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COURT OF APPEAL.

NOVEMBER 19TH, 1912.

ROBINSON v. GRAND TRUNK R.W. CO.

Railway—Carriage of Live Stock and Person in Charge—Half Fare Privilege—Injury to Person—Negligence—Liability—Exemption—Contract with Shipper—Absence of Privity and Knowledge of Person Injured.

Appeal by the defendants from the judgment at the trial before LATCHFORD, J., and a jury in favour of the plaintiff, 26 O.L.R. 437. The action was brought by the plaintiff to recover from the defendants damages caused to the plaintiff while upon a railway train on the defendants' line of railway. The injury was caused by a collision with another train, and negligence in operating the train was admitted. The jury assessed the damages at $3,000.

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

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

R. McKay, K.C., for the plaintiff.

GARROW, J.A.:—The only question upon this appeal arises out of the circumstances under which the plaintiff was upon the train at the time of the injury complained of, which are very similar to those recently before this Court in Goldstein v. Canadian Pacific R.W. Co., 23 O.L.R. 536, even to the circumstance that the blank for the signature of the person travelling with the animal had here as there been left unsigned. There is, however, this circumstance which should be mentioned; in the Goldstein case it did not appear that any fare was paid, or intended to be paid, by the shipper for the carriage of the attendant, while in this case a reduced fare was charged, and paid by the consignee.

The view of Latchford, J., is thus expressed:—"I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide."

In the Goldstein case the main question was as to the right of indemnity which the defendant claimed against the third parties. And in considering that question I incidentally referred to the nature of the contract under which the plaintiff was travelling at the time of his injury, and indicated my opinion of its proper construction as far as the then plaintiff was concerned: see page 539.

Further consideration in this case, in which the question is of course more directly involved, has only served to confirm what I there expressed, that a person in the position of the plaintiff, travelling under such special circumstances, paying no fare himself, and having no other ticket or other authorization entitling him to be upon the train at all, cannot be heard to deny that he was travelling under the provisions of the contract in his possession, whether he had taken the trouble to read it or not. And the result would in my opinion be the same, whether or not the signature of such person upon the back of the contract, in the blank for that purpose, had been obtained. Such signature is clearly not essential to the creation of the contract, its only use being obviously for the purpose of identification, and to prevent anyone else from travelling upon it.

I am not quite certain what is meant in the judgment by the "common law rights" of the plaintiff to which the learned Judge thought he might be remitted. He cannot, of course, have meant a common law right to travel free, or at a reduced fare, upon the defendants' railway, for of course no such right exists or ever existed. The only other common law right which occurs to me is the ordinary right of every one to be protected against negligence. But negligence in such connection does not mean abstract negligence, but negligence under circumstances which imposed

upon the negligent one a duty not to be negligent. And the nature and extent of this duty is not a fixed and definite quantity applicable to all alike, but varies according to the circumstances. For instance, a passenger who has paid his fare and has a ticket, is legally entitled to assert a higher and more extensive duty in his case than has a mere trespasser who has paid no fare and has no contract. So that the fundamental enquiry into the nature and extent of the duty does not stop short at the point where the plaintiff is merely found to have been upon the defendants' train, but must involve and include the further question of how and by what authority he came to be there, with the inevitable result, as it seems to me, that the contract is thus reached, and must be received and acknowledged as the foundation and the measure of the rights, duties, and liabilities of all parties, the plaintiff included. The shipper under such a contract as the one in question may himself accompany the animals, or he may name a person to do so, who becomes in the language of the contract his "nominee." No one accompanying the animals is apparently compelled to accept the privilege of travelling under such a special contract at reduced fare, or no fare at all. Instead it is quite open to the person to purchase in the ordinary way the regular ticket, paying the regular fare, in which case he would be entitled to the rights of an ordinary passenger.

But if the travelling is done under special contract, and at the reduced fare, or no fare, as the case may be, its terms must I think be equally binding upon the shipper, if he alone accompanies the animals, or upon his nominee if he does not.

And as the contract in question clearly excludes liability on the part of the defendants, "whether caused by the negligence of the company, of its servants, or otherwise howsoever," and has been duly authorized by the Railway Board under sec. 340 of The Railway Act, R.S.C. 1906, ch. 37, the only remaining question must be the important one whether the Board had authority in the premises.

And that question I would answer in the affirmative.

The language of the section is "no contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall except as hereinafter provided relieve the company from such liability unless such class of contract, condition, by-law, regulation, declaration or notice shall have first been authorized or approved by order or regulation of

the Board: (2) The Board may in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited: (3) The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the Company."

"Traffic" is interpreted to mean "the traffic of passengers, goods and rolling stock," sec. 2 (30). Any "goods" by (10) of the same section, as "personal property of every description that may be conveyed upon the railway, or upon steam vessels or other vessels connected with the railway."

Section 284, which I need not quote at length, should also be looked at. It prescribes for the "accommodations for traffic" and, among other things, for "with due care and diligence" receiving, carrying and delivering traffic. And sub-sec. 7 gives to every person aggrieved by any neglect or refusal on the part of the company to comply with the requirements of the section, but subject to this Act, "an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration," if the damage arises from the negligence or omission of the company, or of its servants. The omission from this subsection of the word "contract" should also be noted, a word found in sec. 340 in connection with the other words here used, with the additional words "by-law, regulation."

In the well known Vogel case, 11 S.C.R. 612, two of the learned Judges, Strong, J., and Taschereau, J., were of the opinion that a similar provision, without the words "subject to this Act," and without any provision, in the legislation as it then stood equivalent to the present sec. 340, did not prohibit a railway company from entering into a special contract limiting its liability even for the consequences of its own negligence. And a similar opinion was expressed in this Court by Burton, J.A., see 10 A.R. 171, 172, and in effect by Patterson, J.A., at page 183. That was before the days of the Railway Board, when efforts to unduly limit their responsibilities as common carriers were not infrequent on the part of Railway Companies, by means of "notices, conditions and declarations," to which it could not be said that the consignors or consignees were parties otherwise than through an often doubtful notice of some kind. See the history of such efforts in the judgment of Strong, J., in the Vogel case at page 629, et seq. Now, after the matter had repeatedly arisen in the Courts and formed the subject of much expensive litigation (see among other cases, Grand Trunk R.W. Co. v. McMillan, 16 S.C.R. 559; Robertson v. Grand Trunk R.W.

Co., 24 S.C.R. 611; St. Mary's Creamery Co. v. Grand Trunk R.W. Co., 8 O.L.R. 1) the policy of the legislation, which received its present form in the year 1903 (see 3 Edw. VII. ch. 58, sec. 275) apparently is to remit the question of what is a fair and reasonable contract between the carrier and the shipper to the Railway Board.

Such a policy, tending to secure reasonableness and justice between the parties, as well as definiteness and certainty in contracts which from their former obscurity were so often the subjects of litigation, is I think wise and useful, and entitled to receive a liberal interpretation for the purpose of enabling it to accomplish its obvious purpose. And so regarding it I have no hesitation in holding that the contract in question was one the approval of which was well within the powers of the Board.

I would, for these reasons, allow the appeal and dismiss the action with costs.

MACLAREN, and MEREDITH, JJ.A., concurred in allowing the appeal, the latter giving written reasons for his opinion, while MAGEE, J.A., and LENNOX, J., dissented from the judgment of the majority of the Court, both giving written reasons, and were in favour of dismissing the appeal.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

McCLEMONT v. KILGOUR MANUFACTURING CO.

Master and Servant—Injuries to Servant—Dangerous Machinery in Factory—Proper Guarding—Negligence—Contributory Negligence—Evidence for Jury—Findings—Factories Act—Statutory Duty—Voluntary Assumption of Risk.

Appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial before BRITTON, J., and a jury, in favour of the plaintiff (3 O.W.N. 446, 999).

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

T. N. Phelan, for the defendants.

W. N. McClemont, for the plaintiff.

MEREDITH, J.A.:—The jury found that the plaintiff was not guilty of contributory negligence, with which finding their find-

ing that he voluntarily incurred the risk which caused his injury seems to me to be quite inconsistent on the facts of this case.

One subject, and the subject of the greatest controversy at the trial, was whether the plaintiff's manner of doing the work he was engaged in when injured, or some of the other ways deposed to by other witnesses, was the safer and better; and the jury seem to have found in favour of his way, at all events have plainly found that it was not a negligent way, having acquitted him of contributory negligence.

Then it being the fact that the plaintiff was not negligent in getting into the box to do the work, it follows that there was no evidence that he voluntarily incurred the risk: in short he was doing that which it was his duty to do, without incurring any greater risk than that duty made necessary. In doing that which his duty required him to do, and doing it in a reasonable manner, in a manner which did not increase the risk, he did not bring himself within the rule volenti non fit injuria: he was not a volunteer; that which he did was done under the requirements of his service, his duty to his master. A master who requires his servant to perform a dangerous service cannot say that it was done voluntarily, merely because the servant performed the service, did his duty, instead of refusing to do it, at the risk of dismissal or other disadvantage likely to follow such a refusal. If the servant do it in a negligent way he fails because of contributory negligence, not because he voluntarily incurred the risk.

There was therefore, in my opinion, no evidence to support the finding in this respect, and consequently no such question should have gone to the jury, and the case is now to be treated as if there were no such finding; with the result that the verdict and judgment in the plaintiff's favour must stand. Under all the circumstances, the jury's finding in this respect can have meant only that the plaintiff was not compelled to do the work; he might have refused to do it, but did not.

And the jury having found in favour of the plaintiff on the question of the propriety of his method of applying the paste to the belt, a clear case, under the Factories Act, is made out against the defendants; because to anyone getting into the box, that box was rather a snare than a safeguard against the danger caused by the set screw.

I would dismiss the appeal.

GARROW, MACLAREN, and MAGEE, JJ.A., and LENNOX, J., concurred in dismissing the appeal, the first named giving reasons in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

DART v. TORONTO R.W. CO.

Street Railway—Negligence — Contributory Negligence — Answers of Jury—Reasonable Care—Indefinite and Inconclusive Answers—"To a Certain Extent"—"By Lack of Judgment"—Ultimate Negligence.

Appeal by the defendants from the judgment of a Divisional Court reversing the judgment at the trial before LATCHFORD, J., and a jury, in favour of the plaintiff, and directing a new trial.

The action was brought to recover damages said to have been caused to the plaintiffs upon a highway in the city of Toronto by the negligent operation of a street car by the servants of the defendants.

The jury answered the questions submitted to them as follows:—

"Q. Was the accident to the plaintiffs caused by the negligence of the defendants? A. Yes.

Q. If so, in what did such negligence consist? A. Excessive speed, and not proper warning.

Q. Was the car properly under control as it approached the crossing? A. No.

Q. Was the speed of the car excessive as it approached the crossing? A. Yes.

Q. Was proper warning given the plaintiffs by ringing the gong? A. No.

Q. Could Dart by the exercise of reasonable care have avoided the accident? A. Yes, to a certain extent.

Q. Could any of the other plaintiffs, Tassie, Blair, or Norvell, have avoided the accident by the exercise of reasonable care? A. No.

