The
Ontario Weekly Notes

Vol. III. TORONTO, APRIL 10, 1912. No. 30.

HIGH COURT OF JUSTICE.

BOYD, C., IN CHAMBERS. MARCH 29TH, 1912.

*RE HUTCHINSON.

Infant—Custody—Rights of Father against Maternal Grandparents—Welfare of Child—Agreement under Seal—Adoption—1 Geo. V. ch. 35, sec. 3—Application upon Habeas Corpus—Costs.

Motion by W. H. Hutchinson, the father of Adah May Hutchinson, a child of two years, upon the return of a writ of habeas corpus, for an order for the delivery of the child to him, by the maternal grandparents, the respondents.

W. N. Ferguson, K.C., for the applicant.
V. A. Sinclair, for the respondents.

BOYD, C.:— . . . There is a mass of material before me which I have carefully perused and find that there is a cumulation of domestic details on which the various deponents contradict each other in an embarrassing manner. Disregarding the smaller discrepancies, I should judge, despite all the divergent opinions, that there is no danger likely to arise to the child whether she stays with her grandparents or goes to her father, in regard to any tubercular infection. Nor do I think there is any lack of affection on the part of the father, though it may be he is not so attractive to the child as her grandparents. They have been to all intents in loco parentis to this young girl since her birth. The parents of the infant lived in the house and home of the maternal grandparents from the date of their marriage till the death of the wife on the

*To be reported in the Ontario Law Reports.

7th December, 1911, with a short interval from April to the middle of July, 1911, when the parents occupied another house. But during these few months, the infant was left with the grandparents. The child was born in August, 1909, and is yet under three years of age—said to be an active, healthy child, yet easily excited and needing careful treatment.

I have no manner of doubt that the child cannot be better placed than to be left with the grandparents: they are well to do, living in a roomy house, with a large lot in which the child can play. The character of the grandparents is beyond reproach, and they stand particularly well in the opinion of the neighbours and townsfolk of Tillsonburg. They are devotedly attached to the child, as is the child to them. . . . The opinion I have formed on this head was shared in by the father himself. . . .

To hand over the child to the father would be in the nature of an experiment: he is a working man, aged about twenty-six, with no home at present; he proposes to establish one with the assistance of an elder sister, who has been for the last six or seven years working in a cutlery company's works at Niagara Falls, New York, and has had experience in looking after children. Owing to the scarcity of suitable houses in Tillsonburg, it is not likely that the father can do more than get some rooms where the child will be in a sense cooped up, and with the street for a playground. The contrast between these prospects, even if the household machinery works smoothly, and the advantages possessed and now enjoyed by the child, is obvious.

No question of religion enters in to embitter the situation of the claimants; and I see no good reason why the father should not return to the household of the grandparents. . . . He says he would have done so had they destroyed an agreement which he signed on the 4th December, 1912. This is an instrument under seal, prepared in view of the mother's impending death, so as to place the possession, custody, control, and care of the child in the hands of the grandparents, and providing that the father shall have access to the child at all reasonable hours. This instrument is upheld by the grandparents, but is being attacked in an action by the father to set it aside, which is now pending. I must regard this at present as a valid agreement which is binding on the father. It is not for me, on such material as I have before me, to anticipate a decision of the Court on this dispute. I have no doubt that the wishes of the dying wife were that the child should be left to the care of the grandparents.

The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V. ch. 35, sec. 3, taken from the revised statute in force when the deed was executed. But, apart from this agreement, I think, upon the material placed before me, that the interests of the child will be better subserved by letting her custody remain in statu quo; the father having all reasonable access to the child when he so desires; this right of access to be settled by the Local Master, if the parties cannot agree. . . .

[Reference to Re Davis (1909), 18 O.L.R. 384.]

It may be that the proper reading of the statute is, that the declaration that such disposition shall be good and effectual against all and every person claiming the custody and tuition of the child, does not include a father if living. But I do not see any decided case to that effect. But, apart from the statute, if the agreement has been made by the father in pursuance of an understanding that the child was to be the heir to or inheritor of the property of the grandparents, and has been brought up by them under that impression, and if that is supplemented by an actual deed or will irrevocable to such effect, the Court, acting on principles of equity, will not, at the father's instance, disturb that arrangement. I refer to the considerations influencing the Court in such cases as Lyon v. Blenkin, Jac. 245; Roberts v. Hall (1882), 1 O.R. 388, approved of in Chisholm v. Chisholm (1908), 40 S.C.R. 115.

Therefore, in the peculiar circumstances of this case, following Ex p. Templer, 2 Saund. & C. 169, I refuse to change the custody.

I do not award costs to either side.

I can only express the earnest desire that the parties may take thought and act reasonably and considerately on both sides, so as to preserve harmony in the family and avoid a devastating litigation in the Courts, which may go far to impoverish the moneyed litigant and to embarrass the one who is poorer.

MIDDLETON, J. MARCH 30TH, 1912.

RE IRWIN.

Will—Construction—Annuities Charged on Income—Insufficiency of Income—Right to Encroach upon Corpus—Priority of Annuities—Increase of Annual Income by Realisation of Unproductive Property—Method of Dealing with Deficiency and Surplus before Period of Distribution—Apportionment of Proceeds of Non-productive Properties upon Realisation—Rights of Life Tenants—Fund Subject to Trust Settlements—"Family"—Grandchildren—Income from Trust Fund—Marshalling of Securities—Insurance Moneys—Apportionment—Declarations by Will in Favour of Classes—Validity—Predecease of Preferred Beneficiary—Distribution of Share among Survivors—Insurance Act, R.S.O. 1897 *ch.* 203, *sec.* 159(8).

Originating notice to determine questions arising upon certain trusts of the will of James M. Irwin, who died on the 8th October, 1908.

On the 26th November, 1891, a separation agreement was come to between the testator and his wife, Annie Irwin, by which he agreed to make certain payments to her while she should live separate from him.

On the 29th February, 1896, the testator executed a deed poll in favour of A. H. Marsh, assigning certain securities to him as trustee for the purpose of securing the payments to Annie Irwin, and, subject to these payments, for the benefit of his children as he might appoint by will.

A further agreement was made between the testator, his wife, and Marsh on the 5th July, 1898, modifying the separation agreement and supplementing the trust fund.

After the death of the testator, a question was raised as to Annie Irwin's right under these instruments; and an order was made by BOYD, C., on the 22nd March, 1910, declaring that the trust created by these instruments ceased on the death of the testator.

In the meantime, the testator had obtained a divorce (the validity of which was not in question) from Annie Irwin, and had married Sherife MacDonald.

By his will the testator gave all his property, save his household effects, etc., to his executors, with power to convert into money at such times as they in their unlimited discretion should think fit, and to invest the proceeds, holding the fund

upon the following trusts: (1) Out of the income, "as a first charge" to pay to his present wife, Sherife Irwin, $800 a year so long as she should live and remain unmarried. (2) As a second charge in order of priority to pay out of the income $500 a year to his daughter Lillian for her maintenance; and, if she should die leaving children before the time for final distribution of the estate, this annuity to be paid to her children. (3) To pay out of the income a sufficient sum which, together with the income arising from the property which may be transferred to a trustee for that purpose, would make up $600 per annum to Annie Irwin, so long as she should remain unmarried; this to be taken in lieu of dower and in satisfaction of all claims under the separation agreement, and to form "a third charge in order of priority upon my estate." (4) To pay out of the income $500 a year to his daughter Caroline Bird, and after her death to her sons or the survivor until the period of distribution. (5) To pay out of the income $500 a year to the children of his deceased son James, which "annuity shall form a fifth charge in order of priority upon my estate." Upon the annuity to Sherife Irwin ceasing to be a charge, the trustees were to pay $5,000 to the testator's son Mossom; and upon the annuity to Annie Irwin so ceasing, a further principal sum of $2,000 to Mossom. The final period of distribution was to be when the youngest of the two sons of James or the youngest of the now living sons of Caroline should attain the age of twenty-one, or when the provisions in favour of Annie Irwin and Sherife Irwin should have ceased to be a charge upon the estate, whichever should be latest. Then the remainder of the estate was to be divided into four equal shares, and the income from one was to be paid to Caroline during her lifetime, and after her death the corpus to her two sons now living or the survivor (Caroline and her two sons being called class 1). Another fourth was to be paid to the two sons of James or the survivor (class 2). The income derived from the third of the four shares was to be paid to Lillian during her lifetime, and upon her death the corpus to be paid to her children then living; if no children, then to be divided as set forth in detail (class 3). From the remaining fourth was to be deducted three-fourths of the amount to which Mossom was entitled under the other provisions of the will, and the balance was to be paid to Mossom, who, with his children, if he should die before the date of distribution leaving children, was to be regarded as class 4; and the three-quarters so deducted was to be divided among the three other classes.

