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DIVISIONAL COURT. DECEMBER 26TH, 1912.

GAST v. MOORE.

Assessment and Taxes—Sale of Land for Taxes—Action to Set Aside—Non-Resident Owner—Statutory Notice of Assessment—Statement and Demand of Taxes—Transmission of, to Owner's Address, "If Known"—Provisions of Assessment Act as to—Unrevoked Address Disregarded—Duty of Treasurer under sec. 165.

Appeal by the plaintiff from the judgment of RIDDELL, J., of October 21, 1912, in an action to set aside a tax sale of certain lots by the city of Toronto, and for an injunction restraining the defendant from selling or otherwise disposing of said lands. At the trial the action was dismissed with costs.

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

J. M. Ferguson, for the plaintiff.
A. J. Anderson, for the defendant.

LATCHFORD, J.:—The plaintiff purchased the lands in question in 1892, when he resided in Toronto. They were unoccupied lands; and at the time were comprised within the limits of the town of Toronto Junction, which became in 1908, by 8 Edw. VII. ch. 118, the city of West Toronto. About 1894 Gast went to the city of New York where he has since resided. The assessor for both municipalities was aware that Gast was a "non-resident"; and had notice that his address was 136 Liberty Street, New York.

Under the Assessment Act of 1892 (sec. 47) the assessor was obliged "before the completion of his roll to transmit by post to every non-resident who has required his name to be entered thereon, a notice of the sum at which his property has been as-

sessed.'' A similar provision is contained in sec. 51 of the revision of 1897. In the Assessment Act of 1904, 4 Edw. VII. ch. 23, the notice is required—sec. 46, sub-sec. 3—to be transmitted by post to the non-resident's address, "if known.'' Each of the Acts of 1892 and 1897 provides that the owner of unoccupied land may give the clerk of the municipality notice of his address, and require his name to be entered on the assessment roll for the land of which he is the owner: 55 Vict. ch. 48, sec. 3; and R.S.O. ch. 224, sub-sec. 3. Sec. 46 of the consolidation of 1904 provides (sub-sec. 6) that in case any person furnishes the assessment commissioner, or if none, the clerk, with a notice in writing giving the address to which the notice of assessment may be transmitted to him, and requesting the same to be so transmitted to him by registered letter, the notice of assessment shall be so transmitted. Then the last cited enactment proceeds, "and any notice so given to the assessment commissioner or clerk, as the case may be, shall stand until revoked by writing.'' The provision in sec. 3 and sec. 46 of the earlier acts is: "It shall not be necessary to renew such notice from year to year, but the notice shall stand until revoked or until the ownership of the property shall be changed.''

It is in evidence and uncontradicted that the plaintiff notified the treasurer of the town of Toronto Junction that his address was 136 Liberty Street, New York. Upon the collector's rolls of each of the three municipalities which had in succession the right to impose and collect taxes on the lands of the plaintiff, that address appears unrevoked. To him at that address, as required, "if known,'' were sent the statutory notices of his assessment. To him at that address were also transmitted from time to time the "statement and demand of the taxes charged against him in the collector's roll,'' necessary to be addressed in accordance with the notice given by such non-resident, if such notice has been given: sec. 101 of 4 Edw. VII. ch. 23. Here I venture to express the opinion that the plaintiff was not required by sec. 101 to file a new notice of his address. His address stood unrevoked upon the assessor's and collector's rolls, and the statement and demand called for by the statute were required to be sent to him there. They were in fact so sent. The plaintiff produced at the trial statutory notices from the town of Toronto Junction for 1906 and 1907; from the city of West Toronto for 1908, and from the city of Toronto for 1909, 1910 and 1911—each and all addressed to him at the address standing unrevoked upon the assessment and collector's rolls of the several municipalities as the address and the only address of the plaintiff.

That he had in fact a different address in New York I regard as wholly immaterial. His address as formally made known to the municipalities, and as known and recognised by them—except in one instance—was 136 Liberty Street, New York, and all the statutory notices there addressed to him were duly received by him.

The exception referred to was made when, a year after the sale for taxes, the defendant applied to the city of Toronto for a deed of the lands which he had purchased. It then became the duty of the treasurer, under sec. 165, before executing the deed, to search in the registry office and in the sheriff's office and ascertain whether or not there were mortgages or other incumbrances affecting the lands, and who was the registered owner of the land.

The treasurer had the prescribed searches made. It appears there were no incumbrances. The plaintiff was registered as owner of the lands. Sub-sec. 2 of sec. 165 requires the treasurer to send to the registered owner by registered letter mailed to the address of such owner . . . if known to the treasurer, and if such address is not known to the treasurer, then to any address of such . . . owner appearing in the . . . deed, a notice stating that the . . . owner is at liberty within thirty days from the date of the notice to redeem the estate sold. . ."

Mr. Fleming, of the city treasurer's office, Toronto, has charge of the collection of all arrears of taxes. He made inquiry of James T. Jackson, who had been treasurer of Toronto Junction and West Toronto, regarding the plaintiff's address. Why he should have so inquired when the plaintiff's address appeared upon the assessment rolls of the city of Toronto at the time is not clear. Jackson told Fleming that he had written in the year following the sale two letters to the plaintiff at 136 Liberty Street, New York, and that these letters were returned as undelivered. Jackson did not make copies of the letters, or a record of their dates, nor did he preserve them when returned. His evidence regarding them is accepted as true by the learned trial Judge. It is not pretended, however, that these letters were more than friendly intimations to the owner that his lands had been sold, nor is it suggested that they were sent in conformity to the requirements of sec. 165.

Fleming's evidence is, as to his interview with Jackson, brief and may be quoted in full.

"HIS LORDSHIP: Who is Mr. Jackson? A. He was treasurer of West Toronto, and when we came to search through the lands in default the next year we consulted him with reference to them to see if he could give us any information and he told me that the two years he had sent it to——

"His Lordship: Subject to objection.

"Witness: They had been returned from that address, 136 Liberty Street, New York, so all we could do was to send them according to what information was there."

His Lordship in his reasons for judgment summarises the conversation. "Jackson told Fleming what was the truth, as I find—that he had sent on notices (the letters) himself to Mr. Gast at this address, 136 Liberty Street, New York, and that they had been returned to the post-office, not having been called for. That being so the address of the owner was not known to the treasurer."

With great respect, I am of a different opinion. It seems clear to me Fleming was informed that, (1) the owner's address was 136 Liberty Street; (2) that letters so addressed to him were received back by the sender.

Mr. Fleming had knowledge that certain letters addressed to the plaintiff at 136 Liberty Street, New York, had not reached the plaintiff; but he also had knowledge that 136 Liberty Street, New York, was the address of the plaintiff. With that knowledge in his mind, he chose not to transmit to the plaintiff at that address the notice required to be sent under sec. 165, and addressed it instead to Toronto—a course he could properly pursue only when the address was not known to him.

The whole salutary purposes of sec. 165—the last opportunity for redemption "betwixt the stirrup and the ground," "inter pontem et fontem," would, in my opinion, be rendered nugatory if municipal treasurers were permitted in cases like this to disregard the unrevoked address of a non-resident owner of record under the statute upon the books of the municipality—merely because they have information that letters or notices so addressed have failed to reach their destination.

The notice addressed to the plaintiff at Toronto was not in my humble judgment a compliance with the requirements of section 165. The plaintiff should be allowed in to redeem on the usual terms.

I would allow his appeal with costs here and below.

Boyd, C., and Kelly, J., concurred in allowing the appeal with costs, giving reasons in writing.