Q. If Dart could have avoided the accident, in what did his want of reasonable care consist? A. By lack of judgment.

Q. What was the want of reasonable care, if any, on the part of the other plaintiffs or any of them? (No. answer.)

Q. After the motorman ought to have become aware of the peril of the plaintiffs, could he, by taking reasonable precautions have avoided the accident? A. Yes.

Q. What damages, if any, do you find the plaintiffs entitled to? A. Dart, $800; Tassie, $250; Blair, $25; Norvell, $15."

And upon these answers, Latchford, J., directed judgment in favour of the plaintiff.

The Divisional Court set aside this judgment and directed a new trial; holding that there was no evidence to support the tenth answer, and that the answers as to contributory negligence (6th and 8th) were not sufficiently explicit.

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

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

D. Inglis Grant, for the plaintiff.

GARROW, J.A., after setting out the facts as above, said that he agreed with the Divisional Court in both positions taken by them, but that from the course of the argument it was apparent that only the second ground taken by them called for further observation. The judgment proceeds:—

A perusal of the evidence and of the charge amply shews that the jury were well warranted in finding the defendants guilty of negligence causing the accident. And the circumstances would also, I think, have warranted a finding of contributory negligence, of which there was certainly some evidence.

Nor can fault be found, I think, with the learned Judge's charge, in which, with reference to what the plaintiff might have done to avoid the accident, he said:—

"Then, if Dart could have so avoided the accident, that is, by exercising reasonable care, in what did his want of reasonable care consist? Should he have looked out? Should he have approached a crossing of that kind slowly, and when he got to a point where he could see up and down the street, should he have halted his horse before he attempted to cross, where there were two lines of cars, one up and one down? He did not look down, there is no suggestion that he looked down. I want you to answer that question; what was his want of reasonable care? Then, what was the want of reasonable care on the part of any of the other plaintiffs?"

Under these circumstances, and with deference to the learned trial Judge, can one say with certainty that the jury intended to find, or not to find, contributory negligence on the part of the plaintiff Dart? The sixth answer, "yes, to a certain extent," might have passed muster, if the eighth had found the facts upon which the "extent" depended: as, for instance, that Dart did not look in time, or advanced too rapidly, or did not halt when in a place of safety.

But how can such or indeed any safe meaning be reasonably

extracted from the words "by lack of judgment"; which, in the circumstances, seem fatally indefinite and inconclusive. The measure of the plaintiff's duty was to exercise the judgment of a reasonable man; and whether he did or did not perform that duty depends upon what he did or failed to do upon that occasion—as to which we are left by the finding quite in the dark—and not upon whether he has good or bad judgment.

The point is one which is of frequent occurrence but which is usually avoided, wisely, in my opinion, by sending the jury back to further elucidate and make their meaning plain, if possible.

Under the circumstances, where so much depends upon the actual facts, not much assistance can be got, in my opinion, from decided cases—to a number of which we were referred by counsel upon the argument.

Mr. McCarthy admitted that it was necessary for him to maintain that the finding amounted to an absolute finding of contributory negligence. Apart from the cases I could not so construe its language, for the reasons which I have given; but in addition it seems to fall within the rule indicated by Sir Henry Strong, C.J., in Rowan v. Toronto Street R.W. Co., 29 S.C.R. 718, at page 719, where that very learned Judge says that to disentitle a plaintiff to recover, upon the ground of contributory negligence, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him.

There is in my opinion no such distinct finding in the present case. But as the jury evidently intended to make a finding of some kind, not entirely in exoneration of the plaintiff, upon the subject of contributory negligence, I think the Divisional Court exercised a wise and entirely proper discretion in granting a new trial.

The appeal should be dismissed with costs.

MACLAREN, J.A.:—I agree.

MEREDITH and MAGEE, JJ.A., and LENNOX, J., also concurred in the result, MEREDITH, J.A., stating his reasons in writing, in which he stated that he agreed with the learned Chief Justice in the Divisional Court in his conclusions that there is nothing in this case sufficient to support a judgment in the plaintiff's favour on the ground of "ultimate negligence"; and that the findings of the jury on the question of contributory negligence are so uncertain that a new trial must be had before justice can be done between the parties.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

OTTAWA WINE VAULTS CO. v. McGUIRE.

Fraudulent Conveyance—Husband and Wife — Inference of Fraudulent Intent—Evidence — Voluntary Settlement — Solvency of Husband—Value of Assets—Goodwill of Business—Plaintiff's Status to Attack Settlement—Continuous Account—Hazardous Business—13 Eliz. ch. 5—Question of Fact.

Appeal by the plaintiffs from the judgment of a Divisional Court (FALCONBRIDGE, C.J.K.B., dissenting) reversing the judgment of MULOCK, C.J.Ex.D., at the trial in favour of the plaintiffs, setting aside the settlement in question. The case is reported in 24 O.L.R. 591, where the facts sufficiently appear.

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

W. D. Hogg, K.C., for the plaintiffs.

G. H. Watson, K.C., and F. B. Proctor, for the defendants.

GARROW, J.A.:—There was a consensus of opinion by all the learned Judges that the settlement was voluntary, and that, at least upon paper, the debtor had, when the settlement was made, sufficient other assets to have paid his debts in full.

An objection urged by the defendants before us is not apparently dealt with in any of the judgments; that is, that as the plaintiffs' present claim is in respect of a debt arising subsequent to the settlement, and there being no sufficient evidence of an existing prior creditor's claim, the plaintiffs have no standing to attack the settlement; for which proposition Jenkyn v. Vaughan, 3 Drew. 419, and the cases following it in our own Courts, were cited.

The evidence shews beyond question that the account of the debtor with the plaintiffs was continuous from a time anterior to the settlement until the assignment, although payments were from time to time made, sufficient in amount, to wipe out the debt actually owing at the date of the settlement. In Ferguson v. Kenny, 16 A.R. 276, this circumstance was held by two of the learned Judges (Hagarty, C.J., and Osler, J.), to be sufficient to maintain the action in respect of a debt subsequently incurred. Maclennan, J., based his judgment upon other grounds; and Burton, J., while agreeing in the result, withheld his assent

to that proposition; so that the point cannot be said to be established by that decision.

It is not, I think, necessary here to express any opinion upon that part of the defendants' contention, farther than to say that the defendants' proposition is not, I think, sufficiently supported by the decisions to which counsel refers, which clearly recognise what is otherwise well established, that a voluntary conveyance made with intent to affect future creditors alone is within the statute and will be set aside.

Jenkyn v. Vaughan was referred to and commented upon by Malins, V.-C., in Crossley v. Elworthy, L.R. 12 Eq. 158. That learned Judge also subsequently delivered the judgment in the well-known case of Mackay v. Douglas, L.R. 14 Eq. 106; approved by the Court of Appeal in Ex parte Russell, In re Butterworth, 19 Ch.D. 588.

Mackay v. Douglas was a case of subsequent creditors attacking the settlement where there were no prior unsatisfied claims. The headnote in part says: "A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who become such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect."

This language seems to me to be exactly applicable to the facts which we have here, and to supply the proper rule by which we should be guided. The debtor here was not merely about to engage in a new business, but had actually been engaged in it for about three months before the settlement was made. He had, it is true, been in the hotel business more than once, some time before, in country places; but he knew nothing about the trade of the city of Ottawa, which was to him an entirely unknown field of operation. His assets, outside of what was invested in the Ottawa business and of the settled property, were then of little or no account; and much even of the so-called value put into the Ottawa business was intangible, consisting of the price of the license and goodwill, and could not, while the business was being carried on, be made available to pay creditors. Part of the purchase money even (two thousand dollars) was unpaid, and was secured by promissory notes, to be paid, if at all, out of the profits, if any. The business was carried on largely upon credit for some eighteen months, and then an assignment for

the benefit of creditors was made. The property which came to the hands of the assignee was of comparatively trifling amount, going to shew that at the time of, and for some considerable time before the assignment, the business had been hopelessly insolvent. That such a business was, as was said by Falconbridge, C.J., a hazardous one, did not require the event to prove. And that the female defendant at least so considered it is evident by her admitted importunities to obtain the settlement. These were for a time withstood by her husband; but after the three months' experience at Ottawa he yielded.

What had occurred in the meantime to change his mind? Had the three months' experience affected his hopefulness, or shewn him some of the perils which were so soon to overwhelm him? These are questions which I do not find satisfactorily answered in the evidence. I do, however, find that it is stated by a creditor, and not denied by the debtor, that shortly after the date of the settlement—within a very few days in fact—this creditor, alarmed at the amount of the debtor's account, was making enquiries from the debtor about his property and was then told by the debtor that he still owned the Madoc property; and, in apparent harmony with that idea—that is, that he still owned it—is the undisputed fact that he continued to receive the rents for some time after the settlement. It is true he says he did so as agent for his wife; but in the light of all the circumstances that explanation ought not to be accepted. Then there is the important circumstance that the learned trial Judge, with opportunities which we have not, came to the conclusion that the intent to defeat creditors had been established.

The question is really one of fact, and much must always depend upon the impression made upon the mind of the trial Judge by the parties when in the witness-box.

In Fleming v. Edwards, 23 A.R. 718, cited by counsel for the defendants—a case in its outlines somewhat resembling this—the trial Judge had found against the fraudulent intent: a circumstance apparently not without weight in inducing this Court to reverse the judgment of the Divisional Court and restore that of the trial Judge.

Upon the whole I am, with deference, clearly of the opinion that the judgment of Mulock, C.J., was right, and should be restored.

I would allow the appeal with costs.

MACLAREN and MAGEE, JJ.A., agreed, and MEREDITH, J.A., also concurred in the result, giving written reasons for his opinion.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

RUDD v. CAMERON.

Slander—Words Spoken of Plaintiff in Reference to his Trade —Publication—Speaking Brought about by Action of Plaintiff—Privilege—Malice—Damages—Quantum.

Appeal by the defendant from the judgment of a Divisional Court, dismissing an appeal from the judgment of BRITTON, J., at the trial, awarding the plaintiff $1,000 for slander.

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

W. M. Douglas, K.C., for the defendant.

E. F. B. Johnston, K.C., for the plaintiff.

MACLAREN, J.A.:—The plaintiff, a merchant and building contractor, was awarded by a jury $1,000 for damages sustained by him on account of the defendant having slandered him in his business and calling. On appeal to the Divisional Court the judgment was upheld.

The ground of appeal most strongly urged before us was that the defendant was entrapped by the plaintiff into using the language he did, and induced to utter the alleged slanderous words by detectives employed by the plaintiff and sent for that purpose, and that under the circumstances it was the same as if he had spoken the words to the plaintiff himself and at his request, and that consequently there was no publication of the slander and that the occasion was privileged. Counsel relied upon King v. Waring, 5 Esp. 15, and Smith v. Wood, 3 Camp. 323, and upon a number of American cases and authorities which had adopted and followed the rule laid down in England in the above cases.

As to the question of publication, the Divisional Court relied largely upon the case of the Duke of Brunswick v. Harmer, 14 Q.B. 185, where it was held that the purchase of a single copy of the newspaper containing a libel by the agent of the plaintiff sent for that purpose was sufficient proof of publication. They also refer to the fact that Odgers (5th ed.) at pp. 179 and 180 says that so far as the question of publication is concerned King v. Waring and Smith v. Wood must be taken to be overruled by the Duke of Brunswick case. It is also pointed out that Sir Frederick Pollock in his note to Smith v. Wood in 14 R.R. 752

says that the ruling in that case does not seem consistent with the Duke of Brunswick v. Harmer.