A. G. F. Lawrence, for the executors.

T. P. Galt, K.C., for Annie Irwin.

E. D. Armour, K.C., for Caroline Bird, Lillian Irwin, and Mossom Irwin.

H. T. Beck, for Sherife Irwin.

J. R. Meredith, for the infant children of James Irwin and of Caroline Bird.

MIDDLETON, J.:— . . . The income of the estate is not sufficient to meet the annuities. The two wives contend that the annuities are charged not only upon the income but upon the corpus of the estate, or, in the alternative, that they are a continuing charge upon the income after the period fixed for distribution, until any arrears are fully satisfied; this being equivalent to a charge upon the corpus.

The cases upon the subject are very numerous, and not all easy to reconcile with any clearly defined principle. Where the gift is of an annuity, and the disposition of the estate is subject thereto, there is no doubt that the charge is upon the corpus. . . . On the other hand, if the gift is of an annuity payable out of income only, the corpus is not charged. . . .

[Reference to Carmichael v. Gee, 5 App. Cas. 588; Baker v. Baker, 6 H.L.C. 615; Birch v. Sherratt, L.R. 2 Ch. 644; In re Howarth, [1909] 2 Ch. 19; In re Watkins, [1911] 1 Ch. 1; In re Boden, [1907] 1 Ch. 132, 153.]

I find conclusive indications that the testator did not intend the corpus of the estate to be encroached upon. The provisions for the different annuities are not identical. . . . The intention is plain. What the executors are to hold and invest is "all the rest residue and remainder of my real and personal property of every nature and kind;" and upon the arrival of the period of distribution, the testator's desire is, "that then all the rest residue and remainder of my estate of every nature and kind shall be divided. This, I think, indicates clearly that the same fund which the executors received is to be held until the arrival of the period of distribution, and to be then distributed. There is nothing in the gift over indicating any enlargement of the gift to the annuitants; and the gift to the annuitants is in each case a gift out of income, and income alone. The same reasoning shews that the annuities are charged upon the income prior to the period of distribution, and that there is no intention to create a continuing charge.

The only foundation for an argument to the contrary arises in the clauses dealing with the priority of the annuities. The expressions are loose, and vary in the different clauses. The

annuities are declared to be "a first charge," "a second charge upon the investments," "a third charge upon my estate," etc. I do not think that these expressions can be taken to enlarge the gift. . . .

The question was raised, whether these annuities should abate ratably, or whether priority is given between the annuities. . . . I am unable to conceive any clearer expression of intention intimating that the annuities shall rank in priority, than those used in this will. . . .

[The order of priority is: (1) Sherife; (2) Lillian; (3) Annie; (4) Caroline; (5) children of James.]

The question was then raised as to how these annuities should be dealt with, having regard to the fact that the annual income will vary from time to time and will increase as unproductive property is realised. I think that the annuities are to be dealt with annually, and that at the end of each year from the testator's death the executors should ascertain the amount of income available, and should then determine the amount to which each annuitant is entitled—having regard to the priorities declared—and that no annuitant who fails to receive the full amount has any charge against the income for the next or any succeeding year in priority over the annuities payable in that year. Each year will thus be standing upon its own footing. If in any year, before the final period of distribution, the income derived from the estate is more than sufficient to pay all the instalments of annuity falling due in that year, such surplus will, I think, be available to meet any arrears that may be due to the annuitant in respect of instalments of annuity which fell due during lean years. This is, of course, to be confined to the income prior to the date fixed for distribution. All the income prior to that date stands charged with the annuity. If there is any surplus not required to meet the annuities and arrears of annuities, it will then fall into the residue to be distributed among the classes.

The next question . . . was the right and duty of the trustees to apportion the proceeds of non-productive securities when realised. The governing principle is found in Yates v. Yates, 28 Beav. 639 . . .: "Where a testator gives property to trustees with an absolute trust for conversion and with a discretion as to the time at which the conversion shall take place, if . . . the conversion is delayed, then the tenant for life . . . is to have the same benefit as if the conversion had taken place within a reasonable time from the death of the

testator, which is usually fixed at twelve months." This principle is applied in Re Cameron, 2 O.L.R. 756, where the mode of computation is pointed out. . . .

Under the "Marsh settlements" and the separation deed, the widow's right ceased upon the death of the testator, as already determined. Under the first of these settlements, the principal is to go to the testator's children and their issue as the testator may appoint by his will. Under the second, it is to go to such one or more persons, who at the time of appointment shall be members of the testator's family, as he shall by his will appoint. The testator by his will has referred to these two declarations, and directed that these trust funds shall form part of his estate dealt with by his will.

The word "family," used in the second settlement, primâ facie means "children:" Pigg v. Clarke, 3 Ch.D. 672. The words, however, are elastic, and the context here would be sufficiently wide to cover the grandchildren . . . if at the time of the testator's death these resided with and formed part of the recognised "family," in a more colloquial sense, of the testator. . . . The material . . . may be supplemented before the order issues.

I do not think that either Sherife Irwin or Annie Irwin is entitled to share in the income derived from these securities: they do not fall within the scope of the power. The income from these securities will, therefore, be primarily answerable for the annuities payable to the children and possibly the grandchildren; but Annie Irwin will be entitled to have the securities marshalled and to compel Lillian to resort to the income of this trust fund in priority to the income from the general estate. . . .

The testator was insured for a considerable sum, originally declared in favour of his wife and children. By his will he directed that the money should be applied and paid, $500 to his son William, $500 to his daughter Bessie, $3,000 to his son Mossom, and the balance to be invested by his trustees: the income derived from one-fourth of such balance to be paid to Annie Irwin so long as she should be entitled to receive the annuity under his will, and the remaining three-fourths and the reversion of the one-fourth "shall be divided into three equal parts, and one of the said parts shall be taken as supplementing the provision hereinbefore made for class 1, and one of the said parts shall be taken as supplementing the provision hereinbefore made for class 2, and one of the said parts shall be taken to supplement the provision hereinbefore made for

class 3." The only provision made for these classes by the earlier part of the will is a provision becoming operative at the period fixed for final distribution. . . This is a good declaration, under the Insurance Act, in favour of class 1. Class 2 is the two sons of the deceased son James. I think this is a good declaration in favour of these . . . and that it constitutes a present gift to them. . . . The provision for class 3 is a good declaration, under the Insurance Act, in favour of Lillian during her life, and upon her death as provided by the will. Class 4 is, I think, a good present appointment in favour of Mossom, but it is subject to the deduction of $7,000, which will far more than exceed Mossom's share. The amount of this share will, therefore, fall to be distributed between the other three classes as indicated by the will. . . .

Bessie . . . is said to be dead. The date of her death is not given. I assume that she predeceased the testator. If so, under the Insurance Act her share is distributed among the survivors of the preferred beneficiaries in equal shares: R.S.O. 1897, ch. 203, sec. 159, sub-sec. 8. . . .

Costs of all parties may be paid out of the estate.

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

*BETHUNE v. THE KING.

Succession Duty—Amount Paid to Crown by Executors of Deceased Person in Respect of Supposed Annuity—Petition of Right to Recover Amount Paid—Distinction between Annuity and Gift of Income—Voluntary Payment in Pursuance of Succession Duty Act, secs. 11(1), 12(5)*—Mistake of Law—Position of Crown—Mistake of Fact—Payment not Improvident.*

Petition of right presented by the suppliants as executors and trustees of the will of John Sweetland.

