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COURT OF APPEAL.

APRIL 29TH, 1912.

SLINGSBY v. TORONTO R.W. CO.

Street Railways—Injury to and Death of Person Crossing Track—Negligence—Contributory Negligence—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiff.

The action was brought by Lizzie Slingsby, widow of Harry Slingsby, on behalf of herself and children, to recover damages for the death of her husband, who, when attempting to cross the defendants' tracks, riding a bicycle, was struck by a car and killed, owing, as the plaintiff alleged, to the negligence of the defendants or their servants.

The judgment was for $5,000 damages and costs.

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

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

W. D. McPherson, K.C., for the plaintiff.

MOSS, C.J.O.:—The jury found that the car which struck the deceased was running at an excessive rate of speed; and it is conceded that there is evidence upon which they could reasonably arrive at that conclusion.

The question is thus narrowed down to whether the deceased so conducted himself as to cause the accident, which, it is argued, he might have avoided had he exercised reasonable care. The jury have absolved him from the charge of negligence.

There is undoubtedly much room for argument against this conclusion, but it cannot be said that it is wholly without support from the evidence.

It appears that at or near the south-west corner of College

and Shaw streets there is a white post, indicating a place at which cars stop to let down and take up passengers, at which, at the time in question, there was at least one if not more than one person standing, evidently intending to board the car when it came to a standstill. As the car approached Shaw street from the west, the brake was applied and the car's speed slackened to some extent, but, as it turned out, not with the intention of stopping for passengers.

It was allowed to proceed at a high rate of speed, and the deceased, who had come upon the crossing, was struck.

The condition of the roadway and the planking at the crossing evidently demanded the deceased's close attention at the moment, and may have prevented him from observing that the car had not stopped, as its earlier actions might not unreasonably appear to the deceased to indicate. He apparently did not discover that it was coming on until he had reached the rail, and he then made an ineffectual effort to clear the car.

It was for the jury to say whether, under all the circumstances, it was reasonable for him to conclude that the car would stop or had stopped, and that there was ample time for him to cross, or whether he deliberately took his chance of getting safely across before the car reached him.

Upon this their finding is adverse to the defendants' contention; and it cannot be said that there is not evidence upon which they could reasonably come to that conclusion.

The appeal must be dismissed.

MEREDITH, J.A.:—If the rule of the defendants requiring their motormen to reduce the speed of cars, and to keep them carefully under control, when approaching crossings and crowded places where there is a possibility of accidents—only a reasonable, if not really a necessary, precaution—had been observed, this unfortunate accident would not have happened; and so the finding of negligence in the running of the car at too great a speed at the time of the occurrence is not now called in question; but it is said that it was the negligence of the unfortunate man, who was killed in the collision, which caused the accident; or, at least, that he was guilty of contributory negligence.

There is much to be said in favour of these contentions; but they involve only questions of fact proper for the consideration of the jury; and the jury has unequivocally found against the defendants on these very questions, very fully and clearly presented to them at the trial.

It can hardly be said that reasonable men could not find that the negligence of the defendants, before mentioned, was the proximate cause of the injury and loss complained of by the plaintiff in this action; there is more to be said in the defendants' favour upon the other point.

Concise and captivating logic such as that the unfortunate man either saw the car approaching and was guilty of negligence in attempting to cross in the face of it, or failed to see it and was guilty of negligence in that failure, does not cover the whole circumstances of such a case as this: the place where the accident happened was a level crossing of a much used highway: it was the duty of the motorman, under the rules of the defendants, to have reduced speed and kept his car carefully under control when approaching such a place; immediately west of it was a regular stopping place for all cars for letting down and taking up passengers, and there were persons there waiting to be taken up; and the highway at the place in question was being renewed, and was in such a condition that the attention of any one crossing over, especially on a bicycle, as the man was, might necessarily be taken up, in picking his way across, to a much greater extent than would have been necessary had the road been in its ordinary state; and that the motorman and his employers knew. These were all very material circumstances affecting the question, what would reasonable persons ordinarily do in such a case?

Under all the circumstances of the case, this question was also, in my opinion, one for the jury; and so the verdict must stand, whether in very truth right or wrong.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Appeal dismissed.

APRIL 29TH, 1912.

*RE WEST LORNE SCRUTINY.

Municipal Corporations—Local Option By-law—Voting on—Scrutiny—Powers of County Court Judge—Votes of Tenants—Residence—Finality of Voters' Lists—Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24(2)—Votes of Persons Disentitled by Non-residence—Inquiry as to how Ballots Marked—Municipal Act, 1903, *sec.* 200.

Appeal by D. H. Mehring, the applicant for a scrutiny, from the order of a Divisional Court, 25 O.L.R. 267, varying the order

*To be reported in the Ontario Law Reports.

of MIDDLETON, J., 23 O.L.R. 598, and holding that, upon a scrutiny, under the Municipal Act, of the votes cast at the voting upon a local option by-law, a County Court Judge has no right to declare void and deduct from the total of votes cast the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein: sec. 24(2) of the Voters' Lists Act, 7 Edw. VII. ch. 4, having no reference to a change of residence after the list is certified.

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

C. St. Clair Leitch and J. M. Ferguson, for the appellant.

W. E. Raney, K.C., and J. Hales, for Dugald McPherson, the respondent.

MOSS, C.J.O.:—This case furnishes another example of the difficulty and confusion which so often arise from the adoption by the Legislature of the device of incorporating by reference some of the provisions of one statute into the body of another statute which is being enacted. The disadvantages of this mode of legislation have been remarked upon in England and this country, and it has been truly said that this procedure makes the interpretation of modern Acts of Parliament a very difficult and sometimes doubtful matter. See Knill v. Towse (1889), 24 Q.B.D. 186, 196, where the question was not unlike in some respects the question involved in this case. And a legislative committee in England is reported to have described legislation by reference as making an Act so ambiguous, so obscure, and so difficult that the Judges themselves can hardly assign a meaning to it, and the ordinary citizen cannot understand it without legal advice: Craies' edition of Hardcastle on Statutory Law (1907), p. 26.

It is scarcely to be wondered at, therefore, that unanimity of opinion is not to be found expressed in many of the decisions in which the questions arising on this appeal or some of them have been discussed.

The first question raised in the appeal has been much debated, and has given rise to much divergence of opinion among the Judges who have it under consideration in other cases. As stated by Teetzel, J., in his opinion delivered while sitting as a member of the Divisional Court whose judgment is now in appeal, the question is: whether, upon a scrutiny under the

Municipal Act, the County Court Judge may declare void and deduct from the result the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein.

This question affects four votes polled, and, if answered in the negative, as it was by the Divisional Court, practically ends any necessity for discussion as to the fate of the one other vote polled, which is in question here.

In holding that the four votes in question were not open to attack upon the scrutiny, the Divisional Court considered itself bound so to hold by the decision of another Divisional Court in In re Local Option By-law of the Township of Saltfleet (1908), 16 O.L.R. 293, though it had been subjected to adverse comment in some other cases.

In Re Orangeville Local Option By-law (1910), 20 O.L.R. 476, Meredith, C.J., considered the question of the jurisdiction of the Judge to enter upon an inquiry as to the right to vote of any one who has deposited his ballot paper, and declared his own opinion to be against the exercise of such jurisdiction. He expressed the opinion that the inquiry is limited to a scrutiny of the ballot papers, and differs only from a recount in that the Judge is not limited to dealing with the ballot papers ex facie, but may take evidence in the same way as may be done upon a trial of the validity of an election of a member of a municipal council, for the purpose of determining whether any ballot paper ought or ought not to be counted.

With deference, I am unable to follow the distinction drawn between a scrutiny of ballot papers and a scrutiny of votes, bearing in mind the object with which the scrutiny is entered upon. The Judge is to determine and certify whether the majority of votes given is for or against the by-law. He is not merely, as in the case of a recount under sec. 189, to count up the votes given upon the ballot papers not rejected, and make up a written statement of the number of votes given for each candidate and of the number of ballot papers rejected and not counted by him, and certify the result to the returning officer. In all this he is acting in a ministerial capacity. In a scrutiny he is acting in a judicial inquiry, with the purpose of ascertaining which way in truth and in fact the majority of the votes is given. Light is thrown upon this view by the language of sec. 24 of the Ontario Voters' Lists Act, which expressly refers to a scrutiny under the Municipal Act, as well as to one under the Ontario Election Act. That section declares that "the certified

list shall upon a scrutiny under either of these Acts be final and conclusive . . . except . . . .'' The exception applies to one scrutiny as much as the other. Then what is the extent of the exception under sub-sec. 2, which is the one with which we are immediately concerned? It applies to persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates or within the electoral district for which the election is held, and who, by reason thereof, are, under the provisions of the Ontario Election Act, disentitled to vote.