I am of opinion however, that in this case we do not need to discuss whether the two English cases first named and the American cases in which they have been followed are or are not good law. The evidence in the present case does not come up to the requirements of these authorities. The detectives were not sent by the plaintiff to the defendant. The evidence is that the plaintiff, finding that such damaging reports were being circulated in the town, and not knowing who were doing so, placed the matter in the hands of a detective agency who sent two of their employees to investigate. They were not told or asked by the plaintiff to go to the defendant. In speaking of the plaintiff to the detectives as he did, the defendant in my opinion both in fact and in law published the slanders he uttered and he is not in the same position as if he had spoken the words to the plaintiff himself. It may be noted that it has been held that a publication induced by the prosecutor is sufficient in a criminal case: Regina v. Carlile, 1 Cox C.C. 229.

I think the defence of privilege also fails. The defendant was under no obligation, and owed no duty that justified him in using such language as he did. He did not go into the box and testify that he believed what he said to be true or that he uttered it in good faith. He went far beyond what was suggested to him or what he was invited to say by the detective. His own examination for discovery shews that he had no ground for making the statements he did. There is abundant evidence of malice, and this would be sufficient to destroy any such qualified privilege as is claimed, even if it had existed. Further it would not in any case apply to the slanders voluntarily uttered to the plaintiff's stenographer.

The jury gave a verdict that included a finding of malice, after a charge that was not objected to by the defence either at the trial or in the argument before us. As pointed out to the jury it was a case in which they might give exemplary damages if they found certain facts. Having found these facts they exercised their discretion and I am not aware of any proper ground on which we can declare it to be excessive.

The appeal in my opinion should be dismissed.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred.

MEREDITH, J.A., also concurred in the result for reasons stated in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

FLEMING v. TORONTO R.W. CO.

Negligence—Street Railway—Injury to Passenger—Electric Explosion in Car—Rebuilt and Defective Controller—Negligence of Motorman—Failure to Apply Brake—Lack of Proper Inspection—Expert Evidence—Onus.

Appeal by the defendants from the judgment at the trial before MEREDITH, C.J., and a jury, in favour of the plaintiff. The action was brought by the plaintiff to recover damages said to have been caused to him while a passenger upon the defendants' railway, owing to the defendants' alleged negligence. The case has been twice tried, resulting each time in a judgment in favour of the plaintiff. The jury, in answer to questions, found that the plaintiff's injuries were caused by the negligence of the defendants, such negligence consisting in using a rebuilt controller in a defective condition, and not properly inspected; the motorman was guilty of negligence in not applying the brake, which would have prevented the accident; and there was no contributory negligence.

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

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

H. D. Gamble, K.C., for the plaintiff.

GARROW, J.A. (after stating the facts):—The only question which we are called upon to determine upon this appeal is, was there sufficient evidence proper for the jury upon which they might reasonably find as they did, and in my opinion there was, except perhaps as to the motorman's negligence, and particularly as to its bearing upon the result. The latter, especially, I, upon the evidence, greatly doubt; so much so that if the case depended upon that finding alone I could not approve. But as the earlier findings are in themselves, if sustained, sufficient, I do not further discuss that aspect of the case.

The full and careful charge of the learned Chief Justice was not objected to.

In opening his address the learned Chief Justice said: "The main facts are simple. Any difficulties there are in the case arise from the view you take of the somewhat conflicting evidence by expert witnesses, and how far you give credit to the testimony generally of the witnesses who have been called."

This extract seems to furnish the keynote, not only of the charge, but of the case itself. It is not in dispute that something unusual occurred on the occasion in question, the outward manifestation of which was a loud explosion followed by flame and smoke, and by panic on the part of the passengers, in the course of which the plaintiff fell, or was forced out of the car, and received severe injuries.

Nor is it, I think, in serious dispute that the seat of the defect was in the controller, resulting in the formation of a short circuit. Both Mr. McCrae and Mr. Richmond seem to agree upon that, the former saying: "In my opinion if you take the area of the controller—confined in the controller, is the area in which the accident occurred," and the latter, that the controller must have been in a defective condition or the accident would not have happened. The latter, it is true, also criticised the original construction of the controller. But he admitted that it was of standard make, and of a type in general use, and was quite unable to point to a case in which his ideas had been carried out. So that if the controller had been otherwise perfect this criticism would, I think, have been harmless.

But the controller was not as originally built, but had been "overhauled" by the defendants, which is explained as, taking it apart and putting in new parts in the place of parts which had become worn.

The circumstances seem to me to bring the case within the principle often acted upon, laid down in Scott v. London Dock Co., 3 H. & C. 596, at p. 601, that "where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." There is, as I have pointed out, practical agreement in the evidence of the experts that the accident was a very unusual one, and one that could not have happened if the controller had been in proper condition. It was certainly under the care and management of the defendants' servants. It had at one time, not long before the accident, become so worn out that it had to be rebuilt, and the onus under the circumstances was, I think, upon the defendants to shew that that had been properly done, an onus not in my opinion discharged by the evidence which was given.

Then as to the inspection—inspection from time to time of the controller is admittedly necessary, and inspection of a kind was, upon the evidence, probably had not long before the acci-

dent. But it, too, as in the case of the evidence as to the rebuilding of the controller, was of an unsatisfactory, general, nature, quite insufficient to convince that such an inspection had recently been had as would probably have discovered the defects if there were any.

Under these circumstances it seems to me that both questions were properly for the jury, and that the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A., also concurred, for reasons stated in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

ALLAN v. GRAND TRUNK R.W. CO.

Master and Servant—Negligence of Fellow-servant—Liability of Master—Railway—Engineer—Signals—Backing Movement—Workmen's Compensation for Injuries Act—"Charge or Control" of Engine.

Appeal by the defendants from the judgment at the trial before BOYD, C., and a jury, in favour of the plaintiff.

The plaintiff, a brakeman employed by the defendants upon a freight train, was while in the discharge of his duties injured at Berlin station upon the defendants' line on the night of the 18th of August, 1911, through the alleged negligence of the engineer in charge of the engine.

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

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

R. S. Robertson, for the plaintiff.

GARROW, J.A.:— . . . The material facts were disputed at the trial. But it is now conceded by the learned counsel for the defendants that, for the purposes of the argument here, the facts must be accepted as given by the plaintiff, from which it follows, and is also conceded, that the only question really is as to the defendants' responsibility under the circumstances for the act of the engineer.

According to the plaintiff the circumstances were as follows: the train crew consisted of the conductor, the engineer and his fireman and two brakemen. On arriving at the station shortly after midnight the conductor directed a certain shunting operation to be made, and left the management of it to the plaintiff, the rear end brakeman, while he proceeded to the station-house in the discharge of his other duties. It being dark, the movements were necessarily directed by means of signals with lanterns. The plaintiff gave to the engineer the "back up" signal, in consequence of which the engine under the direction of the engineer backed up. When it had proceeded as far as the plaintiff considered necessary he gave the "stop" signal, and as he says (one of the much disputed points) the backing movement ceased. Then, while the engine was at rest the plaintiff proceeded between two cars to arrange a coupling, and while in that position, without any new signal having been given, the backing movement was resumed, with the result that the plaintiff was caught and injured as described.

By subsec. 5 of sec. 3 of The Workmen's Compensation for Injuries Act, an employer is made responsible "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway or street railway."

In Martin v. Grand Trunk R.W. Co., not yet reported (see ante 51), this Court recently considered and applied to the facts in that case the subsection which I have just quoted. That was the case of a negligent order given to an engineer by a yard helper by reason of which his foreman was run down and injured. The engineer in that case could not be said to have been negligent, for his duties required him to act upon the orders of the yard helper in the absence of the yard foreman. And we accordingly, Lennox, J., dissenting, held the defendants responsible for the consequences of the negligence of the yard helper in controlling the movements of the engine.

This seems a stronger case for the plaintiff, for here the result followed from the negligent act of the engineer himself in backing the engine after he had received and acted upon a "stop" signal, without receiving a new signal of any kind.

The appeal fails and should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A., also concurred in the result, stating his reasons in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

RE TOWNSHIP OF ANDERDON AND TOWNSHIPS OF MALDEN AND COLCHESTER SOUTH.

Municipal Drainage Act—Report of Referee—Appeal—Instructions to Engineer—Repair of Drain—Sufficient Outlet—Alleged Variation as to Maintenance—Assessment—Reliance upon Engineer's Conclusions.

Appeal by the Township of Anderdon from the report of the Drainage Referee in a matter arising under the Municipal Drainage Act.

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

M. Wilson, K.C., and F. H. A. Davis, for the Township of Anderdon.

J. H. Rodd, for the Township of Malden.

W. G. Bartlet, for the Township of Colchester South.

GARROW, J.A.:—. . . Agreeing as I do with the conclusion of the learned Referee it is not necessary to repeat here at any length the facts, which are very fully set forth and discussed in his judgment.

[Reference to the initiation of proceedings by the Township of Malden, and the instructions given by the council to their engineer, Mr. Alexander Baird, C.E., to make an examination and report upon the Long Marsh drain, providing for the putting of the said drain in a proper state of repair, and carrying it to a sufficient outlet, so as not to further damage the lower lands.] . . .

The Bondy litigation had established that the Long Marsh drain had not been carried to a sufficient outlet, and it was conceded on all hands that something should be done to correct the then existing state of affairs.

The engineer, Mr. Baird, C.E., a man of skill and experience in such matters, after it must be assumed a sufficient examination, was of the opinion that to properly and sufficiently improve the outlet it was necessary to do the work which by his report he recommended, and that, as so improved the drain could be used by and would be of benefit to lands in the appellant township, such lands should contribute in the proportion at which he assessed them.

It is not disputed, and it could not be, that for the purpose of obtaining the necessary outlet the Township of Malden might, under the statute, initiate proceedings under which the work might lawfully be extended into the adjoining township, and that lands in such township might be assessed if the circumstances otherwise justified an assessment. The wide propositions advanced by the learned counsel for the appellant, that one township cannot invade another township except by a strict compliance with the provisions of the Act, and, one township cannot impose a drainage system upon a neighbouring township, are not and need not be disputed, but seem upon the facts to be quite wide of the mark.

Whether what is proposed is more than is required for the purpose of obtaining the improved outlet, which after all must really be the main question, is not a question of law but of fact, depending upon the evidence, and practically upon that of the experts of whom there were five, three called by the appellant and two by the respondent. And a perusal of their testimony shews practical unanimity upon the main proposition, that Mr. Baird in what he proposed to do does not exceed his instructions to obtain a sufficient outlet. . . .

The criticism of the appellant's witnesses was directed not so much to the question whether what is proposed is excessive, as to the assessments in the appellant township which they all considered decidedly too large. On the other hand, Mr. McCubbin, C.E., called for the defendant, substantially agreed with the conclusions of Mr. Baird, both as to the necessity of the work and the justice of the assessment.