F. H. Chrysler, K.C., for the suppliants.
H. D. Gamble, K.C., for the Crown.

FALCONBRIDGE, C.J.:—The petition, after setting out the will and probate thereof, states that the Solicitor to the Treasury for Ontario furnished the suppliants a statement shewing that the total succession duty payable in respect of the legacies

*To be reported in the Ontario Law Reports.

and bequests of the will amounted to the sum of $8,379.82; that, of this amount, the sum of $2,139.80 was attributable to duty payable in respect of the annuity bequeathed by the will to Caroline Florence Anderson; that, in and by sec. 11 of the Succession Duty Act then in force, the duty payable upon any legacy given by way of annuity was to be paid in four equal consecutive annual instalments; and that, in the event of the annuitant dying before the expiration of the first four years, payment only of the instalments which fell due before the death of the annuitant should be required.

The suppliants, deeming it advisable to discharge the whole of the succession duty at once, and obtain a release thereof, paid to the Treasurer for Ontario, a sum of money which included the duty, amounting in the aggregate to $2,139.80, attributable to the annuity bequeathed to Caroline Florence Anderson.

Caroline Florence Anderson departed this life on or about the 9th November, 1908; and, therefore, the suppliants allege that, at the time of her decease, the only amount which they were legally liable for was the instalment of $534.95 which became payable on the 5th May, 1908. And the suppliants allege that they paid to the said Treasurer $1,604.85 in excess of the legal and proper amount payable.

The Attorney-General for Ontario, on behalf of His Majesty, objecting that the petition of right discloses no facts giving any cause of action to the petitioners against the Crown, says that the legacy or bequest to the said Caroline Florence Anderson was not an annuity, within the meaning of the Succession Duty Act then in force; and, therefore, is not affected by that provision of sec. 11(1) of the Act which requires payment only of the instalments falling due before the death of the annuitant; and he further pleads that, if the legacy in question does come within the provision of sec. 11, then the amount paid for succession duty was paid under a mutual mistake of law, and is not recoverable back. . . .

The case rests entirely on the correspondence and on the uncontradicted evidence of Mr. Bethune.

The money was voluntarily paid in supposed pursuance of secs. 11(1) and 12(5) of the Succession Duty Act then in force, 7 Edw. VII. ch. 10. . . .

Both the Solicitor to the Treasury and the suppliants seem to have assumed that the benefit conferred by the will upon Mrs. Anderson was a legacy given by way of annuity within the meaning of sec. 11(1). The authorities are quite clear that

it was not an annuity. They are set out in the extended notes of argument; and the effect both of English and American cases is, that the income or interest of a certain fund is not an annuity, but simply a gift of interest or income. Among the numerous authorities cited, I refer particularly to Foley v. Fletcher (1858), 3 H. & N. 769; Winter v. Mouseley (1819), 2 B. & Ald. 802, at p. 806; . . . Booth v. Ammerman (1856), 4 Bradford (N.Y. Surr.) 129, at p. 133.

If the money, then, was paid under mistake of law, which Mr. Chrysler seems to disavow, it could not be recovered back. . . .

[Reference to Rogers v. Ingham (1876), 3 Ch.D. at p. 355.]

It is the Crown by whom the money is sought to be repaid; and the position of the Crown is, as one might expect, certainly not inferior to that of a subject. This is very clearly laid down in Whitely v. The King (1909), 101 L.T.R. 741.

Then it was certainly not paid under a mistake of fact. The only mistake (if any) was something which related to a future event, viz., the absolutely unforeseen occurrence of this lady departing this life when she did.

I do not see, therefore, how the suppliants can recover. It is not a case of hardship; the estate as a whole does not suffer. If the money had not been paid in this way, there would have been some other succession; and, some of the reversionary legatees being strangers, it is probable that in the result a larger amount of duty would have to be paid.

In this view, and considering that it was done to facilitate a winding-up of the estate, I think that the payment by the executors was not improvident; and probably in the passing of their accounts this circumstance will be taken into consideration.

I am of the opinion, therefore, that no case has been proved giving rise to any cause of action against the Crown; and that it should be dismissed.

It is not a case for costs as between the parties. If I have the power so to order, I direct that the suppliants be paid their costs as between solicitor and client out of the estate.

MIDDLETON, J., IN CHAMBERS. APRIL 1ST, 1912.

APPLEYARD v. MULLIGAN.

Writ of Summons—Failure to Serve in Twelve Months—Order for Renewal Set aside—Absence of Valid Excuse for Delay—Statute of Limitations—Abuse of Process of Court.

Motion by the defendant George Mulligan to set aside an ex parte order for the renewal of the writ of summons.

J. E. Jones, for the applicant.
J. H. Spence, for the plaintiff.

MIDDLETON, J.:—The action was brought by writ issued on the 31st December, 1910, for damages for breach of contract and conversion of the plaintiff's goods. The writ was not served, and on the 30th December, 1911, an application was made before me for an order for renewal of the writ; the plaintiff's solicitors stating that the writ had not been served, owing to instructions received from the plaintiff, and an affidavit was filed by a student stating that the solicitors were informed that, owing to litigation in England, the plaintiff had been unable to give the necessary instructions.

This affidavit was entirely insufficient to justify the renewal of the writ; but, as I was told that if the writ was not renewed the plaintiff would be without remedy, as her claim would be barred by the statute, I made an order providing for the renewal of the writ, and reserving to the defendants the right to move against the order if there were not in fact adequate grounds for the renewal, and directing that the writ should be served within six weeks, otherwise the renewal should be vacated.

The writ was served on one of the defendants within the time, but was not served upon the other. The defendant who was served moved to vacate, upon a number of grounds.

It is quite clear that there was no difficulty whatever in effecting service upon this defendant at any time after the issue of the original writ. If there is any cause of action, it arose in September, 1904. The matter has been already once litigated, and the action dismissed without prejudice to any other action the plaintiff might bring with reference to her alleged claims.

In making the order of the 30th December, I thought that, if the plaintiff had any bonâ fide excuse for not having served the writ within the twelve months, she would be in a position to shew the facts on the return of any motion to set aside the order; and, upon this motion being made, the matter has stood from time to time until to-day, and ample opportunity has been given to put forward any excuse there may be. Nothing has been suggested. The plaintiff's solicitor says that the only information he has is a cablegram protesting that the time limited for the service of the writ was unreasonable; and I am, therefore, obliged to give effect to this motion and to vacate my former order and to set aside all that was done under and in pursuance of it, with costs against the plaintiff.

The limitation of twelve months within which a writ may be served is not intended to be idle; and, before a writ can properly be renewed, there must be some real excuse for the delay. The renewal is by no means a matter of course, and is only to be granted under very exceptional circumstances. In my view, the fact that the plaintiff, by holding a writ without service, and thereby seeking practically to extend the time allowed by the Statute of Limitations for the bringing of an action, indicates that her conduct amounts to an abuse of the processes of the Court, and is entirely unjustifiable.

Order and all done under it vacated with costs.

SUTHERLAND, J. APRIL 1ST, 1912.

O'HEARN v. RICHARDSON.

Vendor and Purchaser—Contract for Sale of Land—Default by Purchaser—Time Made of Essence—Termination of Contract—Absence of Fraud or Waiver.

This action arose out of an agreement for the sale of land, dated the 7th December, 1910. The purchaser, the plaintiff, sought as against the vendor, the defendant, specific performance, and, in the alternative, damages for breach thereof.

J. M. Ferguson, for the plaintiff.
J. W. Mitchell, for the defendant.

SUTHERLAND, J.:—The price for the property was $400, payable as follows: $200 down and $200 within five months, secured by a promissory note. The mineral rights were in the agreement reserved to one John F. Fitzmaurice, from whom the vendor had purchased the lot. He had bought it for $100, and at the time of making the agreement still owed $50 on account thereof. In the agreement he covenanted to "pay the balance of the purchase-price of the said lot to the said Fitzmaurice as and when the same shall become due and to indemnify the purchaser in case of his default in so doing."

The deed of the vendor to the vendee, or the transfer of his certificate under the Land Titles Act, of the property in question, was deposited with the manager of a bank at Porcupine, in the district of Sudbury, in escrow, to be delivered to the purchaser on payment of a note for $200 given for the balance of the purchase-money, payable five months after the date of the agreement.