DIVISIONAL COURT. DECEMBER 28TH, 1912.

REX v. CLARK.

Intoxicating Liquors—Liquor License Act—Construction of sec. 54—"Sale or Other Disposal"—Sale Completed on Saturday—Possession Given on Sunday—Not Mere Question of Title—Scope of Prohibition.

Appeal from the judgment of the Judge of the District Court of Algoma, dismissing an appeal from the decision of the Police Magistrate for the district, who acquitted the respondent from the charge of selling or disposing of liquor contrary to the provisions of sec. 54 of the Liquor License Act.

The appeal was heard by MULOCK, C.J.Ex.D., SUTHERLAND and MIDDLETON, JJ.

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

The respondent was not represented by counsel.

MULOCK, C.J.:— . . . The respondent, the keeper of a licensed tavern in the village of Ryderback, sold one Morrison a bottle of whiskey between the hours of six and seven p.m. on Saturday, the 13th day of April. The purchaser then paid for it, but did not remove the liquor, which "was laid away" for him by the respondent in his kitchen in the hotel. The next day (Sunday) the purchaser called for the liquor, when the respondent took it from the kitchen and delivered it to him in the hotel hall.

Section 54 of the Liquor License Act is as follows: "In every place where intoxicating liquors are authorised to be sold, by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same to any person or persons whomsoever from or after the hour of seven of the clock on Sunday night to six of the clock on Monday, thereafter," etc.

The neat question here to determine is whether the act of the respondent in handing to the purchaser the bottle of whiskey in question in the hall of the hotel on Sunday was "a sale or other disposal" within the meaning of this section.

The sale was completed on the Saturday, and for the purposes of this appeal it may be conceded that the property in the liquor then passed to the purchaser, although he did not obtain actual possession until the next day, Sunday. In the meantime the

hotel keeper had the actual custody of the liquor. As said by Wills, J., in Platt v. Beattie, [1896] 1 Q.B. 523: "The provisions of the License Act were not framed with regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered."

The learned Judge has dealt with this case as if it turned upon the question of title to the liquor. The actual sale may have given the purchaser title to it, but the Act prohibits more than mere selling, and in view of this object a liberal construction should be placed on the words "or other disposal."

In my opinion, these words as here used are intended to include transactions respecting liquor whether or not connected with its sale. If the words were to be given the narrow construction contended for by the respondent, the object of the Act in seeking to suppress the traffic in liquor on Sunday could readily be defeated. Any person desiring to obtain liquor on Sunday could complete his purchase within lawful hours on Sunday, leaving the liquor then purchased in the hotel until Sunday and then call and obtain it. The legislation in question does not, I think, contemplate a licensed hotel becoming a base for such operations, and I interpret them as covered by the prohibitory words "or other disposal." The word "disposal" is not here used in a strict technical, but in a liberal sense. According to the dictionaries it has many meanings; some of them associated with selling, others with the mere matter of possession. The following are some of the meanings given by the dictionaries: "An act disposing of something by gift, sale, conveyance, transfer, or the like; the act of putting away, getting rid of, settling or definitely dealing with; bestowing, giving, making over, alienation or parting with by sale or the like," etc.

The handing of the bottle of whiskey to the purchaser was a transfer of the actual possession of it and as such was, in my opinion, an act of disposal prohibited by the section.

I, therefore, think this appeal should be allowed with costs here and below, and the case should be referred back to the magistrate to be dealt with.

Sutherland and Middleton, JJ., concurred in allowing the appeal, giving written reasons.

DIVISIONAL COURT. DECEMBER 28TH, 1912.

TAYLOR v. YEANDLE.

Parent and Child—Deed from Mother to Daughter—Action to Set Aside—Absence of Secrecy—Absence of Undue Influence—Burden of Proof on Recipient—Necessity of Separate and Independent Evidence—Difference in Case Where Deed Attacked after Death of Donor.

Appeal by plaintiff from the judgment of BOYD, C., of Oct. 15, 1912, in an action by an administratrix, to set aside a conveyance as invalid and as having been obtained by the fraud and undue influence of defendant, etc. At the trial the action was dismissed with costs.

The appeal was heard by MULOCK, C.J.EX.D., CLUTE and SUTHERLAND, JJ.

R. S. Robertson, for the plaintiff.
G. G. McPherson, K.C., for the defendant.

CLUTE, J.:—The action was brought to set aside a deed dated 20th February, 1907, made by the late Eleanor Doherty, who died on the 7th March, 1911, to her daughter, the defendant. The deed was attacked chiefly upon the ground that it was a gift from the mother to the daughter, and that there was not sufficient evidence to support it without relying upon that of the daughter, which could not be looked at for that purpose.

In Lavin v. Lavin, 27 Gr. 567, which was strongly relied upon, reference is made to the judgment of Lord Romilly, in Walker v. Smith, 29 Beav. 396, where he is reported as saying: "I am of opinion that in all these cases you must not take into account the evidence of the recipient himself. The gift must be established by separate and independent evidence, and if there was separate and independent evidence here I could uphold the gift." Spragge, C., further says that he followed this decision in Delong v. Mumford, 25 Gr. at p. 90.

On referring to Walker v. Smith, it will be seen that this was a case between solicitor and client, where the testatrix had made a will, prepared by the solicitor, by which she gave legacies of $500 each to the solicitor, his wife and his son and daughter, and the residue to her sisters, and appointed the soli-

citor her sole executor. The will was attested by two clerks of the solicitor. Shortly afterwards the testatrix made a voluntary gift of £500 of East India stock, which was transferred into his name on the 18th September, and on the 28th of September she gave Mr. Smith a power of attorney to receive the dividends under the three per cents, which he received. She died on the 29th October, 1857. The transactions were kept secret, and no other independent solicitor was employed in them. The family asked a declaration that that the gifts and bequests had been improperly obtained and were void.

The Master of the Rolls in laying down the principle to be applied to cases of that kind, states that one of the questions to be considered is whether the influence of the donee or recipient of the bounty was improperly exercised on the donor, "the burden of proof of the first always lies upon the recipient of the bounty to shew that the gift was intended to be given, and I fully concur in the argument and observation that a solicitor does not stand in any different situation from any other person, and that there is nothing ipso facto in the relation of solicitor and client which makes it impossible for the solicitor to receive a gift from his client, but when the gift has been fully established the question then arises whether undue influence has been exercised, and then the question of the relation of solicitor and client is an ingredient in estimating the extent of the actual or probable influence exercised over the donor."

In that case he did not find any undue influence, and held that in all these cases you must not take into account the evidence of the recipient himself. The gift must be established by separate and independent evidence, and he observes that "if there were separate and independent evidence here I should uphold the gift." He found that as to the will, there was not in evidence any proof of undue influence and upheld the will. He set aside the gift, however, of the £500 East India stock, saying that that stood upon a totally different footing: "Undoubtedly if she had called in a third person who had no interest in the matter, and said, I have deliberately given this £500 to Mr. Smith for the benefit of himself or his children, or for his own benefit exclusively, then I should have upheld the gift, but I look in vain for such a thing in this case. I go through the whole of the evidence but, as I have stated, I am compelled to throw out of consideration the evidence of Mr. Smith himself. Unfortunately, the whole matter was kept secret and the evidence shews that she wished it to be concealed. Unfortunately, the effect of this is to destroy that which alone could support the gift, viz., evidence that the gift was really made." The

result was that the bequest under the will was sustained, and the gift of East India stock was set aside.