If this sub-section applies to municipal elections, it also applies to voting on by-laws, by the express terms of the preceding part, which speaks of a scrutiny under the Municipal Act.

So that, when conducting a scrutiny under the Municipal Act, reference must be made to the provisions of sec. 24 of the Ontario Voters' Lists Act, in order to ascertain the extent to which the inquiry can proceed. I agree with those who think that a scrutiny under sec. 371 is something more comprehensive than a simple recount, and that, when proceeding with a scrutiny under that section, the County Court Judge has authority to inquire into the question whether any persons who have cast their ballots come within the excepted class mentioned in sub-sec. 2 of sec. 24 of the Ontario Voters' Lists Act.

I am also of opinion that it is competent for the County Court Judge to declare void the vote of a person who has cast a ballot, when it appears that, although his name was on the certified list, he was not, when it was placed thereon, resident and has not since become resident within the municipality to which the list relates. Within the very terms of the sub-section, as it appears to me, he is not and has not been resident within the municipality subsequently to the list being certified. I am unable to see why any distinction should be drawn between his case and that of a person who was resident within the municipality when the list was certified, but ceased to be resident subsequently to the list being certified.

The one remaining vote held void by the County Court Judge was admittedly within the exception of sub-sec. 2. The result should, in my opinion, be that the County Court Judge's ruling was correct, and that his certificate should stand.

The remaining question dealt with by the Divisional Court is, whether, if the County Court Judge, upon a scrutiny conducted by him, finds that a person whose name was upon the list, but who had no right to vote, did vote, such person may be compelled to disclose before the County Court Judge how he

did vote. While the decision of the Divisional Court on the other branches of the case rendered it unnecessary to consider this question, so far as the result was concerned, it deemed it of sufficient importance to justify a determination upon it.

Without entering upon any extended discussion, I think it quite sufficient for me to say that I entirely agree with the conclusion of the Divisional Court upon the question, as expressed in the opinion of Teetzel, J.

The result upon the whole is, that the order of the Divisional Court should be set aside, and that the County Court Judge should be left at liberty to certify the result of the scrutiny to the council.

But, in view of the varying and conflicting opinions and the apparent difficulty in solving the question at issue, there should be no costs of any of the proceedings.

GARROW and MAGEE, JJ.A., agreed with the conclusions of MOSS, C.J.O., for reasons stated by each in writing.

MEREDITH, J.A., dissented, upon the first ground of appeal, from the majority of the Court of Appeal, and agreed with the view of the Divisional Court. Upon the other ground, as to the right to inquire how the persons not entitled to vote marked their ballots, he agreed with the view of TEETZEL, J., adopted by the majority of the Court of Appeal. His reasons were given at length in writing.

MACLAREN, J.A., agreed with MEREDITH, J.A.

Appeal allowed; MACLAREN and MEREDITH, JJ.A., *dissenting.*

APRIL 29TH, 1912.

REX v. SCOTT.

Criminal Law—Supplying "Drug or other Noxious Thing"—Abortion—Criminal Code, sec. 305—Poison—Evidence—Conviction—Motion for Leave to Appeal.

Motion by the defendant by way of appeal from the refusal of the Chairman of the Wentworth Sessions to state a case for the consideration of the Court, for leave to appeal from the conviction, and for a direction to the Chairman to state a case.

The conviction was under sec. 305 of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies

or procures any drug or other noxious thing . . . knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child."

The question which the defendant desired to have stated was, whether there was any reasonable evidence that the substance supplied by the defendant was a "drug or other noxious thing."

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

J. L. Counsell, for the defendant.

E. Bayly, K.C., for the Crown.

MOSS, C.J.O.:—Upon this application the law under the Criminal Code and the Imperial Act was discussed and the English decisions referred to at some length by Mr. Counsell. We have since had an opportunity of reading the transcript of evidence and the Chairman's charge and of considering the cases cited and others. Our conclusion is, that no useful purpose would be served by directing that a case be stated upon the point raised. Having regard to the evidence and the charge of the learned Chairman, we see no reason for thinking that the conviction was wrong or that there are sufficient grounds for putting the matter in train for further discussion.

The application must be refused.

MEREDITH, J.A.:—In the Imperial enactment the words are "any poison or other noxious thing:" under the enactment in force here—see the Criminal Code, sec. 305, and also sec. 303—the words now are, "any drug or other noxious thing," though originally they were as in the Imperial enactment . . . ; and the change from the word "poison" to the word "drug" was not made for the purpose of narrowing the effect of the enactment: it may have been for the purpose of enlarging it, in consequence of the cases in England upon which this appeal . . . is based.

Those cases decided that, when the thing administered or supplied was not noxious in small quantities, in order to make a case against the accused it was necessary to prove that it was administered, or supplied to be taken, in quantities enough to make it noxious. So, too, it had been held under the enactment in force here before the change I have mentioned: see Regina v. Stitt, 30 C.P. 30. In no case, of which I am aware, has any

such ruling been applied to a substance which in itself is a poison, even though some of the most deadly poisons are commonly administered, in infinitesimal doses, for the healing of disease, or otherwise benefiting those in ill-health. To the contrary is the opinion expressed by Field, J., in . . . The Queen v. Cramp, 5 Q.B.D. 307, in these words: "If the thing administered is a recognised poison, the offence may be committed though the quantity given is so small as to be incapable of doing harm;" and this agrees with the views of that eminent lawyer Dr. Graves, which will be found expressed in a foot-note at p. 131 of Russell on Crimes, 1st Can. ed.

In my opinion, the requirements of the enactment in question are satisfied if the substance administered or supplied be a drug: if not a drug, it must, of course, be proved to be a noxious thing, and, in my opinion, noxious in the quantity administered or to be taken.

In this case there was reasonable evidence that the substance in question was not only a drug—a drug commonly called yellow jasmine, technically gelsemium—but also a poison: in its alkaloid—which was found in the analysis—a very powerful poison, and a recognised poison prescribed in several diseases, one of which is dysmenorrhœa; and also that it was a noxious substance: and so this motion for leave to appeal fails, being based entirely upon the contention that there was no reasonable evidence that the substance, as supplied, was a "drug or other noxious thing."

GARROW, MACLAREN, and MAGEE, JJ.A., agreed that the motion should be refused.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. APRIL 25TH, 1912.

BELL ENGINE AND THRESHING CO. v. WESENBERG.

Sale of Goods—Several Articles of Machinery—Divisible Contract—Separate Sale of each Article—Promissory Notes Given for Price of Whole Outfit—Action on—Counterclaim—Breach of Warranty—Defect in one Article—Return of—Allowance for—Set-off—Liability on Notes—Findings of Jury—Judgment—Costs.

Appeal by the plaintiffs from the judgment of BARRON, Co. C.J., upon the second trial, with a jury, of an action in the

County Court of the County of Perth, brought to recover the amount of two promissory notes and interest, and a counterclaim for rescission of the contract in respect of which the notes were given, for the return of the notes, and for other relief. The judgment appealed from was in favour of the defendant, upon the findings of the jury.

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

R. S. Robertson, for the plaintiffs.

Glyn Osler, for the defendant.

MIDDLETON, J.:—This action comes before us, even after a second trial, in a most unsatisfactory shape.

The plaintiffs' claim is upon two promissory notes: one for $125, due the 1st January, 1911; the other for $362, due upon the same date. These notes bear interest at ten per cent. per annum after maturity until paid. The defendant, by his defence and counterclaim, sets up that these notes and other notes were given in payment for a threshing outfit, consisting of a traction-engine, separator, band-cutter, wind-stacker, drive-belt, and straw-cutting attachment; that these were purchased under an agreement of the 17th August, 1910, which contained, among other things, a very narrow and limited warranty; that this machinery was delivered but failed to answer the warranty; and that, nevertheless, the plaintiffs refuse to allow the defendant to return the outfit, and also refuse to return to him the second-hand threshing outfit which was turned over to the plaintiffs at $1,200, and which sum was allowed as part payment on account of the purchase-price. Upon this statement, the defendant asks rescission of the contract and a return of his notes and the value of the second-hand outfit turned over to the plaintiffs.