Into the details of the criticisms of the assessment by the appellants' experts I do not propose to enter. It has in such matters of "much or little" been the custom in this Court, wisely in my opinion, to rely very much upon the conclusions of the engineer in charge. He is a statutory officer, sworn to do his duty. He has necessarily to make a close and careful examination and study of the whole premises, and his deliberate conclusions ought not, in my opinion, to be disregarded, except under clear evidence of error, or unless a question of law is involved.

In my opinion the appeal fails and should be dismissed with costs.

MACLAREN, MEREDITH, and MAGEE, JJ.A., and MIDDLETON, J., concurred, MEREDITH, J.A., stating his reasons in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

DUNN v. GIBSON.

Rape—Civil Action—Defendant Mentally Defective—Evidence of Plaintiff—Corroboration—Criminal Law—Late Disclosure—Damages—Excessive Damages—Province of Jury.

Appeal by the defendant from the judgment of a Divisional Court, dismissing an appeal from SUTHERLAND, J., in an action tried before him with a jury, for damages for assaulting and ravishing the plaintiff without her consent. The jury awarded $5,000 damages, and the verdict was affirmed by the Divisional Court.

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

E. F. B. Johnston, K.C., for the defendant.
W. A. Logie, for the plaintiff.

MACLAREN, J.A.:—The plaintiff a young woman of 22 years of age was a servant in the house of the defendant's mother, a grand-daughter being the third member of the family. The defendant, who is about forty years of age and unmarried, lived with a relative near by. He was in the habit of going to his mother's frequently, and bringing in water and doing other chores. From an accident in childhood his mentality was arrested, and he could not be taught, but he developed physically. He was examined for discovery, and as a witness sometimes he answered intelligently and at other times not, but nearly always in monosyllables. He denied the charge. Plaintiff said the offence was committed in the morning when he and she were alone in the house. She said she screamed but was not heard. She did not tell any person about it until nearly two months after the alleged outrage when she went to the hospital and her pregnancy was discovered.

Counsel for the appellant argued that the action should fail because her testimony required corroboration, and because there was no disclosure by her for nearly two months. This is not a criminal case, and the rules of evidence in the Criminal Code on these points do not apply, and these were questions for the jury.

It was also claimed for the appellant that the trial Judge improperly allowed the plaintiff's counsel to urge upon the jury

large damages on account of the expense she would be put to for the bringing up of the then unborn infant, whereas in the result it lived only one day. The defendant's counsel did not raise any objection at the trial, and there is nothing to shew that any improper appeal was made. The possible early death of the child was a contingency that would be present to the minds of the jury, and the actual result could be no ground for a new trial.

A new trial was also claimed on the ground of excessive damages. The damages are much larger than are ordinarily allowed in such cases; but this is a matter peculiarly for the jury. The offence was a very grievous one, if the evidence of the plaintiff was true, and the jury believed her. The Divisional Court were evidently not shocked by the amount, and I do not think it is a case in which we can properly interfere.

In my opinion the appeal should be dismissed.

GARROW, J.A., MAGEE, J.A., and LENNOX, J., concurred.

MEREDITH, J.A., also concurred in the result, stating his reasons in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

REX v. PILGAR.

Criminal Law—Trial for Arson—Conviction—Case Stated by Judge—Request of Counsel to Examine Jurors—Proper Time for—Challenge for Cause — Refusal of Right—Misunderstanding of Counsel — Jurisdiction — Criminal Code, secs. 1014, 1022.

The defendant was tried for arson at the Halton Sessions before the County Court Judge and a jury, and found guilty. The Judge reserved two questions for this Court, which, with the facts upon which they are based, are set forth by him in the stated case as follows:—

"At the opening of the trial and after the defendant had pleaded 'not guilty,' the following conversation took place between counsel for the defendant and myself:—

"MR. CAMERON: Before they call the jury I would like to ask each of the men who are called whether they are interested in the Halton Mutual Fire Insurance Company. If any of them

are interested in that company I submit they would not be eligible to sit on this jury.

"HIS HONOR: We will see when the question arises.

"MR. CAMERON: Of course, I cannot tell without asking them.

"The clerk of the Court then proceeded with the calling of the jurors. At my request the clerk asked to stand aside several of the jurymen who had served on a jury the previous day and counsel for the defendant challenged some five jurors peremptorily. The jury was empanelled and sworn. The following conversation then took place between counsel for the defendant and myself.

"MR. CAMERON: Would your Honor see if any of the jury are interested in the Halton Mutual Fire Insurance Company.

"HIS HONOR: It is too late, Mr. Cameron; I was waiting for it; that would be a good challenge for cause.

"Exhibit 8 shews that the Halton Mutual Fire Insurance Company was actively engaged in prosecuting the Fire Inquest in connection with the burning of buildings for the burning of which the charge of arson was laid herein and the affidavit of John Wilson Elliott shews that some of the jurymen who tried the defendant were interested in the Halton Mutual Fire Insurance Company.

. . . . .

"I have reserved for the opinion of this Honourable Court the following questions:—

"1. Was the request of the defendant's counsel to examine the men called to serve on the jury which was to try the defendant made at the proper time, and at the time when the question of their interest in the Halton Mutual Fire Insurance Company arose?

"2. Did what took place between counsel for the defendant and myself and prior to the empanelling of the jury which tried the defendant amount to a refusal of the defendant's right of challenge for cause?"

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

D. O. Cameron, for the prisoner.

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

MACLAREN, J.A. (after setting out the facts as above):—There is no suggestion that the usual caution was not given to the accused by the clerk of the Court before the jurors were sworn in the prescribed formula: "Prisoner, these good men whose

names you shall hear called are the jurors who are to pass between our sovereign lord the King and you upon your trial: if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn and you shall be heard." See Archbold (24th ed.), p. 207; Taschereau, p. 779.

His counsel had no right to interrogate or ask any juror any question without challenging him for cause: Archbold, p. 213. The first application, if application it can be called, was premature, as it was made before the jury were called. The second was too late, as it was made only after the jury were sworn, when the Judge had no power to grant it.

The first question must, therefore, be answered in the negative.

As to the second question, I do not see how it can be said that what took place between the Judge and counsel before the empanelling of the jury can be said to amount to a refusal of the defendant's right to challenge for cause. It was a statement that the point would be dealt with when it arose, the Judge apparently being under the impression that counsel would challenge for cause any juror whom he suspected, but did not know, to be a member of the Mutual Insurance Company in question. It would appear that counsel misunderstood his Honor's expression, "We will see when the question arises," and interpreted the use of the "we" as an intimation that his Honour would do the questioning. As counsel did not challenge any juror at the proper time it may be that the Judge thought that he knew that none of the twelve who were sworn were members of the Mutual Insurance Company in question. As I have said, I do not think it can be construed into a refusal of the right to challenge for cause, and in my opinion the second question must also be answered in the negative.

By section 1014 of the Criminal Code it is provided that it is only questions of law that can be reserved for this Court in a stated case, and we must answer them strictly as we understand the law to be. We have no authority or jurisdiction to intervene in a case of error or misunderstanding. Section 1022 of the Code indicates where application for relief should be made in such cases, namely, to the Minister of Justice.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred, the last named giving a written judgment in which he expressed the view that it would have been much more satisfactory if the learned County Court Judge, knowing of the desire and inten-

tion of the prisoner's counsel, had, when the proper time for challenge was reached, then called counsel's attention to the matter, and afforded him an opportunity of exercising his undoubted right.

MEREDITH, J.A., dissented from the judgment of the majority of the Court, expressing his views in a written judgment, which concludes as follows:—

"I cannot but think and say that it was plainly the duty of the Court under all the circumstances to have taken great care that a jury of disinterested jurors only was empanelled: to wait until it was too late to object, before saying anything, may very well have misled the prisoner out of his right, and was, in my opinion, an error on the part of the Court as well as of counsel.

"I answer the first question, No; it is not a question which should have been reserved, for it is one about which there could be no reasonable doubt.

"And my answer to the second question is: Yes, substantially.

"And accordingly I would direct a new trial."

COURT OF APPEAL. NOVEMBER 19TH, 1892.

BANK OF OTTAWA v. BRADFIELD.

Promissory Notes — Accommodation Indorsement — Weak Mental Condition of Indorser—Inability to Appreciate Transaction—Scienter — Fraud and Undue Influence — Counterclaim—Moneys Applied on Indebtedness of Maker —Evidence—Finding of Mental Incapacity not Sustained—Conflict of Testimony.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., in an action against the defendant as an endorser of promissory notes to recover $1,425.45 balance claimed to be due on the said notes. The defence was that the defendant was at the time of unsound mind and incapable of making any contract, and he counterclaimed for payments withdrawn by the bank from his bank account, and applied in payment of the two notes in question.

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

F. E. Hodgins, K.C., for the plaintiff.
R. A. Pringle, K.C., for the defendant.

The judgment of the Court was delivered by MEREDITH, J.A.:

After several attempts to find evidence enough to support the findings of the trial Judge upon all material questions of fact, I am obliged to say, in the fullest appreciation of the advantages of a trial Judge, that the finding upon the question of knowledge on the part of the plaintiffs, of mental incapacity of the defendant to transact business, when the notes were endorsed by him, cannot be sustained.

The case is not one of obvious, or commonly known, mental affliction; there is a sharp conflict of testimony as to whether there ever was any such incapacity, a conflict in which there is a good deal to be said on each side, so that if the finding upon that question had been the other way it might have been impossible to disturb it. The man was very old, but he was in no way confined, or restrained, as one of unsound mind; indeed he seems to have been frequently, if not constantly, in and about the place of business, and so concerned in the business in which the debt in question was contracted, which was always carried on in his name.

The trial Judge found that the indorsement by the defendant of the first of the notes in question was obtained by the plaintiff's manager Graham, in person, and that at the time he obtained it he knew of the defendant's mental incapacity, Graham having testified that the endorsement was obtained by the intestate's son, the witness Bradfield; and that he, Graham, had nothing personally to do with obtaining it, and that he never had any knowledge of any kind of incapacity of the defendant.

I cannot but say that the finding strikes me very forcibly as unreasonable. In the first place, it must be borne in mind, that the note was taken in renewal of a note of the firm of R. H. Bradfield & Co., and so a note upon which the defendant, R. H. Bradfield was liable; for there is no finding, nor any evidence upon which it could be well found, that the defendant was not a member of the firm thus prominently bearing his name: and it must also be borne in mind that this firm had for years before been indebted to the plaintiff, and that that note was but one of many renewals of notes given for that indebtedness; so that the proposition is that this astute business man, deliberately obtained from a man he knew to be of unsound mind, the note in question in place of the one upon which that man was already liable; so deliberately doing a most discreditable act in order not to

better, but to make much worse, the legal position of the plaintiffs, one of the incorporated banks of Canada, in which he held the honourable position of one of its managers. If the finding of the trial Judge be true, one may, not unfairly, suggest that, perhaps, the mental capacity of this manager might reasonably have been inquired into. This point seems to have wholly escaped consideration by the trial Judge. [Discussion of the conflict of testimony as to the mental capacity of the defendant. The judgment proceeds:]

The case is, I think, plainly one in which, in order to defeat this action on the ground of mental incapacity of the defendant, he was bound to prove, not only such incapacity, but also that the plaintiffs had knowledge of it: and that the trial Judge's holding to the contrary is erroneous. There was no evidence of any such knowledge when the later note was endorsed; and it is not, I find, proved that there was when the earlier one was endorsed. And I incline to the view that if there were incapacity when the notes in question were endorsed, which incapacity vitiated the endorsements, the plaintiffs might revert to any of the earlier notes for the same indebtedness, and recover upon them, on the ground that the renewals were made under a mistake of fact.