This authority, having regard to the facts in the present case, supports, I think, the decision of the Chancellor. Here the mother had resided with the daughter for some years before the will was made and continued to reside with her for four years afterwards and until her death. The Chancellor finds that the mother in the first instance through her brother asked Mr. Davidson—the solicitor who drew the conveyance in question—to come and see her. The defendant was not present when the deed was made; she took no part in it. The solicitor came and states that the transaction was entered into by the mother herself who gave him the instructions, and this was some six or seven years after she had gone to live with the daughter. She was well-satisfied with the care which her daughter took of her, and during this earlier period she made a note of $500 payable to her daughter. Quite independently of the defendant's evidence, the execution of the deed seemed to be a free act and will of the mother, and, as the circumstances have proved, a reasonable and fair settlement. Whatever view might have been taken of the case, had the mother been dissatisfied with her treatment and sought in her lifetime to set aside the deed, it is, I think, under the circumstances of this case, too late after she had affirmed it by continuing to live with her daughter for over four years.

In this case, differing from Walker v. Smith, there was no secrecy. The deed was made on the 20th February, 1907, and registered on the 20th April, of the same year. There was no evidence whatever of undue influence on the part of the daughter, and there is the further fact that on the same day that the deed of the property in question was given, the mother made a will by which she gave to her daughter, the defendant, all her estate, real and personal, of which she might die possessed. This will was duly executed and never revoked.

It is true that it has not been probated and letters of administration have been granted to the plaintiff. This occurred for the reason that no proper inquiry or search for the will was made prior to the application for letters of administration. The mother died on the 7th March, 1911, and letters were granted on the 20th April, of the same year.

There was no evidence offered to impugn this will, and no reason presented to the Court why it should not be admitted to probate and the letters recalled. But this Court has no jurisdiction to revoke the grant. See McPherson v. Irvine, 26 O.R. 438. See Empy v. Fick, 13 O.L.R. 178; 15 O.L.R. 19; where

the difference is pointed out in the position of a plaintiff who seeks to set aside an improvident deed made by herself, and where relief is sought after her death by her personal representatives.

From the evidence I think it cannot be doubted that the transaction as it actually took place and was worked out was for the benefit of the mother; she was satisfied with it during her life. It is obvious from the evidence, I think, that she intended from the first to compensate the daughter for her trouble and care, and the amount which the daughter received was no more than a reasonable compensation.

I think this appeal should be dismissed with costs.

Mulock, C.J., I agree.

Sutherland, J., I agree.

Divisional Court. December 28th, 1912.

BORNSTEIN v. WEINBERG.

Landlord and Tenant—Repairs—Lessee's Covenant—Ordinary Wear and Tear—Exclusion of, in Computing Damages—Old Building—Liability of Lessee—Damages.

Appeal by plaintiff from the judgment of the Junior Judge of the County of York, of Nov. 7, 1912, in an action by plaintiffs, owners of No. 82 Elizabeth street, Toronto, to recover $53.50 for double value of premises during defendant's retention of possession, $194.50 for repairs to No. 82, the sum of $50 for repairs to No. 78 and $80 damages for loss of enjoyment, being a total of $348. At the trial, judgment was awarded plaintiffs for $76.50 and costs.

The appeal was heard by Boyd, C., Latchford and Middleton, JJ.

L. M. Singer, for the plaintiffs.
A. R. Hassard, for the defendant.

Middleton, J.:—The plaintiffs appeal from a judgment of Denton, Co.J. The action was brought by the landlords against a tenant for breach of covenant contained in an informal lease in the Yiddish tongue, by which the tenant of No. 82 Elizabeth

Street—who was to receive the premises "in the best condition"—undertook "to give up the house in the same condition and repairs."

The learned Judge has allowed damages to the plaintiffs, excluding in his computation damages attributable to ordinary wear and tear.

I do not think that the learned Judge is warranted in reading this exception into the undertaking, which is in form absolute. The extent of the obligation of a tenant under a repairing lease is discussed in the recent case of Lurcott v. Wakely, [1911] 1 K.B. 905, where the Court of Appeal review most of the earlier authorities.

In Gutteridge v. Munyare, 1 M. & Rob. 334—a nisi prius decision—Tindal, C.J., said: "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of a greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value, constitutes a loss which, so far as it results from time and nature, falls upon the landlord; but the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect. He is bound, by seasonable applications of labour, to keep the house as nearly as possible in the same condition as when it was demised."

This is not accepted by the Court of Appeal as being entirely accurate. Cozens-Hardy, M.R., says: "If he meant only to say that, given an old house which in the course of time, though still a habitable house, is rendered worse by mere lapse of time and the effects of wind and weather, the loss falls on the landlord, I should not object to the statement. But if it is made use of as meaning that the tenant is not liable for anything which can be said to be due to the lapse of time and the elements, I respectfully do not assent to it. . . . If a tenant under a repairing lease finds that a floor has become so rotten that it cannot be patched up, if it is in such a condition that it cannot bear the weight of human beings or furniture, can it be said that the tenant is exempt from the liability of repairing that floor?"

As put by Buckley, L.J., in the same case: "All the cases, to my mind, come only to this, that the question is one of degree." And the degree of repairs which is described in this lease as "the best repair" must be taken in relation to the kind of house that was demised and the condition of repair in which it was at the time of the demise, which is also described by the same phrase.

The plaintiff in this case put forward a grossly exaggerated claim; and the defendant, on his part, was equally blameworthy for his lack of any honest attempt to fulfil his obligation.

At the hearing we increased by six dollars the amount allowed, so as to correct what was apparently an error in computation in the amount allowed by the learned Judge for double value during the over-holding. We also increased it by ten dollars, to cover the time lost by the landlord during the making of repairs. Justice would, we think, now be done by allowing a further sum of twenty-five dollars to cover the loss attributable to wear and tear, and not included by the learned Judge in his assessment.

With this variation, the appeal will be dismissed; and, as success has been divided, without costs.

Boyd, C., I agree.

Latchford, J., I also.

Falconbridge, C.J.K.B. December 28th, 1912.

McGREEVY v. HODDER.

Specific Performance Refused—Sale of Land—Right to Retain Instalments of Purchase Money—Laches—Resale—Costs.

Action for specific performance of a contract for sale of land in Port Arthur, or in the alternative, damages.

W. F. Langworthy, K.C., for the plaintiffs.
M. J. Kenny, for the defendant.

Falconbridge, C.J.K.B.:—By four several agreements dated 16th January, 1907, made between the defendant (vendor) and the plaintiff (purchaser), the defendant agreed to sell four lots in the River Park addition, Port Arthur, for $100 each, payable $25 on the date of the agreement, (receipt of which was acknowledged) and the balance in four, eight and twelve months with interest at seven per cent. per annum. The last portion of each agreement is as follows:—

"The purchaser to be allowed five days to investigate the title at his own expense, and if within that time he shall furnish the vendor in writing with any valid objection to the title,

which the vendor shall be unable or unwilling to remove, this agreement shall be null and void, and the deposit money returned to the purchaser without interest. Time to be the essence of this agreement. The vendor to pay the proportion of insurance premiums, taxes, local improvements, assessments, sewer rates, etc., of whatever kind, to this date, after which date the purchaser will assume them."

The plaintiff paid the second instalment of purchase money on the 18th of May, 1907, being in all another payment of $100.