Neither party appears to have paid sufficient attention to the terms of the contract. In it is provided, among other things, "that this contract is divisible, and that each article herein ordered is ordered and sold at a separate fixed price." The contract further provides that any credit for machinery taken in exchange is to be apportioned pro rata between the several items.

The individual machines above enumerated have each a separate price attached: the separator being sold at $425, out of a total of $3,150. The contract further provides that the warranty "is hereby made to apply separately to each machine or attachment herein ordered."

At the trial, no defect was alleged as to any of the machines or attachments save the separator. This was stated to be defective by reason of its swaying while in operation and choking.

The whole outfit was apparently treated as an entirety at the trial, the provisions of the contract above referred to being ignored; but from the plaintiffs' own evidence it is clear that the only defects charged were those indicated in the separator itself.

We are not altogether satisfied with the findings of the jury; but do not see our way clear to disregard them or to direct a third trial; and probably, in view of the conclusion at which we have arrived, the plaintiffs would not desire to have a new trial ordered.

The result is, that the plaintiffs should recover the amount due upon the two promissory notes sued upon; and, upon the defendant returning the separator, he should be allowed $425 upon his counterclaim, which may be set off against the plaintiffs' recovery; the plaintiffs recovering for the balance. This will leave the defendant with the traction engine and the remaining machinery, and will leave him liable to pay the four remaining notes as and when they mature.

The situation will probably be most unsatisfactory to the defendant, because he will be left in the possession not only of the traction-engine but of the other separate articles, which are probably more or less adapted for use with the plaintiffs' separator; but he has chosen to sign a contract in which the articles are separated, and which treats each article as sold for the price placed opposite to it. With this in view, we urged the parties to endeavour to come to some arrangement; but we are now advised that it is impossible to hope for any settlement; and we have, therefore, to do the best we can with this intricate and somewhat one-sided contract.

With reference to costs, the plaintiffs have succeeded in their action upon the notes; tthe defendant has succeeded in his claim upon the defective character of the machine. We think that the plaintiffs should have the general costs of the action, and that the defendant should have the costs of his counterclaim, including therein the entire costs of the controversy respecting the non-compliance of the separator with the terms of the warranty; these costs and the plaintiffs' recovery to be set off pro tanto. No costs of appeal.

BOYD, C., and LATCHFORD, J., agreed in the result.

DIVISIONAL COURT. APRIL 25TH, 1912.

*PUKULSKI v. JARDINE.

*PERRYMAN v. JARDINE.

Company—Liability of Directors for Wages of Servants—Ontario Companies Act, sec. 94—Unsatisfied Execution against Company—Sheriff's Return Made after Winding-up Order—"Proceeding" against Company—Dominion Winding-up Act, sec. 22—Proof of Status of Directors—Travelling Expenses—Inclusion in Debt for Services—Costs of Second Writ of Execution.

Appeals by the defendants from the judgments of DENTON, Jun. Co.C.J., in favour of the plaintiffs in actions, brought in the County Court of the County of York, to recover from the defendants, who were directors of the Boyd-Gordon Mining Company Limited, sums due to the plaintiffs respectively for wages as workmen employed by the company, for which the plaintiffs had recovered unsatisfied judgments against the company. There were also cross-appeals by the plaintiff in respect of the costs of execution.

The actions were brought to enforce the right given by sec. 94 of the Ontario Companies Act.

The appeals and cross-appeals were heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

E. B. Ryckman, K.C., for the defendants.

J. P. MacGregor, for the plaintiffs.

MIDDLETON, J.:— . . . Apart from some minor matters, the main contention of the defendants is based upon the fact that, before the executions against the company were returned, a winding-up order under the Dominion Act had been pronounced. It is said that the effect of this order was to stay all proceedings against the company, and that, therefore, the returns to the executions made after the winding-up are null and void.

The question so raised is of importance, as, if the defendants' argument is well founded, the effect of the winding-up order is materially to diminish the right of wage-earners and the liability of directors; because, under the Ontario statute, the

*To be reported in the Ontario Law Reports.

directors are liable to the extent of one year's wages; while, under the Dominion Winding-up Act, the wage-earner is entitled only to a preference for his unpaid wages not exceeding the arrears which have accrued during the three months next previous to the date of the winding-up order: R.S.C. 1906 ch. 144, sec. 70. The question is also of importance, because in many cases the entire assets of the company in liquidation are taken by debenture-holders; and, if the contention is well-founded, the directors, by reason of the winding-up order, may altogether escape this statutory liability.

Before considering the validity of this argument and the other questions raised, it is desirable to set out the facts proved at the trial, at length.

The Boyd-Gordon Mining Company has its head office at Toronto. It conducted mining operations in the district of Nipissing. On the 11th September, 1911, Pukulski recovered judgment against the company for $157.06, wages earned during the month of June, July, and August, 1911, and $22.04 taxed costs, in addition to the costs of execution. Upon the same day, writs of execution against goods and lands were issued to the Sheriff of Toronto, and on the following day these were placed in the hands of the Sheriff for execution. Contemporaneously, an execution was issued directed to the Sheriff of Nipissing. This was placed in the hands of that Sheriff on the 15th September.

On the 16th September, the company made an assignment for the benefit of its creditors; and on the 29th September an order was made for the winding-up of the company under the Dominion Act.

In order that the conditions precedent prescribed by the statute might be complied with, Pukulski's solicitor requested the Sheriffs to return these writs of execution, and they were respectively returned unsatisfied. The indorsement upon the writ to the Sheriff of Toronto was: "Nulla bona. The answer of Fred. Mowat, Sheriff." The return upon the Nipissing writ was: "Returned unsatisfied. H. Varin, Sheriff." Thereupon this action was brought.

The contention of the defendants is, that the returns made to the writs are void, because by sec. 22 of the Winding-up Act it is provided that, "after the winding-up order is made, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court imposes;" and by sec. 23 it is provided that "every attachment, sequestration, distress, or execution put in force against the estate or effects

of the company, after the making of the winding-up order, shall be void."

The cases collected by Mr. Justice Riddell in Grills v. Farah (1910), 21 O.L.R. 457, are relied upon as shewing that it is open to the defendants to attack the return in a proceeding such as this. That action, and the cases there cited, were not proceedings under the same provision as here in question, but under a provision which enables a creditor of the company to reach the unpaid capital by proceeding against the individual shareholders, analogous to sci. fa. Before these proceedings can be taken, it must be shewn that an execution against the company has been returned unsatisfied. Moore v. Kirkland (1856), 5 C.P. 452, and Jenkins v. Wilcock (1862), 11 C.P. 505, both determine that what the statute requires is, not a return pro forma, but a return after due diligence to realise the amount out of the effects of the company. As it is put by Draper, C.J., in the latter case, "It is not to be a mere illusory formal proceeding, to give colour to proceedings against a shareholder."

Brice v. Munro (1885), 12 A.R. 453, establishes that all that is required is that the execution should be issued to the sheriff of the county in which the head office of the company is.

Upon the facts in this case, it is quite clear that the return to the execution was not a mere colourable and illusory return, and that the Sheriff had exercised due diligence to find assets within his shrievalty. Upon the hearing, it was not shewn that there were any assets which could have been taken under execution. At present it seems to me that the onus was upon the defendants; but the plaintiffs have assumed that it was for them to do more than put in the return; and, if they rightly assumed the onus, they have abundantly discharged it.

Then, does the Dominion Act quoted prevent the making of the return after the winding-up? I think clearly not. That statute aims at the ratable distribution of the assets of the company among its creditors; and so the winding-up supersedes the executions and prevents the creditor from further prosecuting his execution against the assets of the company. The Sheriff would then be justified in returning the execution unsatisfied. He is not by the Ontario Act required to make a return "nulla bona;" and I think it would be sufficient if he made a special return, stating, "I return the writ unsatisfied, because I am unable to take the assets of the company within my bailiwick in execution, by reason of the making of an order under the Dominion Winding-up Act for the winding-up of the company." This cannot be regarded as a "proceeding with

the writ against the company," which is the thing prohibited by the statute. The Ontario statute, which imposes this liability upon the directors of the company, seeks to protect them from vexatious proceedings while the company has assets to which the creditor may resort. As soon as these assets are withdrawn from and rendered unavailable to the process of the wage-earner, and the Sheriff certifies that there are no assets which he can take, the obstacle is removed and the wage-earner is free to enforce his remedy.

