statute of Limitations—Provisions of Will—Presumption from Knowledge of.

Action to recover possession of land and for mesne profits and to set aside a conveyance by Johnson Burch to the defendant.

A. C. Kingstone, for the plaintiffs.

M. J. McCarron, for the defendant.

FALCONBRIDGE, C.J.:—I allowed the declaration of Johnson Burch to be filed as part of the history of the making of the conveyance relied upon by the defendant, but it is not evidence of the facts therein stated, and I entirely disregard it. It is quite clear that the money paid for the land was the money bequeathed to Johnson Burch by his mother's will. Johnson's habits were such that his mother provided that all legacies to him should be invested or applied to the purchase of land to be held in trust by her executors during his natural life, and to be equally divided among his children. The means adopted to carry out the wishes of the testatrix consisted in taking a deed from the vendor of the lot in question to the "lawful children or heirs of Johnson Burch." The introduction of the word "children" renders unnecessary the consideration of whether there is any infirmity in the grant by reason of the absence of a particular estate. The statute R. S. O. 1897, ch. 119, sec. 2, would, no doubt, suffice to cure the objection in any event.

Then as to the contention that Johnson Burch had acquired a title by length of possession. The answer to this contention is that Johnson Burch knew of the will and must be assumed to have taken the land under the trusts of the same, and his possession ought not, under the circumstances, to be treated as adverse: Kent v. Kent, 20 O. R. 445.

The case is a pretty hard one on the defendant, who has, no doubt, expended a good deal of money for and on behalf of Johnson Burch under the expectation of getting the property.

The plaintiffs offered in open Court to repay to the defendant the funeral expenses, amounting to $60 (including the minister's fee), paid by her, and this offer I shall expect them to carry out.

There will be judgment for the plaintiffs for possession of the lands, and setting aside the conveyance from Johnson Burch to the defendant, and $1 for mesne profits, without costs.

MEREDITH, C.J.C.P., IN CHAMBERS. OCTOBER 19TH, 1909.

STIDWELL v. TOWNSHIP OF NORTH DORCHESTER.

Parties—Substitution of Assignee of Original Plaintiff—Order to Continue Proceedings — Praecipe Order — Confirmation on Terms—Security for Costs—Examination of Parties.

An appeal by the defendants from an order of the Master in Chambers, ante 51, refusing to set aside a præcipe order to continue the action at the suit of the assignee of the original plaintiff.

W. E. Middleton, K.C., for the defendants.
J. F. Lash, for the plaintiffs.

MEREDITH, C.J., held that Con. Rule 396 did not apply, and that the order should not have been made on præcipe or ex parte, but allowed it to stand upon the terms mentioned in the note ante 73.

APPENDIX.

COLONIAL DEVELOPMENT CO. v. MITCHELL—MASTER IN CHAMBERS—OCT. 29.

Foreign Commission.]—Motion for a commission to take the evidence of the defendant and of witnesses on his behalf at New York. The Master made the order for a commission, saying that the disposition of motions of this character must depend upon the facts of each case as it arises: Mills v. Mills, 12 P. R. 473; Robins v. Empire Printing and Publishing Co., 14 P. R. 488; Ferguson v. Millican, 11 O. L. R. 35. The defendant was unwilling to come to this province because a true bill for obtaining money by false pretences was standing against him at Ottawa; it appeared that an application for his extradition had been refused. The Master thought this would not exempt him from molestation. R. C. H. Cassels, for the defendant. W. D. McPherson, K.C., for the plaintiffs.

RE PETERBOROUGH SHOVEL AND TOOL CO.—MEREDITH, C.J.C.P., IN CHAMBERS—OCT. 29.

Company—Winding-up.]—The Chief Justice, with some hesitation, came to the conclusion that the material filed in support of a petition for winding-up shewed that the company had exhibited a statement shewing its inability to meet its liabilities or that it had acknowledged its insolvency within the meaning of the Winding-up Act. He made the order for winding-up. L. M. Hayes, for the petitioners. J. F. Boland, for the company.

WHITE v. LORNE—BRITTON, J. IN CHAMBERS—OCT. 29.

Summary Judgment—Partnership.]—An appeal by the defendants from an order of the local Judge at Windsor allowing an amendment to the proceedings by changing the names of the defendants from John Lorne & Son to John Lorne and Fred. S. Lorne, and allowing the plaintiff to enter summary judgment for $1,197.39 in an action for the price of goods sold, was

dismissed, leave being also given to add the Hamilton and Toronto Sewer Pipe Co. as plaintiffs. Frank McCarthy, for the defendants. J. H. Spence, for the plaintiff.

GRAND TRUNK R. W. CO. v. BROOM—RIDDELL, J.—OCT. 29.

Settlement of Action—Issue.]—An action was brought by James Broom aginst the corporation of the town of Toronto Junction, the Grand Trunk Railway Co., and the estate of Reuben Armstrong, to recover damages for wrongful dealing with certain household furniture belonging to Broom. Negotiations and correspondence took place with a view to settlement, and a question arose as to whether a settlement had in fact been made between Broom and the Grand Trunk Railway Co. An issue was directed to try the question, whether the action was settled; this was tried by RIDDELL, J., without a jury, and he now gave judgment in favour of Broom, the defendant in the issue, finding, upon the correspondence and other evidence, that there never was a settlement. The defendant, who appeared in person, was allowed his disbursements, if any. D. L. McCarthy, K.C., for the plaintiffs.