This was a speculative property. There was what defendant calls a "little flurry" in 1907. It was supposed that a certain industry was about to be established in the neighbourhood, but that did not take place, so there were no sales for four years, but the property "came up" in 1911. The defendant paid taxes for the five years—about $2 a year on each lot. Defendant says he usually notifies purchasers that their payments are due, and he supposes that was done in this case, that is by simply mailing a "little bill" of the amount. About the autumn of 1911 defendant assumed to rescind the agreements, and sold the lots to the Alberta Land Company.

I am of the opinion that the laches of the plaintiff entitled the defendant to come to the conclusion that plaintiff had abandoned the agreement, and to re-sell, and I do not decree specific performance. I do not, however, think that the defendant is entitled to retain the money paid on account of the property. It is true that in the clause which deals only with investigation of the title, the expression used is "the deposit money"; but the sums paid constitute one-half of the whole purchase money, and I think both payments ought to be treated as payments on account, and not as mere deposits. Plaintiff will have judgment for $200 with costs. The law will take its course as to the scale of costs and right of set-off. I do not give any certificate one way or the other.

BRISTOL v. KENNEDY.

MIDDLETON, J., IN CHAMBERS. DECEMBER 28TH, 1912.

Pleading—Statement of Defence—Motion to Strike out Certain Paragraphs—"Embarrassing Pleading"—Meaning of—Distinction between such Pleading, and Pleading Bad in Law—Appeals from Chamber Orders, Remarks on.

Appeal by the defendant, Mary Kennedy, from an order of the local Judge at Hamilton striking out paragraphs 1 and 2 of the statement of defence and setting aside the jury notice.

J. Mitchell, for the defendant, Mary Kennedy.
H. A. Burbidge, for the plaintiff.

MIDDLETON, J.:—As the case is not one which, in my opinion, should be tried by a jury, I do not think I should interfere with what has been done by the learned local Judge in reference to the jury notice.

Under our present system of pleading it is difficult to maintain an order striking out a part of a pleading. As pointed out by Mr. Justice Bleckley, in Ellison v. Georgia Railroad, 87 Georgia 691, in every logical and well-constructed universe there must necessarily be much destructive work to be done. In the sphere of law this destructive work was assigned to the demurrer as a legal devil, always present and always ready, not having any particular claim upon modern emotion, but still entitled to some measure of co-operation and even of sympathy.

In Ontario we have advanced far beyond this stage: as by Rule 259 demurrers are forbidden, and there is substituted the procedure by which a point of law is raised in the pleadings which is to be disposed of at the trial unless a special order is made that it be earlier dealt with.

That destructive agent, thus forbidden access to the veritable paradise to be found in modern pleadings, is restless—like his prototype—and seeks to intrude himself, clothed in different garbs, yet intent on exercising his destructive energy. So we find him sometimes, as here, seeking to disguise himself in such wise that he shall not be recognized, in the garb of a motion to strike out a pleading on the ground "that the same tends to prejudice, embarrass, and delay the fair trial of this action."

The learned counsel for the plaintiff argued that such a motion was equivalent to a demurrer. In this I think he is not correct, because, prior to the passing of the rule in question, and while demurrers were still in vogue, there also existed the rule authorizing a motion against pleadings as embarrassing.

The distinction between an embarrassing pleading and a pleading bad in law is not always easy to draw. This distinction is pointed out in Glass v. Grant, 12 P.R. 480, and in Stratford v. Gordon, 14 P.R. 407. Embarrassment is there defined as "bringing forward a defence which the defendant is not entitled to make use of."

Here, what is alleged is that the facts do not shew a defence at all; and although I am quite satisfied from what took place upon the argument that the defendant's counsel is not at all prepared to define what defence is intended to be pleaded, and would be most embarrassed if driven to clothe his thoughts

in language of precision, yet I am not sure that there is not something, as said by Armour, C.J., "obscured as it no doubt is by the verbosity which now passes for pleading"—some attempt, feeble, and perhaps futile—to suggest such a case as was found adequate in Adams v. Cox and Stuart v. Bank of Montreal; and I fear that the elimination of the paragraphs in question would prove to be a greater source of embarrassment at the trial than allowing them to remain; as they look like an attempt to set forth some facts which go to justify the allegation that the signature to the document in question was procured by fraud and misrepresentation. The importance of avoiding anything like a determination of any question touching the merits of the action on a Chamber motion is emphasized when it is borne in mind that there is a very limited right of appeal from Chamber orders. The policy is to have all questions, both of law and fact, disposed of at the trial.

I would, therefore, restore the paragraphs in question, and make the costs—both here and below—in the cause.

DIVISIONAL COURT. DECEMBER 28TH, 1912.

MORAN v. BURROUGHS.

Negligence—Permitting Infant to use Fire-arm—Injury to Playmate—Findings of Jury—Conflict of Evidence—Contributory Negligence on Part of Children—Damages.

Appeal by the defendant from the judgment of BRITTON, J., of May 4, 1912, 3 O.W.N. 1214, in an action to recover $3,000 damages from defendant for allowing his son, a boy of tender years to go on the streets of Smith's Falls with a rifle and ammunition, whereby the plaintiff lost an eye. At the trial judgment was awarded for $300 and costs.

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

C. A. Moss, for the defendant.
J. A. Hutcheson, K.C., for the plaintiff.

BOYD, C.:—Difficult questions of law appear to be involved in the consideration of the legal liability of the defendant on the findings of the jury in response to questions. The sole ground as given by them is that the father was negligent "in

not having the rifle removed the first time he noticed it in the house."

It appears to me, however, that having regard to the question of contributory negligence on the part of the plaintiff, the infant injured, the appeal may be disposed of on that ground alone. The jury find that the boy was guilty of such negligence in that he did not exercise reasonable care, in that he went across in front of the gun instead of behind. The Judge as reported left this to them as a conflict of evidence, but afterwards he vacated the finding on the ground that there was no such conflict on the evidence as justified him in taking the opinion of the jury. He finally found that there was no evidence on the point to be considered by the jury, and he held that the boy exercised reasonable care, or was not guilty of any negligence.

He interprets the answer of the jury, (22 O.W.R. p. 13), to mean that the boy at the time the firing was going on walked in front of the firing line. He says there is no evidence that the gun was intentionally fired at the time of the accident. It was on undisputed evidence accidentally discharged when being held by the son of the plaintiff and while a struggle was going on for the possession of the gun between the son and another boy, Morris McComb.

The presumption he says should stand that the infant plaintiff is not responsible for negligence, and that to disentitle the infant to recover it must be shewn that the injury was occasioned altogether by his so-called negligence.

[The learned Chancellor referred to the conflict of evidence on these points, his conclusion being that "the account given by the infant plaintiff does not accord with the position of the gun given by the other witnesses; in fact this account stands alone and is not corroborated. It is not in agreement with the version given by his own witness McComb."]

The conflict of evidence thus appearing which would be proper for the jury to consider is as to the position of the gun. The infant plaintiff is very emphatic and repeats again and again that the gun was pointed the other way, i.e., not in the direction of the puck, when he started across. The evidence of all the other witnesses present is contrary to this; they say that the gun was always pointed towards the puck and the plaintiff himself admits that if the gun was pointed that way it would be dangerous to cross in front of it. The jury have in effect found that it was dangerous to cross in front of the pointed gun and that the infant should have gone round behind—as he at first says he did.

A careful reading of the evidence leads me to conclude that the Judge rightly left it to the jury.

I may further note that the learned Judge seems to have thought there was some presumption which could be brought into the scales in dealing with contributory negligence on the part of the infant. This boy was over 12, had been several years at school, was bright and intelligent according to the witnesses, and as would appear from internal evidence in reading his testimony, and he was also not unfamiliar with guns and shooting (which seems to be rather a common means of enjoyment among the juvenile population of Smith's Falls).