It is argued that the plaintiffs have not proved that the defendants are directors of the company. They have put in a certified copy of the last Government return, which shews that the defendants were then directors; and they have produced the minute-book of the company from the custody of the liquidator, these minutes shewing that the directorate has not since been changed. This appears to be sufficient.

Two minor questions were argued before us. It was said that an allowance for travelling expenses did not come within the statute. We thought it did. Then the plaintiff Pukulski complained that he had not been allowed the costs of the second writ of execution, and cross-appealed with reference to it. We think the Judge was right in disallowing these. See Marquis of Salisbury v. Ray (1860), 8 C.B.N.S. 193; and In re Long, Ex p. Cuddeford (1888), 20 Q.B.D. 316.

Both appeals should be dismissed. The defendant should pay the costs, less $5 allowed in respect of the cross-appeal.

The facts in the Perryman case are substantially similar, and the same order will be made in it.

BOYD, C., gave reasons in writing for the same conclusion. He referred to some of the cases cited by MIDDLETON, J., and also to Nixon v. Brownlow (1856), 1 H. & N. 405; Ilfracombe R.W. Co. v. Devon and Somerset R.W. Co. (1866), L.R. 2 C.P. 15; Mackenzie v. Sligo and Shannon R.W. Co. (1854), 4 E. & B. 120; Palmer v. Justice Assurance Society (1856), 6 E & B. 1015.

LATCHFORD, J., concurred.

Appeals dismissed.

CLUTE, J. APRIL 26TH, 1912.

McMURTRY v. LEUSHNER.

Mortgage — Covenant — Indemnity — Relief over.

A mortgage action.

Frank McCarthy, for the plaintiff.

J. S. Fullerton, K.C., for the defendant Leushner.

The pleadings were noted as against the defendants Thompson, Ballantyne, and Campbell.

Before the close of the case, Campbell was represented by F. H. Thompson, K.C.

CLUTE, J.:—The action is brought by the plaintiff as mortgagee, and he asks for judgment against the original mortgagor, the defendant Leushner, upon the covenant, and foreclosure against the defendant Thompson, the present owner of the equity of redemption. Leushner added Campbell as a third party. It does not appear why Ballantyne was made a party defendant, and no case was made out against him, and as to him the action is dismissed without costs. The plaintiff is entitled to judgment upon the mortgage for $2,103.33, with interest on $2,000 from the date of the writ, and to the usual judgment for foreclosure.

Counsel for the defendant Campbell, while not disputing Leushner's right to judgment and costs, contended that execution should be stayed until Leushner had paid the judgment against him.

In an agreement between Campbell and Leushner, which is under seal, the land Campbell is to receive in exchange is stated to be subject to the mortgage in question, and Campbell covenants to assume the incumbrance. In the deed made pursuant to the agreement, it is stated that the land conveyed is subject to the mortgage in question, which Campbell "assumes, covenants, and agrees to pay as and when the same becomes due and payable, and hereby undertakes and agrees to save harmless the said party of the first part from all loss, costs, and damages that may arise in connection therewith" This is a covenant of indemnity; and, under the cases, Leushner is entitled to judgment for the amount of the judgment obtained against him and his costs in this action. See Boyd v. Robinson (1891), 20 O.R. 404; British Canadian Loan Co. v. Tear

(1893), 23 O.R. 664; English and Scottish Trust Co. v. Flatau (1887), 36 W.R. 238; Clendennan v. Grant (1885), 10 P.R. 593; Mewburn v. MacKelcan (1892), 19 A.R. 729.

Judgment will, therefore, go against Campbell for the debt and costs; but he should have notice of the proceedings for foreclosure.

MIDDLETON, J., IN CHAMBERS. APRIL 27TH, 1912.

RE CORR.

Evidence — Inquiry as to Next of Kin of Deceased Intestate— Scope of Inquiry—Roving Commission to Take Evidence Abroad—Costs.

Motion by the administrators of the estate of Felix Corr, deceased, for an order directing that the costs of any roving commission which may be issued by the Master in Ordinary, or under his direction, to take the evidence of witnesses in Ireland, be paid out of the estate.

J. S. Fullerton, K.C., for the administrators.

J. R. Cartwright, K.C., for the Attorney-General.

D. Urquhart, Grayson Smith, J. G. O'Donoghue, G. S. Hodgson, and W. M. Brandon, for various claimants.

MIDDLETON, J.:—It appears that the late Felix Corr died on the 3rd May, 1910, at the age of about 75 years. He had come to Canada when a lad of twenty. He left an estate of between $7,000 and $8,000. The National Trust Company were appointed administrators, and, not knowing who were the intestate's next of kin, they paid the net balance, $7,863.40, into Court, under the Trustee Relief Act.

By an order of Mr. Justice Teetzel, dated the 24th October, 1911, the matter was referred to the Master in Ordinary to inquire and report who was or were the next of kin. Pursuant to this, an advertisement was published, and a number of claims were filed.

A quantity of evidence has been taken before the Master. This evidence has not been taken, as one would have expected, in support of the various claims, but rather as if an inquest was being conducted; a great deal of rambling testimony being admitted, upon the theory that, while it was not evidence, it

might give some clue which could be followed up by further inquiry. Counsel stated before me that, upon this evidence, it would be impossible to find any one of the claimants entitled.

At the close of the evidence, according to the Master's certificate, the following took place: "I now request the solicitors present to state if any of them know of any available evidence from any source which may throw light on the inquiry as to whether Corr left any relatives, whether those relatives are or are not represented by such solicitors, or whether they can by any means in their power further assist me in this inquiry. No one answers, which I take to mean that no further evidence is available in Ontario. It already having been disclosed by the evidence that witnesses may be available in Ireland, I suggest to counsel that, though no further evidence can be obtained here, I do not feel justified in closing the investigation, in view of the statements by affidavit and viva voce that evidence may be found in Ireland; and I think that the administrators would be justified in moving for a commission and asking the Court for leave to pay the expenses (disbursements) of that step out of the funds. I adjourn the matter till the 25th instant, at 11 a.m., so that counsel may consider this suggestion. The Attorney-General states that, as at present advised, he is opposed to and will oppose a commission, on the ground that the probability of identification of a Felix Corr who might be proved to have left Ireland as indicated in such evidence with the Felix Corr who dies in Toronto is too remote."

No motion has been made for a commission, but the order applied for is sought; and the statement is made that it is intended that the Master in Ordinary himself shall go to Ireland and conduct such inquiries as he sees fit, without the assistance of counsel for any of the claimants. This course is supported by counsel representing some claimants, and is opposed by the Attorney-General and by other counsel.

It appears that there are several men named Felix Corr who left Ireland at different times for America, and the different claimants seek to establish, and could probably establish, relationship between one or other of these men; but the evidence so far taken not only fails to identify the deceased with any of these, but, in some cases at least, makes it reasonably plain that the identity cannot be established.

A picture has been drawn of the intestate in his 75th year, and the evidence which it is sought to take is that of a number of old people resident in Ireland who, it is suggested, will be able to identify him from this picture.

When one remembers that Corr left Ireland now more than fifty-five years ago, a boy of twenty, the entire worthlessness of the proposed evidence becomes apparent.

Apart from all other objections, I think the motion is vicious in principle, and that the learned Master is proceeding upon an erroneous theory. It is his duty to allow the claimants to present their respective claims as they best can, and each at his own risk as to costs; and, if each and all of the claimants fail to establish a claim, then the fund goes to the Crown; and the Crown will, no doubt, recognise any fair claim that may at any time be made out.

The motion must be dismissed. I think there should be no costs.

MIDDLETON, J., IN CHAMBERS. APRIL 29TH, 1912.

WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Costs—Scale of—Money Recovery within County Court Jurisdiction—Declaratory Judgment Affecting Further Sums—Jurisdiction of Trial Judge to Deal Provisionally with Scale of Costs—Power to Make Order after Judgment Entered—Con. Rule 1132*—Taxation—Appeal.*

Appeal by the defendants from the ruling of the Senior Taxing Officer at Toronto, that the plaintiff was entitled to tax costs on the High Court scale and that the defendants were not entitled to tax the excess of their costs over and above County Court costs, under Con. Rule 1132.

Irving S. Fairty, for the defendants.
D. Urquhart, for the plaintiff.

MIDDLETON, J.:—The action was brought to recover weekly payments due upon an accident insurance policy. The defendants disputed all liability; but, in addition to the question of liability, there was a question whether the plaintiff should recover single or double liability.