The Act respecting the negotiation of co-partnership does not, in any way, relieve the defendant from liability. I would allow the appeal; and direct that judgment be entered, upon the two notes, in the plaintiffs' favour.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

RE FARRELL.

Will—Construction—Disposition of Residue—Codicils — Inconsistency—Revocation—"Balance" — Explicit Language to Prevail.

Appeal by Edward Farrell from the judgment of TEETZEL, J., reported 3 O.W.N. 1099, on a motion by the trustees under the will of Dominick Farrell for an order construing said will. The provisions of the will, and the questions arising in connection with it, are set forth in the report referred to.

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

D. L. McCarthy, K.C., for the appellant.
I. F. Hellmuth, K.C., for the adult respondents.
Glyn Osler, for the trustees.

The judgment of the Court was delivered by MEREDITH, J.A.:—It is impossible for me to tell, with any feeling of certainty, just what the testator intended should be done, under the provisions of the codicil to his will, in question upon this appeal; but, if I were bound to come to some conclusion upon the subject, my conclusion would accord with that reached by the Judge of first instance, Teetzel, J., and would be reached in much the same way as that in which his conclusion was reached; but I prefer to put another prop, and a firm one I think, to that conclusion, thus: the gifts contained in the will, given in plain and explicit language, are not to be revoked by the very uncertain language of the codicil, and the less so, because the testator used in the same testamentary writings very plain and appropriate words of revocation in other respects. That which is very uncertain ought not to override that which is very certain.

I would dismiss the appeal.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

WELLAND COUNTY LIME WORKS CO. v. SHURR.

Contract — Construction — Supply of Natural Gas — Joint or Several Contract—Oil and Gas Lease—Right to—Enforcement of Contract—Usual Form—Reformation.

Appeal by the plaintiffs from the judgment of a Divisional Court (3 O.W.N. 775), setting aside the judgment of SUTHERLAND, J., at the trial (3 O.W.N. 398), in which the facts of the case are stated.

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

W. M. German, K.C., for the plaintiffs.
S. H. Bradford, K.C., and L. Kinnear, for the defendant.

The judgment of the Court was delivered by MEREDITH, J.A.:—I agree entirely with the learned trial Judge in his disposition

of this case; and can find no cause for the Divisional Court's reversal of it.

The main question is whether the landowners were to give separate leases of their respective farms, or one joint lease of the two farms, though neither had any title or right to, or interest in, the farm of the other; and, under ordinary circumstances, and even in the case of an agreement quite silent on the subject, one might well ask, why not separate leases? Why should each demise a thing which was not his, and in which he had no legal or equitable estate or interest?

But the plain, the unmistakable, words which the parties used in the formal writing evidencing the agreement between them, the matter seems to me to be put beyond any kind of doubt; the landowners are to give "the usual gas and oil leases of their respective farms," and the word "leases," nowhere "lease," is used in two other places in this short agreement.

The provision in the agreement for supplying gas to heat the homes of the landowners, free of charge, is not at all inconsistent with separate leases; nor is the provision for heating the house of a tenant of one of the landowners in a certain event. These things may be several and respective, and cannot override the unmistakable words, "leases of their respective farms"; as well as the very nature of the transaction.

Then the common form of lease, which each of the parties has put in, accentuates the absurdities to which a joint lease would lead; the landowner is to have a royalty upon all oil produced; and so much per annum for each well of gas in paying quantities; and so much per acre for damage to the land in working it for gas or oil; all things obviously for the benefit of the owner only, not for another whose land is in no way touched by these particular things.

No reasonable case for reforming the agreement was made at the trial. Indeed, it is the last thing the defendant wants—that is a reformation such as would support the joint lease holding of the Divisional Court. That which each of these landowners wants is really a separate lease, with a provision in it that the other of them, though not a party to it, shall have his home also heated with gas the same as the landowner's is to be under his lease; but there is nothing in the case to support an extraordinary claim of that character.

If there be a usual gas and oil lease, there is nothing in the defences of want of certainty, and the statute of frauds; whether there is, or is not, such a lease, is to be the subject of an enquiry under the judgment directed to be entered at the trial.

I would allow the appeal; and restore that judgment.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

WELLAND COUNTY LIME WORKS CO. v. AUGUSTINE.

Res Judicata—Contract—Supply of Natural Gas—Joint Contract—Judgment in Previous Action — Injunction — Unnecessary Action—Parties—Costs.

Appeal by the plaintiffs from the judgment of BOYD, C., at the trial in an action for an injunction and damages in respect of an alleged breach of an agreement. The judgment is reported in 3 O.W.N. 1329, where the facts are set out.

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

W. M. German, K.C., for the plaintiffs.

S. H. Bradford, K.C., and L. Kinnear, for the defendant.

The judgment of the Court was delivered by MEREDITH, J.A.:—It follows from the decision, in this Court, of the case of The Welland County Lime Works Co. v. Shurr, that the plaintiffs in this action are entitled to the relief sought by them in it; but I do not think they should have their costs of it, as a separate action might easily have been avoided: the defendant Augustine might very well have been made a party defendant, in the other action, at some time; and all the necessary relief against him might have been had in it.

I would allow the appeal: and grant the injunction sought, which I suppose is all the plaintiffs now really seek, in this action.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

SINCLAIR v. PETERS.

Way—Private Place or Way—Dedication—Municipal Corporation—Assessment—User—Prescription — Limitations Act—Deeds—Construction—Injunction —Damages — Misdescription—Amendment.

Appeal by the defendant from the judgment of SUTHERLAND, J., in an action for trespass on certain lands, which is reported in 3 O.W.N. 1045, where the facts are fully set forth.

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

E. D. Armour, K.C., and J. D. Montgomery, for the defendant.

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

The judgment of the Court was delivered by MEREDITH, J.A.:—I agree with the learned trial Judge in his conclusion as to each of the issues joined between the parties in this action: I differ from him only in this, that I have no hesitation, such as he expressed, on the question of dedication, of which I can indeed find no reasonable evidence.

The "street" or "place" in question was never a thoroughfare, but was merely a cul-de-sac for the convenience of but a few persons whose property abutted upon it, who were expressly granted a right of way over, or were the owners of it. Everything that was done regarding it, from first to last, was at least as consistent with its being a private, as with its being a public, way: and some things, as, for instance, granting rights of way, and granting or receiving power to make it a public way, were quite inconsistent with the defendant's contention; there is in my opinion no reasonable evidence of any intention to dedicate, or of any dedication and acceptance of the street or place as a public way; and no evidence whatever of its having become a public way by reason of the expenditure of public money in opening it, or by the usual performance of statute labour upon it.

No grant of any right of way to the defendant is proved; nor does there appear to be any ground for claiming a private right in any such manner.

Nor has title been acquired by user, as the trial Judge made plain in the reasons for his judgment against the appellant.

But it is said that there is power to convert this private way into a public one: the obvious answer to which, however, is, whether or not such power exists, it has not in fact been exercised, and so the plaintiff yet has this right of action. It will be time enough to deal with any such question when it can be properly, and is, raised.

So, too, the amendment of the statement of claim—setting up a deed given for the purpose of correcting an obvious misdescription merely—as I think, was quite properly allowed; and I also agree with the trial Judge in the view expressed by him that the new deed was not essential to the maintenance of this action, that the old deed covered sufficiently the place in question.

The appeal, in my opinion, should be dismissed.

HIGH COURT OF JUSTICE.

RIDDELL, J. NOVEMBER 14TH, 1912.

NASSAR v. EQUITY FIRE INSURANCE CO.

Fire Insurance—Proofs of Loss — Overvaluation — Fraud — Reference to Master—Quantum of Damage—Appeal from Report—Findings of Fact by Master—Alleged Reversal of Finding at Trial—Costs.

Appeal from the report of the Master in Ordinary of June 25th, 1912, by the plaintiff and motion for judgment on the report by the defendants.

G. W. Mason, and F. C. Carter, for the plaintiff.
W. E. Raney, K.C., and E. F. Raney, for the defendants.

RIDDELL, J.:—This case is an action against a Fire Insurance Company for a fire loss at the plaintiff's billiard-room in Toronto. The case came on for trial before MULOCK, C.J.Ex.D., in November, 1911: the trial Judge passed simply upon the issue as to the fraud in the proofs of loss, and directed the amount of the loss to be determined by the Master in Ordinary.

An appeal from this judgment was (with a trifling variation as to costs) dismissed by the Divisional Court (1912), 20 O.W.R. 898, (3 O.W.N. 551.)

The claim was for $3,000: the defendants, while disputing that the plaintiff's loss was so much, paid the sum of $1,250 into Court as sufficient to pay the plaintiff's claim. The Master has found the actual loss $400, which with interest $14.46 from October, 1911, to the date of the report, 25th June, 1912, makes $414.46 due upon the last mentioned day.

The plaintiff now appeals and the defendants' move for judgment on the report.

The case was presented on both sides most earnestly, exhaustively and ably. I have also the advantage of elaborate and carefully prepared reasons of the Master in Ordinary for his judgment: while the Master had himself the advantage of a careful personal inspection of the premises and a detailed examination of the goods in the presence and by the consent of counsel for both parties: (it is said that this was at the instance of the plaintiff; but that I do not consider of any consequence). The Master had also the inestimable advantage of seeing the wit-

nesses, which of course I have not: and I must approach the appeal bearing that handicap in mind—and must remember that according to the well-established practice in Ontario, the Master is the final judge of the credibility of the witnesses he has seen, unless indeed there be some unmistakable document, or something of the kind, which shews the contrary, or which the Master has failed to take into consideration. The findings of a Master are on the same footing as the findings of a trial Judge, for which Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502 may be looked at, Booth v. Ratte (1892), 21 S.C.R. 637 at p. 643, and like cases, e.g. Re Sanderson and Saville (1912), 26 O.L.R. 616 at p. 623, and cases there cited. I note the complaint of the plaintiff that the Master has, in effect at least, reversed the findings at the trial, and has in substance found fraud in the proofs of loss. Of course he has not done so in form—no such issue was open before him—and I do not think that a finding of fact as to value, upon which an argument could be based tending to shew that the real value of the goods had been misrepresented in the proofs of loss, can at all be said to be a reversal of the decision at the trial. The decision was that there was no fraudulent over-valuation at the time in the proofs of loss—not that there was no over-valuation, or that the plaintiff or any of his witnesses would not at some future time lie about the value.

I have read all the material, most of it more than once, and with care, and I am unable to find that the Master has made a mistake.

The appeal will be dismissed with costs.

As to the motion for judgment, the costs have been reserved till now except the costs up to trial occasioned by charges of fraud, which the defendants have been by the Divisional Court ordered to pay. Leaving aside these costs, the case stands: Claim for $3,000: payment into Court of $1,250: judgment for $400 and interest: there is no plea of tender, so as to entitle the defendants to all their costs as in some cases: and it seems to me that the costs are in the discretion of the Court.