In Sangster v. T. Eaton Co., 25 O.R. 78, the head-note gives, "Semble, that the doctrine of contributory negligence is not applicable to a child of tender years." That is founded on Gardner v. Grace, 1 F. & F. 359, which is cited for the same purpose in Simpson on Infants, p. 98 (3rd ed. 1909). In the Ontario case the child was 2½ years old, and in the English case the age was 3¼ years. In that case Channell, B., used much the same expressions as those quoted from 22 O.W.R. "Age is the most important factor in the application of this rule. Want of ordinary care which might not disentitle a child of tender years to recover would so operate in the case of one of older age. The point is neatly put in Eversley: "the question is really whether an infant of tender years can be said by reason of his want of experience and an incapacity to judge rightly of the probable result of his acts to be guilty of negligence: "Domestic Relations," p. 831, 3rd ed., 1906. As summed up in the latest book of repute, "Halsbury's Laws of England," vol. 21, p. 453, we find "When a child is of such an age as to be naturally ignorant of danger, or to be unable to fend for itself at all he cannot be said to be guilty of contributory negligence in regard to a matter beyond his appreciation, but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them." (1912) Title, Negligence.

The law as to infants on this head is well stated by Lord Low in Cass v. Edinburgh (1909), S.C. 1076. The law is also discussed and the same conclusions reached by Field, J., in Collins v. South Boston R.R. Co., 142 Mass. 301. As to children over the age of criminal responsibility (7 years, see Code sec. 17) and perhaps even younger the alternative for the jury would seem to be well expressed in a New York case: "If you say that the child did what an ordinarily careful child would have done, then it is not negligence;" on the other hand, if the boy failed to adopt the means known to him to be effective in protecting

against danger and was injured thereby, then he cannot recover: Moebus v. Herrmann, 108 N.Y. 349.

Those citations of law shew that on the facts of this case he was capable of contributory negligence, and the jury have found that he was guilty thereof.

Upon the answers to the questions the action should stand dismissed, and the judgment in appeal should be set aside and judgment for the defendant. But it is not a case for costs; the jury have found the defendant guilty of negligence in not removing it from the reach of the boy or sending it home.

LATCHFORD, J., agreed with the judgment of BOYD, C.

KELLY, J., came to the same conclusion, giving reasons in writing.

MIDDLETON, J., IN CHAMBERS. DECEMBER 30TH, 1912.

RE CANADIAN OIL COMPANIES AND McCONNELL.

Prohibition—Absence of Territorial Jurisdiction—Defendant not Present at Trial—Discretion of Court to Refuse Prohibition—Delay not Explained or Excused—Costs.

Motion by the defendant in the first Division Court of the County of York for a prohibition, upon the ground of the absence of territorial jurisdiction.

W. E. Raney, K.C., for McConnell.
D. Inglis Grant, for Canadian Oil Companies.

MIDDLETON, J.:—The action is for $44.30, price of goods sold and delivered. The defendant resides at Proton, in the county of Grey. The writ of summons was served on the 6th of August, 1912. A notice disputing the jurisdiction of the Court was immediately filed. On the 10th September, the day named in the summons, the action came on for trial in the Division Court. The defendant was not present nor was he represented in any way; and judgment was given for the plaintiff.

An application was made in the Division Court for a new trial, which application was dismissed, probably because it was out of time.

This motion is now made; and the defendant's affidavit stating that the contract for the purchase of the goods referred to was made in his store at Proton, and not elsewhere, is not contradicted: so that it may be assumed that the York Division Court had no territorial jurisdiction.

The plaintiff bases its opposition to the granting of the order upon the discretion of the Court to refuse to prohibit.

Willes, J., in Mayor, etc., of London v. Cox, L.R. 2 H.L. 238, at p. 283, says: "When the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment, without setting up that objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition is not taken away—for mere acquiescence does not give jurisdiction—yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, as disability, mal-practice, or matter newly come to the knowledge of the applicant."

This statement of the law was adopted by the full Court of Appeal in Broad v. Perkins, 21 Q.B.D. 533.

The question therefore in this case is whether the defendant has shewn anything which amounts to an excuse for his delay. In the affidavit upon this motion no attempt is made to either explain or excuse the delay. In the affidavit made in the Division Court, all that is said is that the defendant did not attend the trial, "believing that the case would be transferred to the proper Division Court."

There is no satisfactory affidavit of merits. The defendant does not condescend to disclose his defence, if he has one. He contents himself by saying, "I have, as I am advised and verily believe, a good defence to this action upon the merits."

I think the cases warrant me in holding that where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, the Court ought not to grant a prohibition; for the reason so well indicated in the extract quoted. Here, not only has there been a failure to attend, but the defendant has applied in the Division Court to set aside the judgment. It is true that this application was abortive by reason of the delay in

making it; but no case of hardship is shewn, as, for all that appears, the debt is justly owing.

I dismiss the motion without costs, as I do not think the practice of suing in a Division Court which is known to have no jurisdiction is one that ought to be encouraged.

DIVISIONAL COURT. DECEMBER 30TH, 1912.

MORRISON v. PERE MARQUETTE R.W. CO.

Railway—Breach of Statutory Duty—Neglect to Furnish Suitable Accommodation for Passengers at Station—Absence of Station-house—Exposure of Passenger to Cold—Railway Act (Dom.) secs. 284, 427*—Measure of Damages—Jurisdiction of Railway Board—*7, 8 *Edw. VII. ch.* 60, *sec.* 10*—Right of Action—Remoteness of Damage.*

Appeal by the defendants from the judgment of BRITTON, J., of Oct. 29, 1912, ante 186, in an action by George H. Morrison, formerly a watchman for the Erie Tobacco Company, for damages for sickness from a severe cold contracted, as alleged, from exposure while waiting at Marshfield for a train of defendants without the protection of any station provided by defendants, which train is alleged to have been late in arriving. Defendants' former station at Marshfield was destroyed by fire over two years before July 20, 1911, and they alleged that they had not been required to build another at this point as the traffic at this point did not warrant it. At the trial judgment was awarded plaintiff for $500 and costs.

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

D. L. McCarthy, K.C., and E. A. Cleary, for the defendants.

J. H. Rodd, for the plaintiff.

BOYD, C.:—In cases of contract the Judges in Hobbs v. London and South Western R.W. Co. (1875), L.R. 10 Q.B. 117, sought to lay down a general principle or rule whereby the damages might be measured in the event of the contract being broken and the nearest approach to certainty made by them still leaves the matter very much at large in particular instances.

The rule formulated in the Hobbs case was reconsidered and

modified in McMahon v. Field, (1881), 7 Q.B.D. 507, and is thus summarised by Cotton, L.J.: "It is said that the rule is, the damages to be recoverable should be such as would be fairly in the contemplation of the parties at the time the contract was made as the probable result of a breach of it; but in my opinion the parties never contemplated a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract."

The result of this modified principle is seen in the difference of view taken upon the question decided in the Hobbs case and the review of it in the latter case. The breach of contract was, taking the passenger to a wrong destination by reason of which the passenger had to walk home at midnight in a drizzle of rain, caught cold and was laid up with sickness. In the earlier case Cockburn, C.J., thought that this catching cold might be called the effect of the breach in a certain sense, but it was not the immediate consequence; it was not the primary but the secondary consequence (p. 118); whereas in the later case, Bramwell, L.J., said, (so far from the cold caught by the passenger being a secondary consequence of the breach of contract and too remote) "I do not see why a passenger who by default of the Railway Co. was obliged to walk home in the dark, could not recover in respect of such damage—it being an event which might not unreasonably be expected to occur" (p. 594), and Brett, L.J., said what happened was the natural consequence of the breach and not too remote. (p. 596).