The action came on for trial before the Chief Justice of the Common Pleas, who gave judgment in favour of the plaintiff, but reserved the question as to the scale of liability. Some discussion then took place, in which the Chief Justice stated that,

if he came to the conclusion that the plaintiff was entitled only to single liability, he would award costs upon the High Court scale, as, although the amount recovered would be within the jurisdiction of the County Court, the action in truth determined a larger question, as the plaintiff had not recovered from his injuries at the time the action was brought, and would be entitled to receive weekly instalments falling due after the issue of the writ.

After consideration, the Chief Justice came to the conclusion that the plaintiff was entitled to recover upon the double liability scale, and, therefore, gave judgment for him for $1,300 with costs (25 O.L.R. 80, ante 232). Recovery being for an amount clearly beyond the jurisdiction of the County Court, no order was made or could then properly be made under Rule 1132.

An appeal was had from that judgment to the Court of Appeal; and that Court, on the 6th March, 1912, varied the judgment by reducing the amount of recovery to the scale of single liability, thus cutting down the amount of money recovered from $1,300 to $650 (ante 778). No costs of the appeal were given, and no order was sought or made under Con. Rule 1132 to prevent a set-off.

Some time thereafter, the learned Chief Justice added to the indorsement upon the record these words: "If it is ultimately held that the plaintiff is entitled only to the single indemnity, the costs will nevertheless be taxed on the High Court scale."

The defendants brought in before the Taxing Officer a bill for taxation, and contended that the plaintiff was entitled to tax only County Court costs, and that the defendants were entitled to the set-off provided by Con. Rule 1132.

The Taxing Officer overruled this contention, considering that he was bound to give effect to the amended indorsement upon the record; and from this ruling the present appeal is had.

The defendants place their contention before me upon two somewhat different grounds. First, it is said that the learned trial Judge had no jurisdiction to alter his judgment; that the judgment had been settled and issued; it was in conformity with the judgment actually pronounced; and, upon the principles indicated in Port Elgin Public School Board v. Ely, 17 P.R. 58, and McIlhargey v. Queen, 2 O.W.N. 781, 916, the trial Judge was functus officio; and that, for the same reason, the Court of Appeal, if applied to, would be unable to afford any relief.

In the second place, it is said that, while Rule 1132 enables a trial Judge to deal with the question of costs when he gives judgment for an amount within the jurisdiction of an inferior Court, it does not enable him to make an anticipatory order dealing with the question of costs in a case where he gives a judgment for an amount beyond the jurisdiction of the inferior Court, but which may be reduced by an appellate Court. It is said that the appellate Court, and the appellate Court alone, has power to "order to the contrary," when it so reduces the amount as to place the plaintiff in jeopardy.

Both these contentions appear to me to be exceedingly formidable; but, upon the best consideration I can give to the matter, I do not think it necessary to determine either of them in this case; because the judgment, as varied by the Court of Appeal, is not, in my view, one within the proper competence of a County Court. The action was not merely for a money recovery —it was also for a declaration; and, as modified by the Court of Appeal, it contains, first, a declaration "that the injuries which the plaintiff received on the occasion mentioned in the statement of claim resulted in temporary total disability, but were not received while he was a passenger within the meaning of the policy sued on;" and then follows a recovery for $650, "26 weeks' benefit accrued at the time of the issue of the writ herein." This is followed by an award of costs, which will carry costs upon the High Court scale, unless it can be said that the action is within the competence of the County Court.

It may well be that the effect of an action to recover the accrued instalments would be to determine all the matters in issue so as to bind the parties litigant in any action for instalments which subsequently accrue; but the judgment here does not leave the rights with respect to the subsequent instalments to be determined upon any principle of res judicata; it makes them the subject of a substantive adjudication; so that it cannot be said that this action was concerned merely with the past-due instalments: it is in form, as well as in substance, an action dealing with the instalments yet to accrue. The learned trial Judge thought—and apparently the Court of Appeal agreed with him—that this made the case one in which the plaintiff was entitled to have his full costs, even though he failed in recovering the full amount sued for; as the defendants, instead of admitting liability to the extent of the single indemnity, denied liability altogether.

For this reason, the appeal should be dismissed; and I can see no ground for withholding costs.

MIDDLETON, J., IN CHAMBERS. APRIL 29TH, 1912.

ONTARIO AND MINNESOTA POWER CO. v. RAT PORTAGE LUMBER CO.

Pleading—Statement of Defence—Interference with Riparian Rights—Action for Injunction and Damages—Status of Plaintiffs—Right to Equitable Relief—Statutory Rights—Non-compliance with Statutes—Motion to Strike out Parts of Defence—Embarrassment.

Appeal by the plaintiffs from the order of the Master in Chambers, ante 1078, refusing to strike out certain paragraphs of the statement of defence.

R. C. H. Cassels, for the plaintiffs.
Grayson Smith, for the defendants.

MIDDLETON, J.:—I think the conclusion arrived at by the learned Master is right. The statement of claim, it is true, puts the plaintiffs' rights upon their riparian proprietorship. The real meaning of the defence is, that the plaintiffs applied for and obtained the right to construct the works in question under certain statutes, and that these statutes imposed conditions which have not been complied with. Upon this it will be argued that the plaintiffs, having attorned to the jurisdiction of Parliament and having accepted the provisions of the Acts, is not now at liberty to repudiate the terms imposed and to construct the work without complying with the conditions.

Upon the argument before me, the plaintiffs' counsel declined to admit that no claim could be put forward under these statutes; but sought rather to take the position that he could, in this action, set up a claim for his clients as riparian proprietors, and confine the issue in this action to that single phase of his title; and that, if defeated in this, he would then resort to the statutes; and in some other litigation it might be open to him to support his claim under them.

I do not think that this is permissible. A party litigant must, I think, under our procedure, assert all his rights and every title that he may have justifying his claim. It is not open to him to try the matter piecemeal.

It may well be that the statement of claim is not altogether artistic, when it introduces allegations by the statement that "the plaintiffs claim;" but this can occasion no real embarrass-

ment, because it is quite open to the plaintiffs, if so advised, to disclaim by their reply the right which they are supposed to "claim."

Quite apart from this, it is clear that, whether the matter set up is well-founded or not, it is one which ought to be left entirely to the trial Judge. It serves as notice of the contention which is to be made by the defendants at the hearing; and it would be quite out of place to eliminate matters of this importance from the record at this stage. This is not the true function of a motion against pleadings as embarrassing.

The second ground of attack upon the pleading is the way in which the defendants set up certain matters which they rely upon as influencing any discretion which the Court may have to refuse an injunction. I think it would have been preferable if the pleader had used less ornate language; but this, I think, is not sufficient to justify a striking out of the pleading. When one company is described as an "appendix" to another company, a surgical operation is, no doubt, suggested; but the pleader probably used this metaphor in some secondary sense, as, in the same paragraph, he refers to the same company as "a mere creature of" the other; and, although when one finds a metaphor in a legal argument one suspects a fallacy, this is for the trial Judge.

The costs may be in the cause to the defendants.

BOYD, C. APRIL 29TH, 1912.

RE GIBSON.

Lunatic—Committee—Sale of Land—Mortgage as Security for Part of Purchase-money—Mortgage to be Made to Accountant of Supreme Court—Principal and Interest to be Paid into Court—Duty of Committee.

Application by the committee of a lunatic for an order authorising the applicant to sell lands of the lunatic and take a mortgage thereon in part payment.

W. Greene, for the applicant.

BOYD, C.:—Proceedings in lunacy are matters dealt with by the Court, and usually by orders made by a single Judge. They are within the scope of Con. Rule 66, which requires that all

securities taken under an order or judgment of the Court shall be taken in the name of the Accountant of the Court unless otherwise ordered. This is the policy or practice of the Court with reference to sales of lands of the lunatic, when mortgages are taken to secure part of the purchase-money. The principal moneys of the mortgage will be paid into Court to the credit of the estate, as well as all moneys which are payments for interest, to be accumulated, unless these periodical payments are required for the maintenance of the lunatic, in which case proper directions are to be given in the order sanctioning the sale and the mortgage. In this case, I understand the estate is otherwise ample for maintenance, and the interest may be paid into Court. It is, nevertheless, the duty of the committee to look after the mortgage investment as if the mortgage had been taken to and in the name of the committee.

BRITTON, J. APRIL 29TH, 1912.

PEACOCK v. CRANE.

Principal and Agent—Sale of Mining Property—Secret Commission—Enhanced Price—Fraud—Right of Purchasers as against Agents to Recover Sum Paid in Addition to Actual Price—Issue—Costs.