I think the proper order to make is that the plaintiff shall have his costs up to the delivery of the statement of defence, and the defendants their costs thereafter, including the reference, the appeal therefrom, and motion for judgment, with a set off of such costs against the amount of damages and costs awarded to the plaintiff. The plaintiff to be declared to be entitled to receive from the defendants the sum of $414.46 and interest

thereon at the Court rate from June 25th, 1912, as damages—and the amount paid into Court to be paid out to the parties as their interest appears on the above basis. If the amount of costs payable to the defendants exceed the amount of damages and costs payable to the plaintiff, the defendants will have judgment against him for the balance. The report of the Master is confirmed.

MIDDLETON, J. NOVEMBER 18TH, 1912.

BEER v. LEA.

Sale of Land—Specific Performance—Principal and Agent—Option Taken by Agent—Written Agreement—Nominal Consideration—Appointment for Closing Transaction—Failure of Vendor to Attend—Acceptance—Revocation—Cheque as Payment—Contractual Relationship—Duty of Agent—Disclosure—"Thirty Days"—Meaning of—Fraction of Day.

Action for specific performance of an agreement for sale of lands at Leaside Junction by the defendant Lea.

E. F. B. Johnston, K.C., and S. W. McKeown, for the plaintiff.

A. W. Anglin, K.C., and H. A. Reesor, for the defendant Lea.

Glyn Osler, for the defendant Ogilvie.

MIDDLETON, J.:—The defendant Lea, who owns a block of some 17 acres of land near Leaside Junction, discussed with Dr. Perry E. Doolittle, his medical attendant, the sale of this land. Dr. Doolittle, having in mind some idea that the property might be advantageously used for a sanitarium, undertook to become Lea's agent for the sale of the property; and at that same time took an option upon the property in his own favour. This dual relationship is evidenced by two documents dated February 1st: by one of which a ten days' option is given to purchase at $2,000 per acre, and by the other, terms are arranged for the payment of the price "in the event of Dr. P. E. Doolittle disposing of my property." This document further provides: "If Dr. Doolittle succeeds in making the sale of my property I agree to give him a commission of two and a half per cent."

After the expiry of the time limited by this option, on the 12th February, 1912, a new arrangement was made, evidenced by a written memorandum in the words following:—

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I hereby grant to Dr. P. E. Doolittle a thirty days' option to purchase my property at Leaside consisting of seventeen and three-tenths acres for the sum of two thousand dollars per acre, along with the further sum of two hundred and fifty dollars to be paid me by him in case this option is not exercised on or before the 22nd inst., and another added sum of two hundred and fifty dollars in the further event of this option not being exercised on or before the third day of March. All costs of searching title to be borne by you. Joseph N. Lea."

Contemporaneously another memorandum bearing the same date was signed, giving the terms of payment "in case the option on my property at Leaside is exercised by Dr. Doolittle." These terms called for payment of $10,000 if the option was exercised within the first ten days of its currency, $10,250 if exercised within the next ten days, and $10,500 if during the last ten days. Notwithstanding the argument of counsel, I think this is the meaning of the document. At the same time, the words "on completion of sale only" were added to the earlier document of February 1st, relating to the commission payable, thus shewing that the relationship of principal and agent still continued.

The option of the thirteenth of February purports to be in consideration of one dollar, but no money was actually paid.

The thirteenth of March, was the thirtieth day after the giving of the option. The thirteenth fell on a Wednesday. Dr. Doolittle had interested the plaintiff Beer in the purchase. An interview had taken place on the Monday, when a draft agreement of purchase had been discussed. Many terms had been assented to, but no final agreement was concluded. It was then arranged that the parties should meet on Wednesday at 2.30 p.m., and that the transaction should be completed. For the purpose of avoiding any uncertainty as to this, Dr. Doolittle during Wednesday forenoon telephoned to the plaintiff advising him that he would be ready to close at the hour named, and the defendant promised to keep the appointment.

At the time stipulated Dr. Doolittle and Mr. Beer attended at the place appointed, but Lea did not put in an appearance. Not anticipating any difficulty in closing the matter in the ordinary mercantile way, by cheque, Dr. Doolittle and his purchaser

Beer had not money with them for the purpose of making any formal payment or tender; but I find that if Lea had been present, Mr. Beer was prepared to make the cash payment. He did not have the money standing to his credit in his bank, but he had securities deposited with the bank entitling him to draw to an amount exceeding that required.

Lea had in the meantime learned of the plans of the Canadian Northern Railway, and was satisfied that he could sell the lands to the company at a much larger price. He had the view that the option expired at 4.00 p.m., it having been signed at that hour; and he deliberately refrained from attending at the place named, for the purpose of evading the receiving of any communication of the acceptance which he anticipated would then be made.

Doolittle was of the view that he had until midnight of the thirteenth to accept. He telephoned Lea at 6.30 p.m., asking an explanation of his failure to attend. Lea then told him that the option expired at 4.00 o'clock and he would have nothing further to do with him.

What then took place I think amounts to a revocation of the offer, and an intimation by Lea that he would no longer sell.

Dr. Doolittle, for the purpose of accepting the offer within the time limited (in his view of the meaning of the option) wrote and mailed a letter to Lea enclosing a marked cheque for five thousand dollars and accepting the offer.

This was not an adequate acceptance, because the contract did not contemplate acceptance by mail. The letter did not reach Lea until after the expiry of the option, upon either theory. Five thousand dollars was the amount of the marked cheque, because in course of the negotiations which took place on Monday, some willingness had been expressed on the part of Lea to assent to a variation of the terms of the sale by reducing the cash payment from $10,500 to $5,000. At the time the cheque was marked, Dr. Doolittle did not anticipate any attempt on the part of Lea to prevent the transaction being carried out, and anticipated that the five thousand dollars would be all that would be required.

Fearing that the mailing of this letter and cheque would not be sufficient, Dr. Doolittle went to Leaside and met Lea, well on in the evening, and then gave him a letter accepting the offer together with an unmarked cheque for $10,500. These were not accepted by Lea, who insisted that the option was at an end at 4.00 o'clock, and who further refused to regard the cheque as payment.

At this time Dr. Doolittle only had a very small sum in the bank to his credit; but I have no doubt that if the cheque had been accepted by Lea, Doolittle would have arranged for payment in some way. But, as a matter of substance, (apart from form), the cheque was by no means the same as money.

Lea then sold the property to Mr. Ogilvie, representing the Canadian Northern Railway, for sixty thousand dollars. It is admitted that Ogilvie took with notice, and has no higher position than Lea himself.

Upon these facts I think the plaintiff fails. I do not think there was any acceptance of the offer before it was withdrawn. The option being in fact without consideration and not under seal was nothing more than a mere offer. The telephone conversation at 6.30 p.m. amounted to a withdrawal of the offer. Up to that time there had been no acceptance.

Beyond this, I think that the offer could only be accepted by a cash payment of the sum stipulated for, and that this was a condition precedent to the existence of any contractual relationship: Cushing v. Knight, 46 S.C.R. 555.

Mr. Johnston very forcibly contends that Lea ought to be precluded from denying that there was an acceptance of the offer, because of his failure to attend at the place arranged when the contract was to be closed. I cannot follow this. There can be no contract unless there is an offer and an acceptance of that offer. If there is a contract, then either party may—as in MacKay v. Dick, 6 App. Cas. 251—by his conduct dispense with the fulfilment of the contract, according to its terms, by the other, but so far as I can find, it has nowhere been suggested that one who has made an offer can dispense with an acceptance so as to create a contractual relationship. There would obviously be no mutuality.

Upon a different ground I think also that the plaintiff fails. Dr. Doolittle was an agent for sale. He had also the option referred to. He was re-selling to Beer at an advance of two thousand dollars. He falsely stated to Lea that he was selling at an advance of four hundred dollars. In Bentley v. Nasmith, 46 S.C.R. 477, it was held that where an agent had under the terms of his employment a right to himself become the purchaser, he could not purchase until he had divested himself of his character as agent, and that to do so he was bound to disclose all the knowledge he had acquired as to the probability of selling at an increased value; and, a fortiori, he must honestly disclose the facts with relation to any contract of re-sale which he may have already made.

The question as to the duration of the option is both important and interesting. In Cornfoot v. The Royal Exchange, [1903] 2 K.B. 363, and [1904] 1 K.B. 40, the Court of Appeal determined that thirty days, in an insurance policy, whereby a ship was insured for thirty days in port after arrival, meant thirty consecutive periods of twenty-four hours, the first of which began to run upon the arrival of the ship in port.

I can see no reason why the same meaning should not be attributed to the expression in all contracts. Any attempt to give any other meaning would create difficulty. It is true that in most cases the law takes no notice of the fraction of a day; but this rule has been modified, and the true principle now seems to be that as between private litigants the exact time can be ascertained, when necessary to determine the rights of the parties litigant. See Clarke v. Bradlaugh, 7 Q.B.D. 151, and 8 Q.B.D. 63; Barrett v. Merchants Bank, 26 Gr. 409; Broderick v. Broatch, 12 P.R. 561.

The action therefore fails; but I think the circumstances justify me in dismissing it without costs.

MIDDLETON, J. NOVEMBER 18TH, 1912.

MILLER v. ALLEN.

Vendor and Purchaser—Option to Purchase Fee, Contained in Lease—Notice of Intention to Exercise Option—Writ Issued Before Tender—Incomplete Cause of Action—Insufficient Acceptance—Cash Payment Condition Precedent to Contractual Right—Insufficient Tender—Option Distinct from Lease—Consideration.

Action for specific performance of agreement for sale of land under an option contained in a lease.

W. C. Hall, for the plaintiff.
W. N. Tilley, and W. R. Cavell, for the defendant.

MIDDLETON, J.:—On the 29th May, 1911, a lease for two years was executed, purporting to be in pursuance of the Short Forms Act, and containing the following clause:—

"The said lessor further agrees to give the said lessee the option to purchase the above premises for one year, ending the third of June, 1912, for the sum of four thousand five hundred ($4,500), paying $1,000 cash, and giving mortgage for balance

repayable $100 half yearly, with the privilege of paying more at any time without notice or bonus, and with interest at six per cent. per annum."

This lease is not under seal, although it purports so to be.

On the 9th May, 1912, the plaintiff's solicitors wrote the defendant stating that their client (the plaintiff)—"intends to exercise the option of purchasing the premises at $4,500 given him in your lease to him dated the 29th of May, 1911, and we would be glad if you would kindly accept this as notice of his exercising the option."

This was followed by a request to have a deed prepared and submitted, and some requisitions upon the title, and the statement: "Subject to the above the title appears satisfactory, and we think our client will be ready to close as soon as the papers are in shape."

No reply was made to this letter; and on the 23rd of May the solicitors wrote to the defendant that—

"Failing to hear from you or your solicitor by Monday with a draft deed we shall take it as an intimation that you do not intend to carry out the transaction, and shall be obliged to issue a writ for specific performance."

The writ was issued on the 31st of May.