The solicitor who drew the agreement was known to the vendor, but unknown to the purchaser, and the latter was taken to him by the former. The agreement contains the following clause: "The party of the first (the vendor) covenants that he will execute the proper transfer of the said lot on completion of the payment of the full purchase-price herein by the party of the second part (the vendee). The party of the second part covenants that he will pay the instalments of purchase-price as and when the same become due and payable. Time shall be of the essence of this agreement."

The plaintiff says that the solicitor inserted the provision about time being of the essence of the contract of his own motion; that there was no discussion about it; that he had no legal advice as to what was meant by it, and gave it no consideration; but had no idea that, if he did not pay on the exact date on which the note became due, an end would be put to his rights. He, however, also says that he thoroughly understood the agreement when he signed it; that he read it over, and it is clear. He further says that the vendor did not represent to him that he would have additional time to pay the balance of the purchase-money.

At the time the agreement was entered into, the plaintiff procured a copy of it and made a memorandum in a note-book of the date when his note became payable, viz., on the 9th May, 1911. Some days before that, thinking that the note would soon become due, he endeavoured to find his memorandum, but it had been mislaid. Thereupon, on the 5th May, 1911, he wrote from Cobalt to the manager of the Traders Bank at Porcupine, telling him that the note in question was payable at that bank, but, as he had mislaid particulars, he desired to know when it would be payable. It is said that the mail service is not very good between these two places, and that the letter was delayed in reaching the manager of the bank. At all events, he did not reply to the letter until the 12th May, when he wrote stating that the note was then several days past due, and had been protested for non-payment at maturity. It appears that Richardson had discounted it. He also intimated in the letter that the defendant had been in that morning, and intimated his intention of taking action to breach the agreement.

Before receiving this letter, the plaintiff, on the 14th May or shortly before, had found his note-book and ascertained that the note was then overdue. Thereupon, on that date, he sent two telegrams from Cobalt to Porcupine; one to the bank manager as follows: "Draw on me for protest fees and interest $200 wired by Bank of Commerce to-day. You did not notify

me as to date note matured. Have you the transfer? Try and arrange matters with Richardson. Wire if necessary." And the other to the defendant as follows: "Wired funds covering note to-day. Bank did not notify me when note matured. Draw on me for any extra expense. Wire if necessary."

On the 17th, the bank manager wrote to the plaintiff that, as he had not met his obligations, and "the papers in escrow were demanded by Mr. Richardson through his attorney," the bank was obliged to surrender them. On the same day, the plaintiff had written to the defendant confirming the information already sent by telegram that he had arranged with the Bank of Commerce to have $200 forwarded to cover the notes, and was prepared to pay the protest fees and interest. In this letter he asked the defendant to have the transfer of the property forwarded to him.

The defendant declined to do anything. Thereupon the plaintiff commenced this action. The defendant takes his stand upon the contract, and in his defence alleges that time was of the essence of the agreement; the plaintiff made default and thereby lost his right to call upon the defendant for a conveyance of the land in question. He brings into Court the $200 paid by the plaintiff to him, and states that he is ready and willing to return it to him with the promissory note which the plaintiff had given.

The defendant was not present at the trial. An application was made on his behalf to postpone it, but I was unable, upon the facts as presented to me, to accede thereto. It is said that the land considerably increased in value between the date of the agreement and the maturity of the note. I think it is clear that the plaintiff had no intention to repudiate the agreement; that he intended to pay the note at its maturity and was able to do so, and that the reason he did not was owing to inadvertence, as stated by him.

The defendant relies upon Labelle v. O'Connor, 15 O.L.R. 528, as being conclusive in his favour in this matter. I think it is. Reference may be made to Lovejoy v. Mercer, 23 O.L.R. 29. No fraud, accident, or mistake in the drawing up of the agreement in question was alleged or proved at the trial.

The plaintiff was not let into possession, and had done nothing under the contract or in connection with the property in the meantime. The defendant in no way waived or condoned the default. See Devlin v. Radkey, 22 O.L.R. 399.

Under these circumstances, and having regard to the fact that the document was read over to the plaintiff before he signed

it, and that he understood it, it would seem to me that one would have to read out of the document entirely the clause stating that time was of the essence of the contract before the plaintiff could succeed in this action.

The action will, therefore, be dismissed with costs.

MIDDLETON, J. APRIL 2ND, 1912.

RE NEWTON.

Will—Power of Appointment—Exercise by Will—Lack of Power in Court to Authorise Appointment in Lifetime of Donee of Power.

Application for an order authorising the payment out of Court to one of the sons of a deceased testator of a share of the money realised from a sale of the testator's estate.

F. W. Harcourt, K.C., for the applicant.

MIDDLETON, J.:—By the will, the testator gave the property to his wife during life and widowhood; upon her death "to such one or more of my children as she may by will appoint." If the wife remarries, then the property is to go to such one or more of the children as the testator's executors may appoint and direct.

The land has been sold under the Settled Estates Act, and the proceeds are in Court.

One of the children, now a grown man, desires to take up farming on his own account; and the widow and such of the children as are adults are willing that a share should be now paid to him to assist him in this enterprise.

I would gladly assent to this, but find myself unable to do so. The power to appoint which is given to the widow is a power to be exercised by will; and the very essence of such a power is, that it is in its nature revocable; and the appointment will become operative only upon the death of the widow. There is the further difficulty that, if the widow should re-marry, she then loses the power to appoint, and a new power of appointment would then arise in the executors.

The executors cannot now appoint, because their power does not come into existence until the marriage of the widow.

The testator has succeeded in tying up his estate until the death or remarriage of his widow, and has thus furnished another illustration of the doubtful wisdom of giving to testators the wide power they now possess to control their estate.

RIDDELL, J. APRIL 2ND, 1912.

COLONIAL INVESTMENT AND LOAN CO. v. McKINLEY.

Mortgage—Construction of Mortgage-deed—Provision for Repayment of Principal and Interest—Rate of Interest—Alternative Privilege of Payment at Lower Rate—Failure of Mortgagor to Take Advantage of—Default—Foreclosure—Mortgage Account—Monthly Rests.

Appeal by the plaintiffs from the report of James S. Cartwright, K.C., an Official Referee, in a mortgage action. The plaintiffs asked for an order setting aside or varying the report and directing a reference back to the Referee.

A. McLean Macdonell, K.C., for the plaintiffs.
H. C. Macdonald, for the defendants.

RIDDELL, J.:—A mortgage for $600 and interest, made in November, 1896, by the female defendant (the husband joining in the covenant) to the assignors of the plaintiffs, contained the following provisions:—

"Provided this mortgage to be void on payment of $600 . . . with interest at the rate of 10½ per cent. per annum, as well after as before the maturity hereof, as follows:—

"The said principal sum to be paid on the 1st day of September, 1909, and interest thereon at the rate aforesaid to be paid monthly on the first day in each and every month, as well after as before the maturity hereof, until the said sum and interest as aforesaid shall have been fully paid and satisfied; the first of such payments of interest to become due and payable on the 1st day of December, 1896, and also at the rate aforesaid as well after as before maturity, upon all arrears of interest, from the date at which the same shall become due and payable, and taxes and performance of statute labour.

"And it is expressly understood and agreed by and between the said mortgagor and the said association, that, if the mortgagor pay or cause to be paid unto the association the sums following, that is to say, a monthly subscription of 30 cents in

respect of each of the said shares as redemption money under the rules and by-laws of the association, together with the sum of 40 cents per month in respect of each of the said shares, being the amount of premium agreed to be paid by the mortgagor to the association for receiving the said amount in advance prior to the same being realised, together with interest at the rate of 6 per cent. per annum on the entire principal sum of $600, payable monthly as from the date of these presents until the 1st day of September, 1909, and thereafter until the full amount of such principal sum shall be fully paid and satisfied, that the same shall be accepted in full payment of the principal and interest above reserved, the said monthly subscription, premium, and interest to be payable on the first day in each and every month during the continuance hereof; and it is also expressly agreed and understood that, in case default shall be made in the payment of any sum or sums to become due as redemption money, premium, or interest, amounting in all to the sum of $7.20 per month, at any of the times hereinbefore appointed for the payment thereof, the mortgagor shall pay to the association the sum of 60 cents as a fine or interest upon arrears of interest or principal, or both, for each month during which such interest or principal or any portion thereof shall remain due and unpaid, as well after as before the maturity hereof, until the whole amount due for interest or principal as aforesaid shall have been fully paid and satisfied, and also will observe and perform the rules and by-laws for the time being of the association in respect of the said shares."