An issue directed by an order.

McConnell and others, the owners of the Silver Cliff mine, desired to sell it for $500,000, and promised to pay the defendant Moore a commission of $25,000 should Moore sell it at the price named. The defendant Jeffery was associated with Moore. Moore and Jeffery became acquainted with the defendant Eames, who was the private secretary of the plaintiff Peacock, and they, Moore, Jeffery, and Eames, formed the plan of selling the Silver Cliff mine to the plaintiffs. Moore then saw the owners, and asked for a larger commission than $25,000. The owners refused to pay any larger sum. Moore then suggested that the owners should call the price $550,000, upon the distinct understanding and agreement that only $500,000 should be paid to them, and that, out of this sum of $500,000, a commission of $25,000 would be paid. An agreement was arrived at, between Moore and the owners, that Moore should have authority to sell the mine at $550,000, upon terms and conditions fully set out.

This authority was limited to negotiating a sale to the plaintiffs upon the terms mentioned, and before the 12th June, 1909. The owners agreed that, upon payment to them of the whole sum of $550,000, $50,000, out of that sum, should be paid to Moore by way of additional commission. Eames represented to the plaintiffs, to the knowledge of Moore and Jeffery, and with their consent, if not at their suggestion, that the actual purchase-price of this mine was $550,000; and the plaintiffs bought at that price, without notice or knowledge of the secret arrangement between the vendors and Eames, Jeffery, and Moore, until after the completion of the purchase and the payment over of the purchase-money. Moore transferred his claim for commission to Eames, and notified the owners, who substituted Eames for Moore.

The vendors received all of the purchase-money except an amount rebated because of payment being made before due. The vendors paid the $25,000 commission, and they were afterwards ready to pay the $50,000; but, in the meantime, the plaintiffs had become aware of the real transaction, and they demanded the $50,000 from the vendors, alleging that they had been defrauded out of that amount by Eames, Moore, and Jeffery.

Another claimant for this so-called commission money appeared. The defendant Crane, on the 3rd August, 1909, notified the vendors that the commission of $50,000 was payable to him, as the sale had been negotiated by his, Crane's, representative. Later on, the defendants Crane, Otis, Morse, Bruce, and Cotton, commenced an action against the defendants Moore, Jeffery, Eames, and the vendors, to recover this commission.

The vendors in that action applied for leave to pay the money into Court. On the 24th January, 1910, an order was made by the Master in Chambers directing: (1) that the defendants the owners should be at liberty to pay into Court $50,000 and interest; (2) that, upon such payment in, that action would be dismissed as against the owners; (3 and 4) dealing with the matter of costs; and (5) that, without the issue of any new writ, Peacock and others, the purchasers, should proceed to the trial of an issue in which they should be plaintiffs, and the plaintiffs in that action, namely, Crane, Otis, Morse, Bruce, and Cotton, and Moore, Jeffery, and Eames should be defendants, to determine whether the plaintiffs in the issue, or some or one of them, or the defendants in the issue, or some or one of them, were or was entitled to the money to be paid into

Court. Then followed directions as to proceedings which should be taken for the trial of that issue.

The money was paid into Court. The plaintiffs delivered their statement of claim, pursuant to the directions contained in the order. The defendants Jeffery and Moore, in their statement of defence, expressly admitted: (1) that the purchase-price of the mining property in question was $500,000, and that the sum of $50,000 was added to the same in order to provide for payment of a further $50,000 commission to the defendant Eames; (2) that they had satisfied themselves that the sum of $50,000 was improperly added to the true purchase-price, without the consent or knowledge of the plaintiffs; and these defendants made no claim as against the plaintiffs to the money standing in Court in this matter. The defendant Eames, by his statement of defence, simply denied all allegations in the statement of claim. He did not appear at the trial.

The defendants Crane, Otis, Morse, Bruce, and Cotton, in their statement of defence, alleged that the defendant Moore was their agent and instructed by them to endeavour to effect a sale of the Silver Cliff mine property to the plaintiffs. They alleged a bona fide sale by Moore to the plaintiffs, through Eames, the agent of the plaintiffs, and that the plaintiffs now held the $25,000, part of the commission, in trust for Moore, and desired to get the $50,000 for the purpose of benefitting themselves and Moore, and in fraud of those defendants.

The issue was tried before BRITTON, J., without a jury.

M. K. Cowan, K.C., and G. H. Sedgewick, for the plaintiffs.

I. F. Hellmuth, K.C., and G. B. Balfour, for the defendants Crane and Cotton.

BRITTON, J. (after setting out the facts):—Upon the evidence, the allegations in the plaintiffs' statement of claim are substantially established. Angus W. Fraser was the solicitor for the owners of the mine, and acted for them in the transactions now under consideration. An option had been given to the defendant Otis to purchase—negotiations for this had been carried on by the defendant Moore. This option expired—the owners would not renew it. Then negotiations commenced between Mr. Fraser, acting for the owners, and Moore and Jeffery. About the 27th May, 1909, Moore made it plain that he had interested these plaintiffs—or Peacock, one of the plaintiffs—in this property, and as possible purchasers or a possible purchaser of it. It is quite clear that Moore's dealings were with Eames, the trusted private secretary of Peacock.

The scheme was devised as between Moore and Eames to have the nominal price changed from $500,000 to $550,000, with the object of getting $75,000 for themselves, instead of only $25,000, which the owners were willing to pay in case the sale was made at their price of $500,000.

The only inference that can be drawn from the clear and undisputed evidence is, that Moore and Eames, or Moore, Jeffery, and Eames, connived, so that Eames would get, either for himself, or for himself and the others, the additional $50,000 of the money of the plaintiffs. This was called commission. It was a secret commission. It was kept from the knowledge of the plaintiffs. The transaction would be bad enough, very bad, if paid by the vendors out of their own money to the agent of the purchasers, but what can be said in support of it by any one, when, by arrangement between the vendors and their agents, and the agent of the purchasers, a scheme was devised to get an additional large commission out of the purchasers?

The story is bluntly told by Eames in his letter of the 7th June, 1909, to the plaintiff Dinkey. Eames, after explaining the situation, as to the first payment, says: "If you care to go along, one-fifth interest will cost $15,000, plus about $2,000 for working capital. This is $5,000 more than we talked about. However, the owners had an offer of $550,000 spot cash, which they would have accepted if they had not given this option to Mr. Moore; so do not think there is any use in trying to do better." This was a deliberate falsehood—not a particle of evidence that the vendors had any such offer. They did not ask more than $500,000. This case is a stronger one for the plaintiffs than was the case of Myerscough v. Merrill, 12 O. W.R. 399, and stronger than Manitoba and North-West Land Corporation v. Davidson, 34 S.C.R. 255.

The evidence of the defendant Crane established that the defendants Otis, Morse, and Bruce have no right to any part of this money. The only claimants, therefore, against the plaintiffs, are Crane and Cotton, and they claim only because, as they allege, Moore and Jeffery were or Moore was their agents or agent. Crane and Cotton cannot claim money paid over through the fraud of their own agents. In so far as these agents by fraud assisted Eames in getting money from the plaintiffs, the defendants as principals are in no better position than the agents themselves. There was a fraud upon the plaintiffs. The rights of Crane and Cotton are no higher than the rights of Moore or Jeffery or Eames. In any view of the case, whatever rights, if any, Crane and Cotton can have to commission, it

can only be as to the $25,000, or part of it. That sum was paid over by the vendors. That money is not in Court. This issue is as to the $50,000 obtained from the plaintiffs by calling it part of the purchase-money, but intending to get it, calling it commission. The rights of Crane and Cotton, if any, against the vendors are reserved by the order. This issue is not as to the $25,000, or any part of it, but only as to the $50,000, which never belonged to the vendors.

I find that the plaintiffs A. R. Peacock, D. M. Clemson, and A. C. Dinkey are entitled to the money paid into Court under the order of the Master in Chambers dated the 21st February, 1910, namely, the $50,000 and interest thereon, less the costs deducted thereout, and also interest allowed by the Court upon the money so paid in, and I find that the defendants, namely, A. F. Crane, Theodore E. Otis, Bryan K. Morse, F. G. Bruce, George A. Cotton, John J. Moore, W. H. Jeffery, and Albert H. Eames, are not, nor is any one of them, entitled to the said money or any part of it. Pursuant to the order above-mentioned, I order and direct that the costs of the issue and the trial thereof shall be paid by the defendants other than the defendants John J. Moore and W. H. Jeffery, in the said issue, to the plaintiffs in the said issue. No costs to be paid to or by the defendants Moore and Jeffery.