Up to this time the purchaser had made no tender of either deed, mortgage, or money; and he was in point of fact in default in payment of the rent, the last rent paid being that due on the 3rd of April.

On the 1st of June, the plaintiff and his solicitor attended on the defendant at his place of business, and then made a tender of one thousand dollars cash and of a mortgage for $3,500 dated on the 1st of June, and carrying interest from that date.

The plaintiff's solicitor seeks to avail himself of what then took place, in support of his action. I do not think that this is open to him. His cause of action must be complete before the action is instituted; and if what then took place is relied upon as an acceptance of the offer embodied in the option, the contract was not made until after the action was brought.

The letters which I have referred to are put forward as constituting an acceptance. I do not think that they are sufficient. The case of Cushing v. Knight, 46 S.C.R. 555, shews that where an option stipulates for a cash payment, the cash payment is a condition precedent to the existence of any contractual rights.

This case affords a good illustration. The vendor stipulated for cash. The purchaser accepts, and substitutes for cash a payment "as soon as the papers are in shape."

There is another aspect of the case that also presents difficulty. Before the plaintiff can justify his action he must shew not only a contract, but that the defendant is in default. Clearly the defendant was not called upon to do anything until the tender was made.

Also, the tender was insufficient, if based upon the theory that the letter of May 9th, constituted an acceptance. Interest ought to have been paid on the cash, and the mortgage ought to have provided for interest running from that date.

That renders it unnecessary to consider the other defences relied upon.

In dealing with the case, I have considered myself bound by the decisions in Davis v. Shaw, 21 O.L.R. 474, and in Maltezos v. Brouse, 19 O.W.R. 6, to regard the clause in question as a mere offer or option, quite distinct from the lease, and not founded upon any consideration. Were it not for these cases I would have found myself unable to answer the question put in Hall v. Center, 40 Cal. 63, "How is it that the Court would thus compel the lessor to part with an estate for years at the mere option of his tenant, but would at the same time permit him to violate his agreement to part with the fee, if the tenant elect to purchase it?" For I take it to be clearly established by a series of English cases that the Court will decree specific performance of an agreement to grant a renewal of a lease.

Even if this were so, the plaintiff would yet fail in this action, for the reasons I have given. The action must, therefore, be dismissed with costs.

MIDDLETON, J. NOVEMBER 18TH, 1912.

"MY VALET," LIMITED v. WINTERS.

Business Name—"My Valet"—Action to Restrain Use of Name, "My New Valet"—Colourable Difference—Misrepresentation—Passing Off.

Action to obtain an injunction restraining the defendant from carrying on business under the name, "My New Valet," or any other similar name, or any name so closely resembling that of the plaintiffs, as to be likely to deceive, and for damages.

E. F. B. Johnston, K.C., and D. I. Grant, for the plaintiffs.
J. H. Cooke, for the defendant.

MIDDLETON, J.:—In the year 1896 William Fountain, a tailor, carrying on business in Toronto, conceived the idea that a business could be profitably conducted by an establishment which would undertake to look after the customers' clothing, establishing a system of collecting, cleaning, pressing, and returning garments, and of making minor repairs; in short, of performing for each customer the services which would be rendered by a gentleman's valet, save the personal attendance. This business was established, and was extensively advertised under the name of "My Valet," coupled in many instances with the words "Fountain, the Cleaner."

This business was very successful, and for a considerable time Fountain enjoyed what was practically a monopoly. His success induced rivals to establish opposition businesses; and this they undoubtedly had a right to do. In the case of some of these businesses the rivals have used the word "valet," and this I also think they have a right to do, as the word is descriptive of the kind of business which is being carried on. I do not think that Fountain could acquire a proprietary interest in this word which would entitle him to monopolize it. As said by Cozens-Hardy, M.R., in Re Crossfield, [1910] 1 Ch. 118, at page 141: "Wealthy traders are habitually eager to enclose a part of the great common of the English language and to exclude the general public of the present day and of the future from access to the inclosure,"—a statement even more true of the successful trader than the wealthy trader.

While this is so, it is equally well-established that a trader may not so use a word which another has attempted to appropriate, as to hold out to the public his business as being that of his rival.

[Reference to judgment of James, L.J., in Levy v. Walker, 10 C.B. 447; and to Standard Paint Co. v. Trinidad Asphalt Manufacturing Co. (1910), 220 U.S. 446. The judgment proceeds:]

In this case the facts developed at the trial, I think, would shew a deliberate attempt on the part of the defendant to trade unfairly in the sense indicated. I think he intended to represent his business as being the plaintiff's business, and to unfairly divert to his own pocket that which was lawfully the plaintiff's; and that what he did was not merely calculated to deceive, but did actually deceive, and bring about, at least in some cases, the result intended. Had he used some such name as "Winters, the Valet," his course would have been unobjectionable. I do

not think that the use of the word "New" in the title which he did adopt—"My New Valet"—is sufficiently distinctive.

It is not without significance, in considering this aspect of the case, that the word "My" is common to both names. It is not a case where the defendant is merely using the descriptive word; it is a case in which he is also using another word which forms an integral part of the plaintiff's title.

The British Vacuum Cleaner v. The New Vacuum Cleaner, [1907] 2 Ch. 312, comes very close to this case, but it is, I think, distinguishable. There could be no monopoly of the words, "Vacuum Cleaner" or "Vacuum Cleaner Company"; and the holding was that the word "New" sufficiently distinguished the defendant company from the plaintiff company, which had chosen as its descriptive word "British." I think the result would have been otherwise if the defendant company had called itself "The New British Vacuum Cleaner Company."

For these reasons I think it proper to award the plaintiff an injunction to restrain the defendant from the use of the name "My New Valet" or any other similar name only colourably different from the plaintiff's name.

The plaintiff company has sustained some damage; I have not satisfactory evidence as to how much, and therefore award fifty dollars, with the liberty to either party to have a reference at its risk as to costs; and I think the defendant should pay the costs of the action, including the costs of the motion for an interim injunction. If there is a reference, costs of the reference will be reserved.

LATCHFORD, J. NOVEMBER 18TH, 1912.

RE GLOY ADHESIVES, LIMITED.

Company—Liquidator — Appeal and Cross-Appeal from Master —Purchase of Worthless Shares—Gross Fraud—Principal and Agent—Liability for Agent's Fraud—Election of Debtor—Subrogation.

Appeal on behalf of T. B. Hughes from the report of the Master in Ordinary, declaring Hughes not to be entitled to twelve hundred dollars paid by one Crosby for shares held by Hughes. He claimed to be entitled to rank on the assets of the company to the extent of the twelve hundred dollars. On behalf of the liquidator of the company the report of the Master was sought

to be varied in so far as it holds that the liquidator is not entitled to recover from Hughes a sum of $800 paid to Hughes by the company.

A. C. McMaster, for the appellant.
W. R. Wadsworth, for the liquidator.

LATCHFORD, J.:—That the twelve hundred dollars was received by the company for Hughes is undoubted. It was, with the eight hundred dollars in question, obtained by H. E. Vanderberg from the boy Crosby, by gross and unconscionable fraud. To hold Hughes entitled to the twelve hundred dollars would be equivalent to determining that he could rightly profit by Vanderberg's wrongful—and, as I regard it, criminal—course in plundering young Crosby.

The circumstances under which the two thousand dollars was obtained by Vanderberg are so extraordinary that I think the evidence taken before the Master should be submitted to the Crown officers charged with the administration of the criminal law; and I am directing the registrar accordingly.

The relation of principal and agent did not, as the Master has rightly found, at any time exist between Crosby and Vanderberg, in regard to the purchase of the worthless shares of Hughes. Vanderberg was no doubt instructed by Hughes to sell his stock, and did sell it. Vanderberg was *the* company, as the Master puts it; meaning, I assume, that he conducted all the affairs of the company; the board of directors, of whom Hughes was one, leaving all matters in Vanderberg's hands. Vanderberg induced Crosby to make the cheque for the two thousand dollars which Crosby had obtained from his widowed mother, payable, not to Hughes, but to the company, which was at the time in a moribund condition. The company had the benefit of twelve hundred dollars out of the two thousand, only eight hundred being handed over to Hughes; but the company was not entitled either to the eight hundred dollars or to the twelve hundred dollars; it was simply made a conduit for the money between Crosby and Hughes, and part of the money remained with the company; a part only, the eight hundred dollars, passing on to Hughes.

Crosby has chosen to regard the company as his debtor, not only to the extent of the twelve hundred dollars of his money which it retained, but also as to the eight hundred dollars which Vanderberg passed on to Hughes in part payment for his shares.

The liquidator has apparently not contested Crosby's claim.

The Master in fact had allowed it, and the liquidator has not appealed upon the point. Hughes is not entitled to claim the twelve hundred dollars which the company received through his agent's fraud. He is, moreover, in my opinion, liable for Vanderberg's fraud, whether Vanderberg was acting for his own benefit or not. Dicta to the contra were recently expressly dissented from in the House of Lords: Lloyd v. Grace & Co. (1912), 28 Times L.R. 547, reversing the decision of the Court of Appeal, [1911] 2 K.B. 489. Hughes is, in my opinion, not entitled to rank on the assets for the twelve hundred dollars, and his appeal should be dismissed with costs.

The cross-appeal also fails. The eight hundred dollars which Hughes received was not the money of the company, but the money of Crosby. It reached Hughes in part payment of shares which Vanderberg had sold for Hughes to Crosby. Had Hughes received the whole two thousand dollars, and not merely part of it, the company would, in my opinion, have no right, whatever Crosby's right might be, to recover these moneys from Hughes. The company had parted with nothing in exchange for Crosby's money, and it has not, I think, in any way become subrogated to the rights which Crosby had, or might have had, if he had not elected the company as his debtor for the eight hundred dollars as well as for the twelve hundred dollars. No costs of the cross-appeal.

SUTHERLAND, J. NOVEMBER 19TH, 1912.

POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION.

Contempt—Motion to Commit—Refusal to Answer Questions on Examination—Company—Director—Con. Rules 902, 910.

Application for an order to commit Edwin R. Reynolds, for contempt in failing to comply with the directions and terms of an order of the Divisional Court, dated 23rd September, 1912, and in refusing to answer satisfactorily certain questions alleged to have been properly put to him on his examination, and to produce certain documents as therein required, or in the alternative for an order that he do attend at his own expense and submit to be further examined pursuant to the provisions of the said order.

Paragraph 2 of the order referred to is as follows: "2. And this Court doth under the provisions of Rule 910 in that

behalf order that the said E. R. Reynolds, upon being served with an appointment issued by one of the special examiners of the Court, do attend before such examiner and do submit to be examined upon oath by or on behalf of the plaintiff as to the names and residences of the shareholders in the defendant corporation, the amount and particulars of stock held or owned by each shareholder, and the amount paid thereon and as to what debts are owing to the defendant corporation, and as to the estate and effects of the defendant corporation, and as to the disposal made by it of any property since contracting the debt or liability in respect of which judgment has been obtained by the plaintiff in this action."

C. A. Masten, K.C., for the plaintiff.
E. R. Reynolds, in person.

SUTHERLAND, J. (after setting out the order as above) :—On the motion it was contended on behalf of the plaintiffs in the action that the examination of Reynolds was intended, under the said order, to be as wide as in the case of an officer of the defendant corporation.