SEWELL v. CLARK—BRITTON, J.—OCT. 29.

Particulars—Seduction.]—The order of the Master in Chambers, *ante* 75, was affirmed. W. E. Middleton, K.C., for the defendant. T. J. Blain, for the plaintiff.

SCOTT v. UNION BANK—MASTER IN CHAMBERS—NOV. 1.

Discovery—Privilege.]—Upon a motion by the plaintiff for a better affidavit on production by the defendant, the Master held that the claim of privilege was not sufficient under the decision in Clergue v. McKay, 3 O. L. R., 478, and was also of opinion that certain correspondence referred to was not privileged. Order for a better affidavit with costs to the plaintiff in any event. H. Cassels, K.C, for the plaintiff. C. A. Moss, for the defendants.

SPROAL v. SPROAL—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 1.

Jurisdiction of Local Judge—Appeal.]—Leave to appeal from an order of a local Judge was granted to the plaintiff and the appeal allowed, on the ground that there was no sufficient evidence that all parties agreed that the motion should be disposed of by the local Judge, one of the solicitors not residing in the local Judge's county. Costs of motion and appeal to be costs in the cause. W. Proudfoot, K.C, for the plaintiff. G. H. Kilmer, K.C., for the defendant.

MCGREGOR v. VAN ALLEN CO. LIMITED—DIVISIONAL COURT—NOV. 1.

Contract—Novation.]—Appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff, who was employed as a traveller by the E. Van Allen Co. Limited prior to the 1st September, 1906, and continued in their employment until January, 1907, when the defendants took over all the assets of the E. Van Allen Co., and the plaintiff continued in the defendants' employment during a part of 1907. The plaintiff sued for commission in respect of orders sent in by him prior to January, 1907. The Court (MULOCK, C.J.Ex.D., MACLAREN, J.A., AND CLUTE, J.), held that there was, on the evidence, a clear novation and substitution of the liability

of the new company for the old. Appeal dismissed with costs. W. E. Middleton, K.C., and G. Kerr, for the defendants. G. Lynch-Staunton, K.C., for the plaintiff.

COLONIAL INVESTMENT AND LOAN CO. v. SPOONER—RIDDELL, J., IN CHAMBERS—NOV. 2.

Mortgage Account.]—Upon appeal by the defendants under Con. Rules 596 (4), 767, from the rulings of a judgment clerk in taking an account of the amount due to the plaintiffs in a mortgage action, where the defendants disputed the amount only, it was held that the amount found due was right, certain receipts produced by the defendants not being applicable to the mortgage debt. A. B. Cunningham, for the defendants. A. McLean Macdonell, K.C., for the plaintiffs.

DROUILLARD v. DROUILLARD—MASTER IN CHAMBERS—NOV. 3.

Discovery—Examination of Foreign Party—Interpreter.]—The plaintiff, a foreigner, attended for examination for discovery, but refused to be sworn and examined in English, because not sufficiently familiar with it, although the examiner, after questioning the plaintiff, ruled that he understood English sufficiently to be examined. Upon a motion by the defendant to compel the plaintiff to submit to examination, the Master held that the ruling of the examiner was to be obeyed at this stage, and made the order asked for, referring to Con. Rule 439; 17 Am. & Eng. Encyc. of Law, p. 29; Wigmore on Evidence, vol. 1, p. 811. Costs to the defendant in any event, subject to the conclusion of the trial Judge as to the necessity for an interpreter. Frank McCarthy, for the defendant. F. L. Bastedo, for the plaintiff.

KELLY v. JOURNAL PRINTING CO.—BRITTON, J.—NOV. 4.

Receiver.]—Motion by the defendants, judgment creditors of the plaintiff, to continue a receiver and injunction. Order made continuing the defendants as receivers, and continuing until further order the injunction; this to be without prejudice to any motion that may hereafter be made by the defendants, or by any execution creditor, to have the sheriff or any other officer of the Court appointed as receiver, so that all creditors, if so entitled, may have their rights under the Creditors' Relief Act protected. H. M. Mowat, K.C., for the defendants. No one for the plaintiff. J. A. Macintosh, for an execution creditor.

ELMIRA INTERIOR WOODWORK CO. v. ENGINEERING CONTRACTING CO.—MASTER IN CHAMBERS—NOV. 4.

Venue.]—In the circumstances of this case, the Master refused the defendants' motion to change the venue from Berlin, where the plaintiffs carried on business, to Toronto, where the work in question in the action was put up, though prepared in Berlin. The refusal was without prejudice to any application to the trial Judge for a direction as to the payment of witness fees. The Master referred to Saskatchewan Land and Homestead Co. v. Leadlay, 9 O. L. R. 556. He also pointed out that the affidavit in support of the motion, being made by the defendants' solicitor on information and belief without giving the source, was not receivable: Leach v. Bruce, 9 O. L. R. 380. F. J. Roche, for the defendants. J. E. Jones, for the plaintiffs.