RIDDELL, J. APRIL 29TH, 1912.

DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOCIATION.

Benevolent Society—Police Benefit Fund—By-laws—Amendment—Right to Retiring Allowance—Forced Resignation of Member of Police Force.

Action by the former Chief Constable of the City of Ottawa to recover $1,000 retiring allowance out of the fund of the defendant association.

A. E. Fripp, K.C., for the plaintiff.
M. J. Gorman, K.C., for the defendants.

RIDDELL, J.:—The plaintiff was Chief of Police, Ottawa; and in 1905, largely through his exertions, the members of the

police force agreed to establish and maintain a superannuation and benefit fund for the benefit of the members of the force and their families. Many, if not all, signed a declaration accordingly, directing their officers (named) to become incorporated under the Ontario Insurance Act, under the name of "The Board of Trustees of the Ottawa Police Benefit Fund Association."

The trustees did not obtain such incorporation, but the members of the force contributed to the fund according to a prescribed plan; and at length, in March, 1907, the acting trustees applied under the Benevolent Societies Act, R.S.O. 1897 ch. 211, for incorporation under the name of "The Ottawa Police Benefit Fund Association." The application was certified under sec. 3(3) of the Act by the County Court Judge, and filed on the 11th March, 1907; and there is no doubt that the effect of sec. 3(5) is to form a corporation.

In the application appears the following: "6. That the by-laws and regulations governing the said corporation and the members thereof shall be approved of at the first annual meeting of the said corporation after the incorporation thereof, or at any general meeting of the members called for that purpose, provided that said by-laws shall not contain any particulars or provisions which are contrary to law."

Mr. Sinclair, a solicitor in Ottawa, was employed to draw up by-laws, etc., and did so, making use where he thought proper of the regulations previously drawn up, but not used as by-laws, etc., of a corporation.

The by-laws drawn up by Mr. Sinclair contained the following:—

"10. Every application for a retiring allowance, gratuity, or aid, must come before the board of trustees, when the whole circumstances of the case will be fully gone into, and a report on the case sent in for the sanction of the Board of Commissioners of Police; and in case of differences between the trustees and the Board of Commissioners of Police, the trustees shall be heard in person by the said Board of Commissioners of Police, and, if possible, concurrence arrived at: but, in case of failure to concur, the judgment or decision of the Board of Commissioners of Police shall be final; but in no case shall a member be entitled to retire who is in good health and capable of performing his duties."

"14. The Chief Constable shall be treasurer of the fund, but no money shall be paid out of said fund by him unless ordered by the board of trustees and sanctioned by the Board of Com-

missioners of Police, subject, in case of differences, to the result as stated in section 10."

"18. So far as the funds of the association will provide . . . the following scale of benefits at retirement and death respectively shall be paid to members of the association in good standing (or their representatives . . .) who are not in arrears for dues or other authorised assessments towards the benefit fund:"—

(A scale is set out.)

A clause, No. 19, was introduced to cover the case of the plaintiff, then the Chief Constable.

"19. Any member who joined the police force previous to the 1st day of March, 1905, and who at that date had attained the age of 50 years, shall upon retiring be entitled to one month's pay (as at date of such retirement) for each year of service, but shall in no such case receive more than the sum of $1,000."

Other provisions are:—

"24. Any member who is compelled to resign by reason of illness shall have his case considered by the board of trustees, subject to the approval of the Board of Commissioners of Police."

"26. Any member of the association who may be dismissed from the police force for cause by the Board of Police Commissioners shall immediately thereupon cease to have any interest in the fund of the association, and shall not be entitled to any gratuity or benefit therefrom."

These were adopted, perhaps informally, but nevertheless adopted in fact, by a meeting of the force in December, 1909—except the last clause in sec. 10, which was objected to and not adopted.

In 1910, the plaintiff was asked for his resignation, and he refused: the Board of Commissioners sent their secretary to see him and force him to resign—"no compulsion but you must"—and the plaintiff did resign. The Board accepted his resignation and spread in their minutes a fulsome commendation of the resigning Chief (22nd February, 1910).

In March, 1910, at a meeting of the trustees of the fund, it was moved, seconded, and carried to strike out the words, "but in no case shall a member be entitled to retire who is in good health and capable of performing his duties" from sec. 10. I think this was wholly unnecessary, as that clause had not in fact been adopted at any time. This resolution was approved by the Board of Commissioners of Police in May, 1910. I cannot see that either the board of trustees of the fund or the Board

of Commissioners of Police had any power in the premises—the by-laws, etc., are to be made by the members, not the trustees, and the Commissioners are not mentioned in the application.

In September, 1910, the plaintiff applied for an allowance of $1,000 under sec. 19. This was considered by the board of trustees, and "they regretfully came to the conclusion that they could not recommend him for a retiring allowance under the rules and regulations governing the benefit fund at the time of his leaving the force." In this judgment the Board of Commissioners of Police concurred. In April, 1911, a demand was again made, and the board of trustees at a meeting decided that, "under the by-laws, Major de la Ronde is not entitled to a retiring allowance." This action was then brought.

It would seem that the boards were, in deciding upon the application, of the impression that the last part of sec. 10 was in force. This is an error. This clause never was adopted, and I shall so declare. Even were it in force, the plaintiff does not come within its provisions. He did not claim the right to retire—he was forced out. The clause never was intended to cover such a case—nor does sec. 26 apply.

I do not at present give judgment; I retain the case in the hope that, with the above findings, the parties will be able to agree. If not, I shall give judgment.

KELLY, J. MAY 1ST, 1912.

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.

Highway—Boundaries of Lots—Allowance for Road—Encroachment—Failure to Prove—Erection of Fence—Removal—Injunction—Dedication—Estoppel.

Action to restrain the defendants from interfering with or removing a fence alleged by the plaintiffs to be the western boundary of part of lot 26 in the broken front concession on Lake Erie, in the township of Bertie, of which part of the lot the plaintiffs claimed to be the owners, and from entering on the plaintiffs' land, and for damages.

The defendants by their counterclaim asked that the plaintiffs should be ordered to remove the fence and should be restrained from incumbering or obstructing the roadway.

W. M. German, K.C., and H. R. Morwood, for the plaintiffs.
E. D. Armour, K.C., and G. H. Pettit, for the defendants.

KELLY, J.:—The part of lot 26 owned and occupied by the plaintiffs fronts on Lake Erie.

For at least thirty years prior to June, 1899, there was open for travel a road running southerly, between lot 26 and lot 27, from the concession road, which runs easterly and westwardly, to another road running easterly, known as the Haun road, and which is a considerable distance north of the north line of the plaintiffs' property.

On the 1st June, 1899, the Crystal Beach Steamboat and Ferry Company, the plaintiffs' predecessors in title . . . and a large number of other property-owners and residents in that locality, presented a petition to the defendants, setting forth that "a portion of the Government allowance for road between lots 26 and 27 in the broken front concession, Lake Erie, has not yet been declared open for public travel;" that the petitioners believed "it to be in the public interest to have said road opened from the Haun road to the lake shore;" and the petitioners asked the defendants "to take the steps necessary according to law to make this road allowance a highway." The petition was signed by the Crystal Beach Steamboat and Ferry Company, by their general manager, J. E. Rebstock; and he and the president of the company, with others, attended at a meeting of the defendants' council and urged the granting of the petition. J. E. Rebstock is, and was as early as 1902, a director of the plaintiff company; who acquired their property in June, 1902.

On the 9th September, 1899, the defendants passed a by-law declaring open for public travel "the Government allowance for road from the road known as the Haun road south between lots 26 and 27 broken front, Lake Erie, to the shore of Lake Erie." The land which was so opened for roadway at or adjoining the plaintiffs' land is 25 feet on each side of a fence then existing, which was thought by some to be the boundary line between lots 26 and 27, and which was the dividing line between the property then occupied by the plaintiffs' predecessors . . . and the property to the west thereof. This is the line which the plaintiffs now allege to be the westerly boundary of their property.

The defendants, when opening the road, did not employ a surveyor to fix its location.

Soon after the passing of the by-law, work was commenced

to put the roadway in condition for traffic, by cutting through a hill near the lake, and filling in the marshy part of the road north of the hill; and work in the way of improvement and repair to the roadway has been done by the defendants year after year since that time.