It seems to me perfectly clear that the latter provision in ease of the mortgagor can be appealed to only if the mortgagor performs the conditions named, that is, makes the payments set out. It was a privilege given to the mortgagor, of which she might take advantage by making such payments, and only upon these terms. If she omitted to make the payments, the clause did not apply at all, but the first-mentioned terms were in force.

These payments were not made. The mortgage was in arrear; and the plaintiffs, in 1903, brought their action for foreclosure; judgment was obtained in May, 1904; the plaintiffs took possession in 1904, and agreed to lease to one M. A. Johnson, and made an agreement to sell to her if the mortgage was not redeemed. She made certain payments which were credited upon the mortgage account, and, in December, 1905, assigned all her interest to one Findlay; Findlay desired to get his deed, and the plaintiffs applied for a final order of foreclosure. As

they had been in possession, a new account had to be taken, which was done, and $773.79 was ordered to be paid into the bank on or before February, 1909. This was done; but the plaintiffs refused to take the money, as Johnson and Findlay had made very large improvements, for which they claimed—and for which nothing had been allowed in taking the accounts. Then plaintiffs obtained an order, on the 4th November, 1909, setting aside former proceedings, and referring it to Mr. Cartwright to make all necessary inquiries and for redemption and foreclosure.

The defendant, in January, 1911, procured a release of Findlay's claim.

The Referee, in taking the accounts, has done so with monthly rests, influenced, it would seem, somewhat if not largely, by the opinion expressed in Hunter on Foreclosure, p. 89, and a rather rhetorical obiter in Archbold v. Building and Loan Association (1888), 15 O.R. 237, at p. 250.

Neither of these, I think, is of any assistance. Mr. Hunter is speaking of a mortgage in which "the principal is received back on a sort of sinking fund plan"—in such cases, he thinks "the mortgagee cannot well deny that he has agreed to take his principal by driblets, and therefore is outside the rule against rests."

What may be the correct method in the case of such a mortgage, I do not think it necessary to determine (although I am not to be taken as assenting to the text-writer's opinion)—here there is a specific provision for repayment, the principal sum on the 1st September, 1909, and interest meantime monthly at 10½ per cent. The mortgagees indeed agree that, if the mortgagor pay certain sums monthly, these payments will be received in lieu of the payment provided for—a privilege the mortgagor may or may not take advantage of. The mortgagor did not take advantage of this privilege by performing the conditions.

Nor is the dictum of Armour, C.J., in point. "Thou shalt love thy neighbour as thyself" is not a rule of law or one enforceable by the Courts—any more than is its congener, "If any man will sue thee at the law and take away thy coat let him have thy cloke also," or "Give to him that asketh thee, and from him that would borrow of thee turn not thou away." The rule of law is, "a bargain is a bargain;" and the Courts do not and cannot make new bargains for litigants in lieu of those they make for themselves.

I think the matter must be referred back to the Referee with a direction to take the accounts in the usual manner; and the plaintiffs must have their costs, which they may, if so advised, add to their claim.

The other matters argued before me depend, I think, upon the determination of the question upon which I have given a decision—if not, they will be left open to be disposed of after the Referee shall have made his report—or, if the parties prefer, I may be spoken to.

RIDDELL, J. APRIL 2ND, 1912.

TEBB v. BAIRD.
TEBB v. HOBBERLIN BROS. & CO.
HOBBERLIN BROS. & CO. v. TEBB.

Partnership—Loan to Partner—Promissory Note Signed by Partner in Name of Partnership—Fraud on Partnership—Bona Fides of Lender—Absence of Authority—Master and Servant — Dismissal of Servant — Misconduct Justifying Dismissal—Knowledge of Master—Wages — Conspiracy — Assignment of Book-debts—Validity—Authority of Partner—Bills of Exchange—Authority of Partner to Accept—Amendment—Recovery of Price of Goods Sold.

The first action was brought by the wife of one Tebb, against Baird, Tebb's partner, Tebb himself, and "The Veribest Ordered Clothes Company," the name of the firm composed of Tebb and Baird, to recover $2,500 and interest upon a promissory note signed by Tebb in the firm name.

The second action was brought by Tebb against Hobberlin Bros. & Co. and Baird for conspiracy and fraud, and against Hobberlin Bros. & Co. for wrongful dismissal of Tebb from their service and for a balance of wages.

The third action was brought by Hobberlin Bros. & Co. against Tebb, Baird, and "The Veribest Ordered Clothes Company," for the amount of certain bills of exchange drawn upon the firm and accepted by Baird for the price of goods supplied to the firm, and for the price of other goods supplied.

The three actions were tried before RIDDELL, J., without a jury, at Hamilton.

W. M. McClemont, for the plaintiffs in the first two actions, and for the defendants in the third.

M. J. O'Reilly, K.C., and G. H. Levy, for the defendants (except Tebb) in the first and second actions and for the plaintiffs in the third.

RIDDELL, J.:—One Tebb, being in business in Hamilton as a dealer in men's clothing, sold out a one-sixth interest in the business to Baird, for $500, forming a firm under the name of "The Veribest Ordered Clothes Company"—the real agreement being apparently that Baird should put in $500 cash or capital and Tebb $2,500. Mrs. Tebb had, a short time before, come into a little money, and Tebb borrowed $2,500 from her "to put into the business." At the trial it was said more than once that the loan was to "the business" or to the firm; but at length it was clearly made to appear to me that the real transaction was, not a loan to the partnership, but a private loan to Tebb, to enable him to put up his share of the capital. A promissory note payable on demand for $2,500 was given to Mrs. Tebb by her husband, signed "The Veribest Ordered Clothes Company," per Tebb. It was contended at the trial that this note was given long subsequent to the loan; but I find against that contention.

Tebb had full power to sign the firm name—the firm has become insolvent.

Mrs. Tebb made a demand for the amount of the note, and, when it was not paid, she brought action, making Baird, Tebb, and "The Veribest Ordered Clothes Company" defendants.

Although the husband had full power to sign the firm name, his using the firm name to a note for his own private debt was a fraud on the partnership. And it is well established that "a person who knows that a partner is using the credit of the firm for a private purpose of his own knows that he is using it for a purpose prima facie outside the limits of his authority. Therefore . . . if one partner makes a note in the name of the firm and gives the . . . note in payment of a private debt of his own, the creditor who takes the . . . note . . . will not be able to enforce it against the firm, unless it was in fact given with the authority of the other partners, which it is for the creditor to prove:" Lindley on Partnership, 7th ed., p. 201: see also pp. 179, 202, and notes. And a belief that there was authority, however bona fide, is not sufficient to charge the firm: per Cockburn, C.J., in Kemdal v. Wood, L.R. 6 Ex. 248.

Baird knew nothing about the note being given, and gave no authority to sign the note for the purpose—and, with whatever good faith the plaintiff acted in the business, she cannot recover from any one but her husband upon the note. Nor can she recover for money lent; for, although the husband put most of the money into the business, it was not put in as a loan from Mrs. Tebb, but as a contribution by himself to the capital—a contribution he was bound to make.

The $100 paid to Mrs. Tebb was paid as interest; and she will have judgment against her husband for the amount of the note, interest, and costs; but the action will be dismissed against the other defendants without costs. This is the first of the actions.

Tebb, when the business was getting in low water, was employed by the House of Hobberlin, the chief—indeed almost the only—creditor, to travel for them and to assist their local agents in selling goods. He left behind Baird to manage the whole business; and the Hobberlin company from time to time drew upon Tebb for the amount of their claims for goods supplied. Baird accepted these drafts in the name of "The Veribest Ordered Clothes Company," per himself. The business went from bad to worse; the rent was allowed to remain in arrear, and so were the taxes; and the landlord sold. The Hobberlin company bought certain goods at the sale.