In Grinsted v. Toronto R.W. Co., 24 S.C.R. 570, the cause of action was not in contract, but for wrongfully putting off the plaintiff from a street car in consequence of which he caught cold and became ill. There had been some altercation between the conductor and the passenger, in which the latter had become heated and was thrown into a profuse perspiration. In this state he was ejected from the car, and his bodily condition thus occasioned predisposed him to suffer from the cold, and on this ground the railway company was held liable in damages.

This case is not in point on the present litigation, where the damage arose from a breach of statutory duty on the part of the railway company. It was not seriously disputed that my brother Britton was right in holding that there was such a breach.

Marshfield had been "a stopping place established for such purpose" within the meaning of the Railway Act, sec. 284 (1), and for two years the defendants had neglected to furnish an adequate and suitable shelter for the accommodation of pas-

senger traffic at that point. A former station house at that place had been burned down and there was nothing put up to replace it, for two years. The company must have therefore been prepared to take all risks of accident and damage resulting from passengers being exposed to climatic changes of temperature at the point. The passenger had a return ticket by the evening train which stopped at Marshfield; he was there on time and had to wait for some time in the chill atmosphere—long enough and cold enough in the opinion of the jury to occasion the sickness which came upon him almost forthwith. The plaintiff was shut up to the situation created by the default of the railway; he had no means of finding out how late the train was, or when it might be expected; for fear of losing it, he had to walk about on the platform awaiting its arrival.

These circumstances were all for the jury, and it was for them to consider whether the damages claimed were reasonable under the direction of the Judge: Hammond v. Bussey, 20 Q.B.D., at pp. 89, 90. The statute gives by sec. 284(7) an action to any person aggrieved by the neglect of the company to comply with the requirements of the section, and the company shall not be exempt by any notice, declaration or condition, if the damage has arisen from the negligence or omission of the company. In this case there was a deliberate act, and a continuous act of neglect for two years, in violation of the statute, and it is to be assumed that the company had in contemplation all the likely and natural consequences which might arise to passengers exposed at that station to all conditions and changes of weather.

And by sec. 427 (2) of the Act the company is made liable in case of such omission of duty to any person injured thereby, for the full amount of damages sustained thereby.

The question was raised whether or not this matter lay in the hands of the Board of Railway Commissioners. The amendment to the Act by 7, 8 Edw. VII. ch. 60, sec. 10, shews that even if they had a right to interfere, the action of the person aggrieved is not taken away—though the result of that action sounding in damages may be modified by their active interference.

The proper measure of damages in case of breach of contract and of tort in many respects coincide. The distinction between this case and the Hobbs case does not to me appear to reside so much in the nature of the cause of action as in the proper answer to the enquiry. What is the natural and probable consequence of the breach? It has been said that the rule with regard to the remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort: Brett, M.R., in The Notting Hill (1884), 9 P.D. 105, 113.

Applying this test the plaintiff is entitled to recover for his loss of health occasioned by the company's default and neglect, and breach of statutory obligation. The jury has rightly measured the "full amount" of his damage: (see Addis v. Gramophone Co., [1909] A.C. at p. 498.)

I am prepared to adopt as correct the text of Lord Halsbury's book on this branch of law at vol. 10, p. 321, sec. 589, "where a wrongful act has occasioned exposure to the weather and illness has resulted from such exposure, it seems that such illness is not to be regarded as due to an intervening and independent cause."

The judgment should be affirmed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I agree.

FALCONBRIDGE, C.J.K.B. DECEMBER 30TH, 1912.

DALLONTANIA v. McCORMICK AND THE CANADIAN PACIFIC R.W. CO.

Negligence—Master and Servant—Compensation for Injuries Act—Notice—Scienter—Principal and Agent—Independent Contractor—Control by Railway—Damages Assessed under Statute—No Decision as to Common Law Claim.

Action for compensation for injuries suffered by the plaintiff in consequence of the alleged negligence of the defendants, or one of them.

R. R. McKessock, K.C., for the plaintiff.
W. R. White, K.C., for the Railway.
J. A. Mulligan, for McCormick.

FALCONBRIDGE, C.J.K.B.:—The plaintiff was working at the end of a tunnel beside the C.P.R. track, and a mass of rock and debris fell from the heights above where he was working, from which he received such injuries that his right leg had to be amputated.

I find that the plaintiff was not negligent or careless in any way, and that his injuries were caused by the negligence of both defendants. And I find, too, that the defendant McCormick personally, and the C.P.R., by its engineers and servants,

had abundant notice of the danger that existed in carrying on the work in the manner in which it was being carried on, and that the cause of the accident was the negligence of the defendants, in either not guarding against the falling of the rocks which caused the accident, or first removing them before doing the work.

I find as a fact that McFadyen and Boughton are mistaken in thinking that "scaling" was done before the accident.

The work was being done originally under a contract dated 30th December, 1911, and made between the defendants for the driving of a tunnel by McCormick, and the excavation of approaches at a bridge on the Sudbury subdivision of the C.P.R.

On the 13th March, 1912, McCormick wrote to the resident engineer of the C.P.R. as follows: . . . "I find I am compelled to give this approach work up, as it has been misrepresented entirely to me from the beginning. The material is all quicksand and some loose rock" . . .

To which the resident engineer replied on the 30th March, 1912 . . . "After discussing the matter with the division engineer, I am advised that the tunnel approaches will be completed by force account plus ten per cent. I am also instructed to place an inspector on the job. He will keep track of the time, and advise the division engineer's office weekly the progress being made."

McCormick contends that this new arrangement merely constituted him a hiring and purchasing agent with a profit of ten per cent. and is entirely a different proposition from the doing of extra work under section 17 of the contract.

On the other hand, the C.P.R. contends that at the time of the injuries to the plaintiff, plaintiff was in the employ of the defendant Michael McCormick as an individual contractor, and not in the employ of the C.P.R. And the C.P.R. further contends that it had no control or supervision over the work or methods used by Michael McCormick.

As I have indicated before, I think, in the peculiar circumstances of the case both defendants are liable to this plaintiff, regard especially being had to sec. 4 of "The Workmen's Compensation for Injuries Act," R.S.O. ch. 160.

I observe that neither of the defendants in their statement of defence claims any remedy over against the other; each one merely endeavours to avoid or evade responsibility to the plaintiff. While something was said on the subject in argument, I do not feel called on to apportion the damages or to give any remedy to one defendant over against the other.

The action is brought at common law and under the statute.

Without deciding that the plaintiff's action does not lie at common law, I assess his damages at $1,750 as under the statute. Judgment accordingly against both defendants with costs.

DIVISIONAL COURT. DECEMBER 31ST, 1912.

CORDINER v. ANCIENT ORDER OF UNITED WORKMEN OF THE PROVINCE OF ONTARIO.

Fraternal and Benevolent Society—Constitution of—Amendment by Grand Lodge—Increase of Insurance Rates—Instruction of Representatives—Failure to Give Notice of Proposed Amendment—Injunction made Perpetual—Relations of Grand and Subordinate Lodges—Parliamentary Practice—Constitutional Changes.

Appeal from the judgment of Riddell, J., restraining the defendants by interim injunction from taking any proceedings under an alleged amendment of sec. 63, sub-sec. 1, of the "Constitution" of the Order, which was by consent changed into a motion for final judgment. The judgment of Riddell, J., is reported, ante 102, where the facts are stated.