Mr. Reynolds, who appeared in person, contended for a very strict construction of the terms of the order, which he said was made under Rule 910. He seemed to rather contend that the order as drafted had gone farther than it should have gone or was intended. By a reference to paragraph 2 already quoted, it would seem to have been made under the provisions of Rule 910, but when Rule 902 is referred to, the remaining part of said paragraph 2 seems to have been drawn so as to make the order applicable under that section also.

I was not referred by either counsel to any written judgment of the Divisional Court. It appears that the reasons for the judgment were delivered orally at the time. A written judgment was, however, handed down later, which contains the following statement:* "We agree with the judgment in review that a director is an officer who may be examined under the provisions of Con. Rule 902. If there could be any possible doubt as to the correctness of this, the case is one in which an order might well be made for examination under Con. Rule 910."

It seems to me that the plain intention of the order of the Divisional Court was that Reynolds should be examined in as wide and full a manner as though he were an officer of the company. It appears that he was one of its provisional

*NOTE.—A note of the judgment appears *ante* 219.

directors, and there has been no meeting held for the regular organisation of the company. Under these circumstances, I think the motion must succeed. Reynolds is ordered to attend and be further examined at his own expense, and to pay the costs of this motion.

MACKAY v. MASON—CLUTE, J.—NOV. 14.

Mining Company—Amalgamation—Exchange of Shares—Transfer—Registration—Separate Causes of Action—Election—Shareholder—Costs.]—Action by the plaintiff, the New Ontario Goldfields Limited, for a declaration that Homer Mason is not and never was a shareholder in respect of 41,000 shares issued to him, and for the delivery up of the certificates of said shares, and in the alternative, damages. The Goldfields Co. and George A. MacKay were joined as plaintiffs in the original action, the latter asking also for relief on his own behalf, but the trial Judge having ruled that the causes of action of the plaintiffs were distinct, and that they must elect as to which should be proceeded with, election was made to proceed with the claim of the Goldfields Co. CLUTE, J., after stating the facts of the case, which are somewhat complicated, said that he did not think the plaintiff company was entitled to succeed, and that, therefore, the action should be dismissed, but, owing to the conduct of the defendant Mason, as disclosed in the evidence, without costs. He further held that as the costs had not been materially increased by the joinder of MacKay as a party plaintiff in the action as originally constituted, and under the circumstances, he would give no costs to the defendant, either of the action as originally constituted, or after the amendment by striking out the name of George A. MacKay. G. H. Kilmer, K.C., for the plaintiffs. W. A. MacMaster, for the defendant.

WOLTZ v. WOLTZ—MASTER IN CHAMBERS—NOV. 15.

Pleading—Particulars—Allegations too Vague.]—Motion by the defendant for an order for particulars of statement of claim. Mr. HOLMESTED, sitting for the Master in Chambers, said that as the particulars delivered in answer to the defendant's demand did not in his opinion sufficiently answer the demand in relation to certain paragraphs, he would order the plaintiff within a fortnight to deliver better particulars as to the matters referred to in those paragraphs, with times, places, and persons specified

in reference to the allegations therein made, as the particulars delivered were too vague in these respects. The costs of the motion to be in the cause. W. H. Kirkpatrick, for the defendant. Gray (Montgomery & Co.), for the plaintiff.

STEWART v. HENDERSON—MASTER IN CHAMBERS—NOV. 15.

Discovery — Examination of Plaintiff — Necessary and Material Witness—Commission to Examine—Materiality of Evidence—Order Granted on Terms—Security for Costs.]—Motion by the plaintiff for an order for a commission to Seattle to examine Stewart senior. The facts of this case appear sufficiently in the report of a previous motion, ante 166. On examination of the plaintiff for discovery, he stated that his father, a resident of Seattle, was present at the first and second interviews with the defendant referred to in the examination. He also said that his father had an interview with Sir D. Mann, but that he was not informed of its purport. The examination was then adjourned and a motion made for a commission to examine Stewart senior at Seattle. The affidavit of the plaintiff was filed in support of the motion, alleging that his father is a necessary and material witness on his behalf, and that he cannot come to Toronto for the trial. The Master said that on the pleadings it was not easy to see how any evidence of oral statements made by the defendant in June or July, 1911, could be material when the agreement sued on, dated 10th April, 1912, concludes with the words: "This absolutely cancels any and all former commission contracts to you." However, since Ferguson v. Millican, 11 O.L.R. 35, an order of this kind cannot be refused though proper conditions must be imposed. The Master also said that, considering the magnitude of the plaintiff's claim which is $500,000, the defendant might require counsel here to attend on the examination, and that he did not think he could do better than follow in measure the order made by a very careful Judge in Toronto Industrial v. Houston, 5 O.W.R 349, and let an order go on the plaintiff giving security for the costs of same, which he fixed at $200. Grayson Smith, for the plaintiff. Casey Wood, for the defendant.

CAMPBELL v. VERRAL—GIBSON v. VERRALS—SUTHERLAND, J., IN CHAMBERS—NOV. 15.

Staying Proceedings—Prior Judgment against Company—Res Judicata—Estoppel—Negligence.]—Motion by the defend-

ants for leave to appeal from the orders of RIDDELL, J., of 9th November, ante 300. Motion dismissed. J. M. Godfrey, for the defendants. John MacGregor, for the plaintiffs.

GATTO v. CITY OF TORONTO—MIDDLETON, J.—NOV. 18.

Damages — Water Leaking from Pipe — Oven Made Wet — Evidence — Inspection by M.H.O. — Notice of Complaint —Negligence—Statutory Defences.]—Action to recover damages, for injury sustained by water leaking from a broken service pipe and making an oven, constructed in an area under the sidewalk, wet, so that the plaintiff was unable to bake bread therein for a period of 42 days. The trial Judge said that, on reflection, he retained the opinion expressed at the trial, that the plaintiff's claim had little merit, and was grossly exaggerated. After a detailed review of the evidence, the judgment proceeds: "Even making large allowance to the plaintiff by reason of his inability to speak English, I think he ought to have drawn the attention of the Water Works Department to the leak in some more effective way; and, further, I believe he would have done so if he was suffering any such inconvenience as he now suggests. I have no doubt that some inconvenience was suffered; and at the trial I stated that, in my view, two hundred dollars would be an outside allowance if he was entitled to recover, and entitled to damages by reason of inability to bake enough bread to answer his requirements. The evidence as to this is most unsatisfactory. Particulars had not been given; special damage had not been pleaded; and there was every indication of a desire to exaggerate. If this element of damages is too remote, I would think that fifty dollars would more than compensate for the inconvenience. As I am unable to find any negligence on the part of the city I think the action fails; but if I had thought the plaintiff entitled to recover, I would not have certified to prevent a set-off of costs. In addition to the other grounds, the defendants rely upon statutory defences which were originally given to the Water Commissioners, and which they claim have passed through them as part of the "privileges" referred to in the legislation. See 35 Vict. ch. 79, secs. 19, 21, 28, and 41 Vict. ch. 41, sec. 1. I do not find it necessary to pass upon this contention. W. E. Raney, K.C., for the plaintiff. C. M. Colquhoun, for the defendants.

NIAGARA AND ONTARIO CONSTRUCTION CO. v. WYSE AND UNITED STATES FIDELITY AND GUARANTY CO.—SUTHERLAND, J., IN CHAMBERS—NOV. 19.

Particulars in Action on Guaranty—Suggested Assessment of Damages on Reference.]—Motion by way of appeal from an order of the Master in Chambers dated 5th November, 1912 (ante 248), requiring the plaintiffs to furnish particulars under certain paragraphs of their statement of claim. SUTHERLAND, J., after setting out the facts, said that it seemed to him clearly a case in which the defendant company ought not to be compelled to go down to trial without fairly complete particulars under the paragraphs in question. It had been suggested by the Master that the only issue determined at the trial might be whether the guaranty company is liable to indemnify the plaintiff against any default on Wyse's part, and that in that case the damages could be assessed on a reference, as is usually done in actions on bonds; but he had been informed by counsel during the argument that, while they had conferred with one another with respect to this suggestion, they had been unable to come to any agreement to adopt it. He thought the order of the Master was right and that the plaintiffs should be required to give particulars of the alleged damage sought to be recovered by them. Appeal will be dismissed with costs. C. F. Ritchie, for the plaintiffs. W. B. Milliken, for the guaranty company.

JOHNSON v. LEVY—KELLY, J.—NOV. 19.

Appeal from Report of Official Referee.]—Appeal by the defendant from report of J. A. C. Cameron, Official Referee. The learned Judge was of opinion that the evidence taken before the Official Referee justified his findings; and therefore dismissed the appeal with costs. W. A. Lamport, for the defendant. J. E. Jones, for the plaintiff.

DAVIES v. MACK—SUTHERLAND, J.—NOV. 19.

Partnership—Arbitration Clause in Articles—Interim Receiver.]—Application at the instance of one of two partners doing business since the 29th day of June, 1909, under written articles of partnership bearing that date, for an order appointing a receiver of the properties and assets of the partnership of Mack & Company with all the necessary powers and directions, and for an injunction restraining his co-partner, the de-

fendant, from carrying on business on his own account in the partnership premises or elsewhere in contravention of the provisions of the articles of partnership and from dealing in any way with the partnership properties and assets pending an adjustment of the partnership affairs, SUTHERLAND, J., referred to a clause in the articles providing that in case of disputes or differences between the partners, the same are to be referred to arbitration in the manner mentioned in that clause, and said that in the material filed, charges and countercharges were made by the partners against each other and that it was admitted during the argument that it was impossible for the partners to continue to work harmoniously together. Under these circumstances he thought the proper order to be made was to appoint an interim receiver of the partnership to look after the property and assets of the business, pending a reference to arbitration under the clause of the articles of partnership, or the trial of this action. He, therefore, appointed Mr. E. R. C. Clarkson as interim receiver. Costs of this motion to be fixed by the arbitrators in case the matter proceeds to arbitration, or otherwise to be disposed of by the trial Judge. R. C. Levesconte, for the plaintiff. H. E. McKittrick, for the defendant.

REX v. DAVIS—KELLY, J. IN CHAMBERS—NOV. 19.

Selling Liquor without License—Conviction—Evidence—Acting as Messenger.]—Motion to quash a conviction. The defendant was convicted by the Police Magistrate for the city of Toronto, for having on August 5th, 1912, sold liquor without a license. On that day the defendant was a waiter in the National Cafe, in Toronto, and one of two persons who were together in the cafe gave him a dollar and asked him to go out and get them some beer. Acting on this, the defendant brought back four bottles of beer and returned to the person who gave him the dollar, forty cents in change, placed two of the bottles on the table for those for whom they had been procured and put the others in the ice-box. KELLY, J., said that there was no evidence that these persons offered to buy liquor from the accused, or that he offered to sell them, or that the accused did anything more than act as messenger in the purchase of the beer for the persons who desired it, and unless he were to make assumptions not warranted by the evidence, he was unable to find that the accused was guilty of the charge on which he was found convicted. Conviction quashed with costs, and order for protection to the Magistrate. W. A. Henderson, for the defendant. E. Bayly, K.C., for the Crown.