In the meantime, Tebb, going to the Maritime Provinces and elsewhere, while he assisted the local agents of the Hobberlin company to sell goods, asked (indeed rather demanded) and received money from the agents for his services. These services he was bound to render under his agreement with the Hobberlin company for the fixed salary agreed upon—if they should have been rendered at all. What he asserts is, that he enabled the local agents to sell at a higher profit than they otherwise would, and so it was not improper that they should pay him a "bonus." This course of dealing came to the knowledge of the Hobberlin company, through complaints of their agents—and that company promptly dismissed Tebb. The hiring had been for the season—say, six months.

Tebb brought his action against the Hobberlin company and Baird for conspiracy and fraud; against the Hobberlin company also for wrongful dismissal and balance of his wages.

It needs no argument for any business man to recognise at once that Tebb's manner of dealing with the agents was most deleterious to his employer's business and interest.

As was said by Lopes, L.J., in Pearce v. Foster, L.R. 17 Q. B.D. 536, at p. 542: "If a servant conducts himself in a way inconsistent with the lawful discharge of his duty in the service, it is misconduct which justifies immediate dismissal . . . It is sufficient if it is conduct which is prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing the servant."

This was followed in Marshall v. Central Ontario R.W. Co., 28 O.R. 241.

It was said that the master here did not know, at the time of the dismissal, of any of the improper acts proved at the trial. Such is not the case, taking the evidence of the plaintiff; but, in any event, "if good cause for dismissal exists, it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient:" McIntyre v. Hocken, 16 A.R. 498, and cases cited.

The action for wrongful dismissal fails; but the plaintiff is entitled to $50 arrears of wages and expenses—and this the Hobberlin company may apply on their costs.

As to the alleged conspiracy, there is no shadow of foundation for the charge.

Tebb also contends that an assignment of book-debts made by Baird in his absence to the Hobberlin company is invalid. The assignment was made by the partner left in full control of the business—and notice was given by the Hobberlin company to the debtors, some of whom have paid the amounts to the Hobberlin company.

It is said that "one partner can assign a debt due to the firm:" Lindley on Partnership, 7th ed., p. 161; Marchant v. Morton Down & Co., [1901] 2 K.B. 829. No doubt, if the Hobberlin company knew that the assignment was not within the power of the partner Baird, for any reason, they could not take advantage of the assignment; but that is disproved. The recollection of Tebb that he himself was to sign all documents, etc., when he was absent, is not to be relied upon.

I thought at the trial that I should not pass upon this question adversely to the Hobberlin company, without allowing those debtors who had paid their accounts to be heard. But, as the law is clear, I think I should now declare the assignment valid so far as the parties to the record are concerned.

Then the Hobberlin company sue on the drafts and for an open account.

Objection is made by Tebb to paying the amounts of the drafts given for goods, drafts signed by Baird. I do not think it of any importance to determine whether the bills of exchange are valid. I allow an amendment of the pleadings, and allow the Hobberlin company to claim for the value of the goods supplied, which value is in part represented by the bills of exchange.

The Hobberlin company are entitled to their costs, and judgment will go accordingly.

DIVISIONAL COURT. APRIL 2ND, 1912.

GREER v. ARMSTRONG.

Sale of Goods—Conditional Sale—Resale by Vendee before Payment of Price—Action by Vendor for Conversion—Finding of Fact—Name of Vendor Printed on Article—Conflicting Evidence—Rule for Weighing—Appeal—Leave to Adduce New Evidence—Refusal of.

An appeal by the defendant from the judgment of the County Court of the County of Middlesex in favour of the plaintiff, and a motion, in the alternative, for a new trial or for leave to adduce the evidence of one Grey upon the appeal.

The action was brought by a carriage manufacturer to recover damages for the conversion of a cab sold by the plaintiff to Grey under a conditional sale agreement by which the property remained in the plaintiff until payment.

The County Court Judge gave judgment for the plaintiff for $100 and costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

C. A. Moss, for the defendant.

H. E. Rose, K.C., for the plaintiff.

FALCONBRIDGE, C.J.:—In the final analysis, the sole question is, whether, at the time possession was given, the name and address of the bailor or vendor was painted, printed, stamped, or engraved on the cab: R.S.O. 1897 ch. 149, sec. 1.

The learned Judge has, on conflicting evidence, found that it was. He does not decide this by the application of the rule as to the burthen of proof, but gives good reasons for the conclusion which he has arrived at.

The Judge finds in favour of the party asserting the affirmative.

In the civil law it was said, magis creditur duobus testibus affirmantibus quam mille negantibus—rather an exaggerated statement, one might think. But Sir John Romilly, M.R., in Lane v. Jackson, 20 Beav. 535, says: "I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said."

The trial Judge's conclusion ought to be affirmed.

Then as to the application for a new trial or re-opening of the case to take the evidence of Grey—none of the recognised requisites for a successful application of this kind exists. It is not newly discovered evidence. The defendant knew of it and could have got a further postponement of the trial on payment into Court of $100 or giving security for $200. He was unable or unwilling to comply with the condition, and went on and took his chances without Grey. I cannot say that his evidence would have probably changed the result.

The judgment is for only $100. I think, with the onerous terms as to costs we should have to impose, it is in the defendant's interest to let matters rest as they are.

The appeal and motion are dismissed with costs.

BRITTON, J.:—I agree that the appeal and motion should be dismissed with costs.

SUTHERLAND, J.:—I agree.

MIDDLETON, J., IN CHAMBERS. APRIL 3RD, 1912.

REX v. PEMBER.

Municipal Corporations——Transient Traders By-law—Conviction for Offence against—Exhibiting Samples and Taking Orders—Municipal Act.

Motion to quash a magistrate's conviction of the defendant under a transient traders' by-law of a municipality.

J. Jennings, for the defendant.

A. J. Wilkes, K.C., for the informant.

MIDDLETON, J.:—The firm of Pember & Co. carry on business in Toronto, dealing in hair goods and toilet articles. The accused, Frank R. Pember, is not a member of the firm, but travels for it. His custom, which he followed on this occasion, is to rent a room at an hotel at the place he visits, after previously advertising his advent, and there to display samples of the wares in question to those attracted by his advertisement. He does not sell the articles exhibited; he takes orders, which are transmitted to the firm in Toronto, and are there accepted or rejected by the firm. The question is, is this an infringe-

ment of the by-law of the town, which has been passed in the terms of the Municipal Act and its amendments? This narrows itself to a question whether what is done constitutes the accused a transient trader, within the meaning of the statute.

I think the matter is concluded by the case of Rex v. St. Pierre, 4 O.L.R. 76. There it was held not to be an offence for a person temporarily at an hotel to take orders there for clothing to be made in a place outside the municipality, from material corresponding with the samples exhibited. Since that decision, the Legislature has amended the statute with respect to hawkers, by adding to the interpretation clause defining that word, so that it now applies to those "who carry and expose samples or patterns of any such goods to be afterwards delivered, within the county, to any person not being a wholesale or retail dealer in such goods, wares, or merchandise."

Although the section of the statute relating to transient traders has been under consideration by the Legislature and has been amended, no corresponding amendment has been introduced, and I cannot find anything in the amendments which have been made which will make the reasoning in the case cited less applicable.

Mr. Wilkes argued very forcibly that what was done by the accused was within the mischief apparently aimed at by the statute, and was just as unfair to those residing within the municipality and bearing the burdens of local taxation as any kind of trading. Unfortunately this argument must be addressed to the Legislature itself, as I cannot assume that it has not been adequately considered by the learned Judges who decided the St. Pierre case, after argument by eminent counsel.

The conviction should, therefore, be quashed, with costs to be paid by the informant. The usual order for protection, so far as the magistrate is concerned, will be granted, and the $100 paid into Court as security should be refunded.

MIDDLETON, J., IN CHAMBERS. APRIL 3RD, 1912.

BARTLETT v. BARTLETT MINES LIMITED.

Evidence—Attachment of Debts—Cross-examination on Affidavit of Member of Garnishee Firm—Scope of Inquiry—Agreement between Master and Servant—Servant Sharing in Profits—Attempt to Inquire into Organisation of Partnership—Allegation of Fraud—Refusal to Answer Questions—Motion to Commit for Contempt—Capias ad Satisfaciendum.