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

E. F. B. Johnston, K.C., and A. G. F. Lawrence, for the defendants.

I. F. Hellmuth, K.C., and P. Kerwin, for the plaintiff.

MULOCK, C.J.:—The defendants are a fraternal association, one of its objects being to provide for the payment of stipulated sums of money to the beneficiaries of deceased members, the moneys for such purpose being derived from monthly assessments upon the members, each member being required to contribute according to a certain table of rates which is set forth in section 63 of the "Constitution."

Recently the Grand Lodge purported to make material changes and increases in this table of rates, whereupon the plaintiffs brought this action, complaining that the procedure necessary in order to entitle the Grand Lodge to make such changes and increases had not been complied with, and that therefore they were invalid. The learned trial Judge sustained the plaintiffs' contention, and granted the interim injunction appealed from.

Part of the material used on the motion is a book marked Exhibit "A," which purports to declare the objects of the Order, and to shew the "Constitution" of the Grand Lodge and its rules of order.

As set forth in this "Constitution," the Order consists of Grand Lodge and subordinate lodges. The Grand Lodge consists of certain grand officers and one representative from each subordinate lodge (sections 2 and 5), and is to meet regularly on the third Wednesday of March in each year (section 11), and may hold special meetings (section 12), and when on any question before Grand Lodge the yeas and nays are called for, each representative shall be entitled to as many votes as there are members of the lodge represented by him at the date of the last annual report made by his lodge to Grand Lodge.

Section 63 enacts as follows:

"63. (1) Each and every present member of this Order, from and after the first day of May, A.D. 1905, and each and every new member of this Order, without notice, commencing with the month following the receiving of the Workman Degree, shall pay to the financier of the lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the order, according to the following graded plan." (Then follows the graded plan, shewing the table of rates payable by a member in respect of his beneficiary certificate, and then the section concludes as follows):

"To be due and payable on the first day of each month, or within thirty days thereafter, as prescribed by statute in that behalf, and in addition to said regular monthly assessments, such extra assessments as may be required to pay and discharge all death claims upon the Order.

"(2). The date of such payment shall be kept by the financier, who shall credit the member with and give him a receipt for the amount so paid.

"(3). A member may pay his assessments in advance quarterly or otherwise."

Section 169 of the "Constitution" is as follows:

"169. Alterations and amendments to this Constitution may be made at any annual meeting of Grand Lodge by vote of two-thirds of the entire number to which members present at such meeting are entitled, provided that all such alterations and amendments are forwarded to the Grand Recorder on or before the 31st day of October, in order that a copy thereof may be sent to each subordinate lodge and to all members of the executive lodge and to all members of the executive committee and

officers of Grand Lodge, before the 15th day of November following.''

Section 76 declares that the representative of each subordinate lodge to Grand Lodge ''shall be elected annually at a regular meeting in December,'' etc.

Thus the scheme of the Order provided by the ''Constitution,'' whereby any alterations or amendments may be made to the ''Constitution'' is as follows: The proposed alteration or amendment must be forwarded to the Grand Recorder on or before the 31st October, in order to enable that officer to transmit a copy to each subordinate lodge before the 15th November thereafter. Thus each subordinate lodge before electing at its December meeting its representative to Grand Lodge will have before it the proposed alteration or amendment, and be in a position to consider the same, and to elect a suitable representative for the purpose of voicing the views of its members at the meeting of Grand Lodge to be held on the third Wednesday of March, thereafter.

On the 21st of June, 1912, at its adjourned annual meeting, Grand Lodge purported to pass an amendment to the ''Constitution'' making material changes in the graded plan of table of rates established and set forth in section 63 of the ''Constitution'' as above referred to, and one contention of the plaintiffs is that no notice of this change was given to the subordinate lodges as required by section 169 of the ''Constitution,'' and that therefore Grand Lodge had no power to pass such amendment.

It is admitted that no notice of the amendment complained of (called the Mills Amendment) was given to the subordinate lodges, but it is contended that notice having been given to them of another proposed amendment (called the Executive Committee's Amendment), it was competent for Grand Lodge to pass the Mills Amendment as an amendment of the executive committee's proposal, and in support of this view the defendants refer to section 171, subsection 16, of the ''Constitution'' which is as follows: ''When not otherwise provided for, Bourinot's Manual shall govern all parliamentary questions in Grand Lodge and subordinate lodges.''

This section does not, in my opinion, qualify the plain meaning of section 169, that before Grand Lodge shall have jurisdiction to adopt any amendment to the ''Constitution,'' notice of that particular amendment must have been given to the subordinate lodges. Parliamentary practice permits an amendment to a main motion substantially differing therefrom, while even a proposed amendment may, as a matter of parliamentary

practice, be in order and be the subject of debate, and may be advanced through various stages, still Grand Lodge has no jurisdiction to finally pass it and thereby amend the "Constitution," until the requirement of section 169 as to previous notice to the subordinate lodges, shall have been complied with. Were it otherwise the plain object of section 169 as to notice could be defeated. That section in substance creates a contract with the subordinate lodges, and with those who were members on the 1st of May, 1905, when the graded plan of rates came into force, and with all new members, that the graded plan fixed by section 63 should not be changed until notice of the proposed change was given to the subordinate lodges, and until they had an opportunity of passing upon it, and electing representatives to Grand Lodge to vote thereon. By that graded plan rates of assessment increased each year until the member attained the age of 49 years, but no longer; whilst the Mills Amendment proposed to increase the rate each year until the member attained the age of 65 years.

No notice of such proposed amendment was given to the subordinate lodges, and, in my opinion, it is no answer to say that although no such notice was given, yet notice of some other proposed change was given which, as a matter of parliamentary practice, might be amended to the effect set forth in the Mills Amendment.

As to the contention that under the provisions of section 14, above quoted, Grand Lodge could of its own motion enact, alter, and amend the "Constitution" laws, rules, and regulations of the Order, without notice of the proposed amendments to the subordinate lodges; if Grand Lodge has such unrestricted right to alter its "Constitution," then the provision of section 169 as to notice would be meaningless. The two sections must be read together, and then full effect can be given to both of them; that is, Grand Lodge may alter and amend the "Constitution," provided notice as required by section 169 has been given to the subordinate lodges.

Mr. Johnston further contended that the question of rates was a mere matter of detail, and that a change therein was not, in a parliamentary sense, a constitutional change. A perusal of book "A" shews that the word "Constitution" there used is not used in its strict technical sense. The title of the document is "Constitution of the Grand Lodge of the Ancient Order of United Workmen of the Province of Ontario," and it deals with a variety of matters, such as the powers of Grand Lodge and of the subordinate lodges, the methods of carrying on busi-

ness by the different branches of the Order, the powers and duties of their various officers, the rights and liabilities of the members, the creation and maintenance of a reserve fund and a beneficiary system, and other matters. No distinction, in this document, is drawn between what might be considered constitutional principles, and what, mere details; but all are dealt with in the one instrument in consecutive sections from 1 to section 172, and together represent the nature of the compact between the Order and its members, and the rights of its members between themselves.

The change proposed by the Mills Amendment is a most material change. In fact, it is difficult to imagine any alteration of this compact which might have more serious results than would one affecting the assessment rates, and I cannot assent to Mr. Johnston's contention that they may be changed at the mere will of Grand Lodge, without previous notice to the subordinate lodges as required by section 169.