In 1903, the defendants constructed a sewer leading from a point in the new road, north of the north limit of the plaintiffs' property, through the road as so opened to the lake, the north end of the sewer commencing in the east ditch of the roadway and bearing somewhat to the west as it proceeds to the south, so that the northerly portion of it is to the east of the centre line of the road, as so laid out, and the southerly portion of it is to the west of that line.

In 1905, the sewer having been damaged, the defendants repaired it.

The road has continued as a public travelled road from the time it was opened; and the traffic upon it has been partly on the land east of the line fence erected by the plaintiffs and partly to the west of it. The width of the old road north of the Haun road varies from 36 feet to 40 feet, while the part opened in 1899 has a width of 50 feet from a short distance south of the Haun road to the lake.

In 1911, the plaintiffs, asserting that the west boundary of lot 26 extended to the centre of the road as opened, erected a fence along the boundary so asserted, and the defendants removed it. . . .

It has not been made clear . . . that an allowance for road existed between lots 26 and 27; and there is also grave doubt as to the true location of the west boundary of lot 26. . . .

The plaintiffs, on whom rests the burden of proving that the line where they erected the fence on the roadway is the west limit of their property, have failed to shew where the westerly boundary of lot 26 lies, or that it falls within the boundaries of the land laid out in the roadway. Especially have they failed to shew that the fence which they erected, and which was removed by the defendants, was the westerly boundary of lot 26. Even had the plaintiffs established that line, there would still have to be considered the circumstance of the plaintiffs' predecessors in title having petitioned to have the road north of the Haun road opened to the lake shore; and whether their action and the action of the defendants in opening the road constituted a dedication of the road.

There was no complaint or objection on the part of the plaintiffs or their predecessors, except some objection to the loca-

tion of the sewer made to the contractors who were engaged in its construction; but this objection was not made to the defendants, and did not come to their knowledge.

I do not, however, rest my judgment on the question of dedication.

Since the plaintiffs have not established that the line of the fence which they erected is the west limit of their property or of lot 26, and have not proved that any part of the road opened is on their land, they are not entitled to succeed; and I dismiss their action with costs.

In the absence of some positive evidence shewing whether there existed an allowance for road between lots 26 and 27 and fixing the westerly boundary line of lot 26, I make no order on the counterclaim that the plaintiffs be ordered to remove the fence and be restrained from incumbering or obstructing the road.

FRASER v. WOODS—KELLY, J.—APRIL 25.

Deed—Reformation of Conveyance of Land—Description—Boundary Line—Mistake — Evidence—Trespass — Injunction.] —The plaintiff, being the owner of two adjoining parcels of land in the town of Amherstburg, called respectively "the lumber-yard lot" and "the homestead," sold the former, which lay south of the latter, to the defendant Mabel S. B. Woods, and executed a conveyance to her by which he intended to convey that parcel, describing it by metes and bounds. The defendant Sophronia Beresford was a mortgagee under a mortgage made by her co-defendant. There was a dispute as to the northern boundary of the part conveyed. A surveyor, acting for the defendants, ran the line, according to the description in the deed, about 30 feet to the north of the boundary line between the two properties as shewn on the ground; and the defendants began to erect a fence on the line so marked out. The plaintiff brought this action to restrain the defendants from trespassing, for reformation of the conveyance, and other relief. KELLY, J., after reviewing the evidence in detail, said that, having in mind that very strong evidence was necessary to found a right to rectification of a written instrument, he was clearly of opinion that the evidence submitted on behalf of the plaintiff was, to use the words of Lord Chelmsford in Fowler v. Fowler (1869), 4 De G. & J. at p. 264, "such as to leave no fear or reasonable doubt upon the mind that the deed does not embody the final intention of the parties." He

referred also the language of Armour, C.J., in Clarke v. Joselin (1888), 16 O.R. 68, 78, and concluded his written reasons for judgment thus:—After careful consideration of the whole evidence, and having regard to all the circumstances surrounding the transaction, the conclusion I have come to, and I have reached it without any doubt as to its correctness, is, that the deed from the plaintiff to the defendant Woods does not embody the true description of the property intended by the parties to be dealt with. The evidence convinces me, and I find, that what the purchaser, through her husband and Davis (solicitor for the husband), asked to purchase, and what the plaintiff intended to sell and offered to sell for $3,500, and what the purchaser intended to purchase for that price, and what the defendant Sophronia Beresford intended as security for the money advanced to her co-defendant, was the property shewn on the ground as the lumber-yard property, the northerly boundary of which is the line of the south wall of the barn on the plaintiff's homestead property and its continuation westerly to the river. There will, therefore, be judgment declaring that the northerly boundary of the land intended to be sold and purchased and intended to be mortgaged to the defendant Beresford is the south line of the barn and its continuation westerly to the river;; that the conveyance from the plaintiff to the defendant Mabel S. B. Woods be reformed so as to carry this into effect; and that the mortgage from the defendant Mabel S. B. Woods to her co-defendant be likewise reformed. The injunction restraining the defendant Mabel S. B. Woods, her servants, workmen, and agents, from entering on or trespassing upon or interfering with the plaintiff's property north of that line is made perpetual; the other defendant is likewise restrained. The plaintiff is entitled to his costs of action. A. R. Bartlett, for the plaintiff. J. H. Rodd, for the defendants.

UNITED INJECTOR CO. v. JAMES MORRISON BRASS MANUFACTURING CO.—MASTER IN CHAMBERS—APRIL 26.

Particulars—Statement of Claim—Infringement of Patent Rights—Postponement till after Discovery.]—In an action for infringement of patent rights and use of trade marks, the defendants moved, before pleading, for particulars of allegations made in the statement of claim. The Master referred to the analogous case of Batho v. Zimmer Vacuum Machine Co., 3 O.W.N. 1009, 1152, and said that it seemed sufficient at this stage to

make an order such as was made in that case. What machines the defendants had made and what sales, or whether they had made any, must be within the knowledge of the defendants. If they had done none of these things, they could safely plead to that effect. Then, with the case at issue and discovery made, it would be open to them to amend their defence as they might see fit. The motion should be dismissed; costs in the cause. The defendants to plead in eight days. Leave reserved to apply for further particulars after discovery, if desired. The case might be put on the peremptory list two weeks after being set down, so as to have a trial before vacation. Grayson Smith, for the defendants. Britton Osler, for the plaintiffs.

JAMIESON MEAT CO. v. STEPHENSON—BRITTON, J.—APRIL 30.

Partnership—Failure to Establish—Money Claim—Assignment of Interest in Business—Attack by Creditors—Disclaimer by Assignee—Judgment—Costs.]—Action against two defendants, Stephenson and Spragg, for the price of meat supplied to the "Savoy Café" at Cochrane. The plaintiffs alleged and attempted to prove that the café was being run or carried on by the defendants as partners. Stephenson and Spragg both denied that any partnership ever existed between them in this café business. The plaintiffs' claim was admitted by Spragg as against the café, and, therefore, against Spragg, as he alone, as he contended, carried on the business. The learned Judge said that the question was entirely one of fact, and, upon the evidence, he must find that the defendant Stephenson was not a partner, and that the plaintiffs did not supply meat upon his credit.—The plaintiffs also attacked an assignment made by Spragg to Stephenson on the 18th January, 1912, purporting, in consideration of $1, to assign to Stephenson all Spragg's interest in the restaurant business known as the Savoy Café, the stock in trade, furniture, goodwill, etc. The real consideration was, that Stephenson agreed to pay certain liabilities of the restaurant. The plaintiffs alleged (by amendment) that the assignment was void as a preference to Stephenson. The defendant Stephenson said, at the trial, that he would not accept the interest of the defendant Spragg in the property mentioned, upon the terms under which it was given, and he had no desire to prejudice the creditors of Spragg or to prejudice his own claim. The learned Judge said that, in regard to this claim, the judgment should be, with the consent of Stephenson, that,

as against the plaintiffs, as creditors of Spragg, the assignment should not be set up or in any way relied on by Stephenson or stand in the way of the plaintiffs as execution creditors of Spragg in the recovery of the amount of their execution, but the defendant Stephenson was not to be prejudiced as to any claim he might have against Spragg or as to any securities he held other than the assignment. Judgment for the plaintiffs against Spragg for $335.60, with costs as if he were sole defendant and as upon a judgment by default. Action as against Stephenson (otherwise than as above) dismissed with costs. T. W. McGarry, K.C., for the plaintiffs. G. E. Buchanan, for the defendants.