Motion by the defendants (judgment creditors) to commit C. W. Allen for contempt, or "for a writ of *capias ad satisfaciendum,* upon the ground that Allen, in cross-examination upon an affidavit filed by him on behalf of the garnishees, the Allen General Supplies, improperly refused to answer certain questions."

M. L. Gordon, for the judgment creditors.
J. D. Falconbridge, for Allen.

MIDDLETON, J.:—The judgment creditors have a judgment against J. W. Bartlett, and have obtained a garnishee order attaching all debts due by the Allen General Supplies to him. It appears that Bartlett is an employee of the Allen General Supplies, a partnership, consisting, it is said, of Allen and others. Bartlett receives, in addition to his fixed salary, a percentage of the net profits—an agreement which is perfectly lawful under the Masters and Servants Act, 10 Edw. VII. ch. 73, sec. 3, and which does not create any relation in the nature of a partnership or give the employee the right to examine into the accounts of the business, and makes any statement by the master as to the profits conclusive between the parties, and unimpeachable except for fraud.

It appears that, at the time of the service of the garnishee summons, Bartlett's account, including his share of the profits, was overdrawn, so that there was no debt to be attached. The accounts shewing the position of the firm were produced, and from these it appeared that all declared profits had been apportioned, including Bartlett's share; and Bartlett is quite content.

On cross-examination upon this affidavit, counsel for the judgment creditors sought to inquire into the constitution and organisation of the firm and its business transactions, with a view of shewing that Bartlett was a partner. This is quite irrelevant to the inquiry, which is solely as to the existence of an attachable debt. The questions were quite improper, and the objection to answer was well taken. Then it was sought to go into all the books of the firm and its business transactions; it is said with a view of establishing that there were greater earnings than the amounts shewn by the statements exhibited, and that there ought to have been more carried to the credit of Bartlett as his share of the profits. This, again, seems to me to be quite beyond the limited scope of the inquiry now on foot; which, as I have already intimated, is limited to the narrow question of debt or no debt: Donohoe v. Hull, 24 S.C.R. 688.

It was said by counsel in support of the motion that the whole claim was fraudulent, and that in truth Bartlett is not a servant but a partner, and that an inadequate sum is being declared as dividend, by collusion with Bartlett, in order to defeat the applicant. If this is so, all I can say is, that the applicant has entirely mistaken his remedy. He cannot enter upon an inquiry of this kind in cross-examination on an affidavit upon a garnishee application, where the sole question at issue is debt or no debt.

The motion must be dismissed, with costs to be paid by the judgment creditors to Allen forthwith after taxation.

I need not say that, so far as a *ca. sa.* is sought, the motion must have been launched under some misapprehension.

MIDDLETON, J., IN CHAMBERS. APRIL 3RD, 1912.

SWAISLAND v. GRAND TRUNK R.W. CO.

Discovery—Examination of Officer of Defendant Railway Company—Production of Reports of Officers as to Railway Accident—Privilege—Contradicting Affidavit of Documents—Admissions of Officer not Binding on Defendants—Insufficiency of Affidavit—Identification of Documents—Claim of Privilege.

Appeal by the plaintiff from an order of the Master in Chambers dismissing a motion for an order directing the defendants to produce, on the continuation of the examination of one Whittenberger, certain reports by officials of the defendant company with reference to the accident giving rise to the action, and for an order that the defendant company do file a further and better affidavit on production.

W. E. Raney, K.C., for the plaintiff.
Frank McCarthy, for the defendants.

MIDDLETON, J.:—Upon the happening of the accident in question, the defendants' officials made an investigation, and their reports were in due course sent to the office of the Superintendent of the Eastern Division, Mr. Whittenberger. An affidavit on production has been made, in which, in the second part of the first schedule, are mentioned "reports made for the information of the defendants' solicitor and his advice thereon;"

and privilege is claimed, upon the ground "that the said reports were made for the information of the defendants' solicitor and his advice thereon, and are, therefore, privileged." This affidavit is made by the treasurer of the company at Montreal, who swears that he has knowledge of all the documents which are in the custody of the defendants and is cognizant of the matters in this action.

Upon the examination of Mr. Whittenberger, the plaintiff claims to have established that this affidavit was untrue, and that the reports were made for the purpose of ascertaining the cause of the accident, quite irrespective of any actions that might or might not be brought by those who were injured. A train was travelling upon the main line of the company between Toronto and Montreal, and the accident took place where the track was apparently in first-class condition; and for no ostensible reason the train left the rails. It is suggested that the investigation was made for the purpose of ascertaining the cause of the accident, so that the company might guard against the recurrence of such accidents and so profit by the experience; and that the fact that the reports would be of use if litigation ensued, though possibly one reason for the investigation, was certainly not the sole reason, perhaps not even the main reason.

By affidavit filed upon this motion, Mr. Whittenberger discloses that these reports on their face state that they are "for the information of the company's solicitor and his advice thereon."

This is not in itself conclusive—see Savage v. Canadian Pacific R.W. Co., 16 Man. L.R. at p. 386—and one cannot help feeling that companies operating railways have sometimes adopted the expedient of having this statement printed at the head of all blanks supplied for casualty reports and investigations, to lend colour to an otherwise unjustifiable claim of privilege.

I have come to the conclusion, however, that I cannot, on this motion, go into this question of fact; because it has been established that the affidavit on production is conclusive, unless it can be shewn, from the documents which have been produced, or from the admissions in the pleadings or by the party himself, that the affidavit is either untrue or has been made under a misapprehension of the legal position. Under the practice here, there is no right to cross-examine upon an affidavit on production; and I do not think that it is competent for the plaintiff to use the examination for discovery of an officer of the corporation for the purpose of contradicting the affidavit. The function of the examination of an official or servant of a corporation

before the trial is purely discovery. Where a party is himself examined, his statements can be used against him as admissions; but the statements made by an officer or servant of a company cannot be regarded as admissions by the company; and to allow such examination to be used for the purpose of contradicting the affidavit on production would be to admit controversial material—the precise thing that cannot be done, according to a series of cases too well-known to require discussion.

Then it is said that the affidavit on production itself is not satisfactory. The documents are not set forth and identified, and privilege is not sufficiently claimed.

I think that the reports should be set forth more precisely. There can be no reason why the name of the officer investigating should not be given. The plaintiff may desire to go into the defendants' camp in his search for the cause of the accident; and it is certainly fair that he should know the names of the officers who investigated and reported. Moreover, it is essential that the documents should be so clearly identified that, if it turns out that the affidavit on production is untrue, there will be no difficulty in securing a conviction for perjury. As the affidavit now stands, it is so vague and uncertain that, to say the least, a trial upon any such charge would be most embarrassing.

Then, I think, the claim for privilege should be more clearly and specifically stated. The deponent should state that these reports were provided solely for the purpose of being used by the company's solicitor in any litigation which might arise out of the accident in question. I was told that this branch of the motion had not been argued before the learned Master. His recollection agrees with this.

The appeal is, therefore, allowed, to the extent of directing the defendants to file a further and better affidavit on production. The costs here and below are in the cause to the successful party.

MIDDLETON, J. APRIL 3RD, 1912.

SCHRADER MITCHELL & WEIR v. ROBSON LEATHER CO.

Sale of Goods—Defects in Goods Sold—Promise of Compensation—Enforcement—Damages—Evidence—Breach of Contract—Failure to Deliver Goods—Measure of Damages.

Action for two independent money claims. The first was upon an alleged agreement by the defendants to compensate the

plaintiffs for loss sustained by the defective condition of waxed splits sold by the defendants to the plaintiffs, or for damages; and the second was for damages for breach of a contract for a supply of hides.

Glyn Osler, for the plaintiffs.
M. H. Ludwig, K.C., for the defendants.

MIDDLETON, J.:—First, it is said that the defendant company —who are tanners carrying on business at Oshawa—sold to the plaintiffs—a partnership firm at Glasgow, Scotland—certain waxed splits, and that the goods delivered were not merchantable and saleable as waxed splits, as warranted, but that a large portion thereof were so tender as to be unmerchantable and unsaleable as waxed splits; and that, upon the discovery of the quality of the goods sent, the defendants agreed to reimburse the plaintiffs for allowances they might have to make to their customers or for loss otherwise sustained by reason of the defective condition of the goods in question.