For these reasons I think the judgment appealed from should be affirmed with costs here and below, and that the injunction should remain perpetually. Having reached the foregoing conclusion, it is not necessary to deal with other objections advanced by the plaintiffs.

Clute, J., came to a similar conclusion, giving reasons in writing.

Sutherland, J., agreed with the judgment of Mulock, C.J.

Sheardown v. Good—Master in Chambers—Dec. 21.

Pleading — Statement of Claim — Mistake — Motion to Amend.]—Motion for leave to amend statement of claim by rectifying a mistake and claiming mesne profits. In this case a new trial was ordered by the Divisional Court which gave liberty to the defendant to amend the statement of defence and to plaintiff leave to reply thereto within a week after such amendment. The defendant amended on 9th December and the plaintiff replied next day. He now moved for leave to amend as above. The Master said that the whole question had been considered by him in the case of Hunter v. Boyd, 6 O.L.R. 639, and that he saw no reason to depart from that decision, or to qualify the reasoning on which it proceeded. An order would therefore be made allowing the plaintiff to withdraw the reply and

amend his statement of claim as desired. The defendant must have 8 days thereafter to amend her statement of defence if so desired, and the costs of this motion as well as all costs lost or occasioned by reason of this order will be to defendant in any event. C. W. Plaxton, for the plaintiff. L. V. McBrady, K.C., for the defendant.

NIAGARA NAVIGATION CO. V. TOWN OF NIAGARA-ON-THE-LAKE—MASTER IN CHAMBERS—DEC. 21.

Change of Venue—Renewal of Motion.]—After the dismissal of the motion to change the venue in this case on 10th December, (ante 459), the defendants renewed it on the ground of preponderance of convenience. The previous application was dismissed because on the pleadings the Master was of opinion that the action was not one coming under Con. Rule 529 (c). He now said that the pleadings had not since been varied, and he must therefore abide by his judgment on the previous motion from which no appeal had been taken, there being no preponderance of convenience shewn. Motion dismissed with costs to the plaintiffs in any event. R. H. Parmenter, for the defendants. T. L. Monahan, for the plaintiffs.

LEVITT V. WEBSTER—KELLY, J.—DEC. 27.

Sale of Land—Specific Performance—Authority of Agent—Alteration in Material Term—Authority must be Clear, Express, and Unequivocal.]—Action by Sarah Levitt against the defendant for specific performance of an alleged agreement for sale to the plaintiff of a property known as 111 West King street in the City of Hamilton. After a full review of the evidence in the case, which turned mainly on an agent's authority to sell on the terms of the agreement in question, the learned Judge came to the conclusion, (adopting the language of Idington, J., in Gilmour v. Simon, 37 S.C.R. 422), that he did not find in this case, "that clear, express, and unequivocal authority," given by the defendant to her agent, which would enable him to hold the plaintiff entitled to the specific performance claimed herein. Action dismissed with costs. A. M. Lewis, and F. F. Treleaven, for the plaintiff. T. Hobson, K.C., and J. M. Telford, for the defendant.

WALLBERG V. JENCKES MACHINE CO.—MIDDLETON, J.—DEC. 27.

Contract—Construction—"Site of the Work"—Reformation.]—Action by plaintiff to recover $3895 and interest from July 20, 1911, paid by the plaintiff under protest, for the purpose of securing the discharge of a mechanics' lien registered against the power plant and premises in question. MIDDLETON, J., said that in the view he took of the contract between the parties, the "site of the work" means some place immediately adjacent to the line of location, and that its true interpretation is indicated in the fact that the purchaser is to provide "a standard gauge track adjacent to pipe line for the distribution of material along the line of location." He thought the intention of the parties was that the purchaser was to bring the pipes to such a place that they could be conveniently distributed along the line of location by the tramway which he was called upon to provide, and that his obligation was not at an end when he deposited the material upon a dock some quarter of a mile away. Applying this view to the facts of the case, he thought the purchaser's duty ended when the pipes were placed upon the skidway near the top of the hill. At the trial he allowed an amendment to be made by the defendants, by which they set up that if this is not the true construction of the contract it ought to be reformed. In the learned Judge's view, however, no reformation is necessary; and as practically the whole evidence upon this alternative branch of the case is documentary, he refrains from expressing any opinion upon it. He considered, however, that the claim put forward by the contractor was very much exaggerated, and makes a deduction of $575. Judgment for the plaintiff for $3320, with interest at 5 per cent. from July 20, 1911. No costs to either party. I. F. Hellmuth, K.C., and M. L. Gordon, for the plaintiff. G. H. Kilmer, K.C., and J. A. Rowland, for the defendants.

DEEVY V. DEEVY—KELLY, J.—DEC. 28.

Deed—Alleged Forgery by Deceased Grantee—Evidence.]—Action by the father and mother of W. J. Deevy, deceased, against the widow and sole devisee and sole executrix of the said W. J. Deevy to set aside as fraudulent a deed of Sept. 21, 1909, from plaintiffs to their son. The learned Judge, after reviewing the evidence, said that he was not prepared to accept the testimony of the plaintiffs, that the deed in question was not

signed by them, and that what appear to be their signatures thereto are forgeries. Action dismissed with costs. T. D'A. McGee, for the plaintiffs. F. A. Magee, for the defendant.

WOOD V. GRAND VALLEY R.W. CO.—DIVISIONAL COURT—DEC. 30.

Contract—Undertaking to Extend Railway to Village—Payment of Money to Railway Company by Property-owners in Village—Receipt of Company's Bonds—Breach of Undertaking—Liability of Company—Personal Liability of President—Damages—Principle of Assessment—Return of Bonds.]—Appeal by defendants, Pattison and the Railway Company, from the judgment of Middleton, J., of June 7, 1912, 3 O.W.N. 1356. This was an action claiming damages from the railway company for breach of contract made with the railway company through their president, A. J. Pattison, whereby plaintiffs allege they were induced to purchase bonds of the railway company to the amount of $10,000 on condition that defendants should cause to be made certain traffic arrangements with the C.P.R. Co., whereby the current competitive freight rates will apply continuously from St. George on the same basis as from Galt, etc. At trial judgment was awarded plaintiffs for $10,000 damages and costs. The appeal was heard by BOYD, C., LATCHFORD and KELLY, JJ., written judgments being delivered by BOYD, C., and LATCHFORD, J., while KELLY, J., agreed in the result with BOYD, C. The effect of the judgment is to reduce the damages to both the company plaintiffs to the sum of $3980, giving to the other plaintiffs the $10 paid into Court as nominal damages. With this reduction of amount the judgment is affirmed with costs. It may be a proper term of the judgment to direct the delivery up of the $9000 bonds held by the two companies as originally subscribed by them. C. J. Holman, K.C., and T. H. Peine, for the defendant Pattison. S. C. Smoke, K.C., for the defendant railway company. G. F. Shepley, K.C., and J. Hartley, K.C., for the plaintiff.

MAITLAND V. MILLS—FALCONBRIDGE, C.J.K.B.—DEC. 31.

Master and Servant—Workmen's Compensation for Injuries Act—Negligence—Defective Ways—Unguarded Circular Saw—Conflict of Evidence.]—Action by the plaintiff for damages for injuries received by coming into contact with a circular saw while engaged in defendant's employment, whereby he lost the use of his left hand and arm, which injuries he alleged were caused by defendant's negligence. The learned Chief Justice held that the plaintiff had entirely failed to establish every material fact which it is necessary for him to prove in order to succeed. His action is therefore dismissed, but without costs. H. Keefer, for the plaintiff. D. J. Cowan, for the defendant.