The evidence of the parties is conflicting, and it is convenient to summarise the correspondence before dealing with the oral testimony. . . .

The position taken by the defendants is, that there was no warranty of the splits upon which they are liable; that splits are a low and inferior grade of leather, and that there is no such thing as a difference in quality; that, so long as the leather is not so frail that it cannot with skill be manufactured into a boot, it is still a waxed split; and that there never was any undertaking to answer to the plaintiffs for any loss they might sustain; and a counterclaim is made for the recovery of $202 which had been paid on account of the loss.

The defendant's statement that a split does not cease to be a waxed split because it is tender was corroborated by the evidence of several witnesses at the trial. . . .

There is no doubt that a split—cut as it is from the inside of the hide—is an inferior grade of leather; but it is clear to me, not merely from the evidence as a whole, but from the defendants' own correspondence, that there is a difference between a satisfactory merchantable waxed split and a waxed split which, by reason of some defect, either in the hide itself or the process of manufacture, is so tender, short-fibred and unsubstantial as to be entirely unfit for the market. I do not say that some use might not be found for even the poorest split; but certainly it is quite possible that a split may be so inferior that it fails to answer the designation "waxed split," as understood by the trade.

It is a very significant thing that throughout the correspondence there is not from beginning to end any suggestion that the plaintiffs were not justified in the statements made as to the poor quality of the goods sent. The defendants' attitude throughout is: "We accept your statement, we assume responsibility; adjust the claims as best you can, and we will stand the loss." The plaintiffs' attitude is, as far as I can see, quite straightforward and honest from first to last. When the defective goods are returned, they forward samples to the defendants. The defendants do not even trouble to inspect the samples which reached them at Oshawa. They do not repudiate the charge of inferiority, nor even seek to evade responsibility; and I accept the evidence of the plaintiffs upon commission, that the defendants' attitude was in the interviews apologetic and conciliatory, and that they then fully assumed the responsibility. This is quite in keeping with the letters. . . .

Upon the whole evidence, I find for the plaintiffs, both upon the ground of the inferior grade of goods supplied and upon the ground of the agreement alleged by the plaintiffs.

Upon the commission an endeavour was made to shew that the plaintiffs had not sustained any damage, by starting with the assumption as to the profit that ought to have been made from the goods if they had been manufactured in accordance with the contract, and comparing that with the net profit made upon the whole contract. I do not think that this is the way in which the question should be approached. There is nothing in the evidence to suggest that the plaintiffs culled the goods and sold the best quality at an advanced price by reason of the culling, and that they now seek to charge the loss upon the culls against the defendants. It may be that they fortunately made a large profit upon some of the goods; but they were entitled to have all the goods approach the standard, and the loss claimed appears to me to be reasonably attributed to the inferior quality of the goods supplied.

I cannot follow the particulars in all respects. Some claims are made which I do not think are justified. The claims which I think ought to be allowed, as taken from the particulars, total $2,354.79, from which I have deducted $280.61, leaving a net balance of $2,074.18.

In view of the correspondence and what took place upon the interview in England, I do not think that a claim should be made for the loss of profits upon the cancelled order to Watson. The loss on reselling these goods, as far as I can make out, is already covered by the items for which allowance has been made.

The second branch of the plaintiffs' claim is based upon the contract made when the two Messrs. Weir were in Canada, in September. An order in writing for these goods was placed with the defendants; and I think that the letter of the 16th September, 1910, refers to and identifies this order sufficiently to get over any defence based upon the Statute of Frauds.

It is argued that this memorandum and letter do not contain the whole contract, because the date of delivery is not mentioned. I do not think that the date of delivery forms any part of the contract. No doubt, there was an expression of intention as to the probable date of shipment; but this falls far short of making it any part of the agreement.

Greater difficulty exists as to the measure of damages applicable to this branch of the case. Much of the evidence given on commission approaches the matter from the wrong standpoint. The goods were purchased on the Canadian market, and were to be shipped from Canada, the purchasers paying the freight Although the conduct of Robson, even taking his own version of what he did, is entirely reprehensible, the defendants are not liable to pay damages unless the plaintiffs have made a case bringing themselves within the recognised rules. Their theory is, that the measure of damage is to be determined by the market-price ruling in Scotland or England. I do not think that this is correct. Not only were the goods purchased in Canada, but the market where probably eighty per cent. of splits is to be had is American; and the only evidence as to the American market is that given by the defendants.

I think that, upon this evidence, I should find that the price remained practically unchanged, and that the plaintiffs, if they had desired, could have purchased a corresponding quantity of hides in Canada without paying any increased price. When they purchased before, they found it necessary and expedient to send some one to Canada to arrange the purchase; and I think they should not be expected to purchase the substituted hides without taking the same precaution. I, therefore, allow them, as damages for the breach of the contract, what it would have cost them to send a representative to Canada to purchase. No evidence was given before me of what these expenses would have been; but I am probably not far wrong in fixing these damages at $500.

The plaintiffs, therefore, recover against the defendants a total of $2,574.18, together with their costs of action.

RIDDELL, J. APRIL 3RD, 1912.

KINSMAN v. KINSMAN.

Contract—Promisory Notes Obtained by Misrepresentation—Absence of Intention to Defraud—Executory Contract—Cancellation of Notes—Counterclaim—Repayment of Money Paid for Shares in Company.

Two actions arising out of the same transactions in regard to a sale of company-shares, an agreement to repurchase, and promissory notes signed, in the circumstances set out below. There were also counterclaims in both actions.

S. F. Washington, K.C., for the plaintiff in the first action.

W. M. McClemont, for the defendants in the first action and the plaintiffs in the second action.

S. F. Washington, K.C., and A. Weir, for the defendants in the second action.

RIDDELL, J.:—R. E. Kinsman had a business in Hamilton which he turned into a joint stock company. A relative of his, a dentist in Sarnia, Homer Kinsman, was asked by R. E. Kinsman to take some stock in the company. Homer Kinsman had no money, but his wife, Maria Kinsman, had. R. E. Kinsman and his wife, Emily Kinsman, went to Sarnia and endeavoured to induce Maria Kinsman to take stock. She offered, instead, to lend money on a mortgage upon property in Hamilton owned by Emily Kinsman. Finally, Emily Kinsman agreed that, if Maria Kinsman would take stock in the company, she and her husband would take it from her at any time she wished and repay her her money. Maria Kinsman did take in all $3,500 stock. While the company was a going concern, Maria Kinsman demanded her money, first for $1,000 stock. R. E. Kinsman sent her a note for $1,000, saying that his wife was too ill to sign it. This was not satisfactory, and the whole amount was demanded. The Hamilton Kinsmans had difficulty in raising the money, and did not pay. The company failed.

It came to the knowledge of Homer Kinsman that R. E. Kinsman had paid the bank on his own debt some $13,000 of the company's money, which with interest would amount to about $18,000 at the time of the transactions in question in these actions. He thought it would be a good scheme for the company to sue the bank to recover this $18,000, and also to buy in the assets of the company for the benefit of the shareholders. He

thought that, if his wife had security for her $3,500, she would help him financially in the purchase of these assets. He was afraid, too, that some creditor would attach the property of Emily Kinsman. He had read some law-book, and became filled with the idea of a lis pendens—he was his own lawyer, with the proverbial result.

He came to Hamilton full of his scheme, and went to the house of Emily Kinsman. There meeting R. E. Kinsman, her husband, he asked to see Emily Kinsman, but refused to discuss matters with the husband at all. At length being admitted to her room, he launched out into a statement that he had a scheme whereby $18,000 could be realised for the shareholders, and asked Emily Kinsman to sign a note for $2,500 for the stock, and also to put her name on the note for $1,000 which her husband had already given. I have no doubt whatever that what he said led her to understand that the giving of the notes was part of the scheme to realise the $18,000. He had the new note dated back so as to be due before the day upon which it was signed, explaining that this was to enable him to register a lis pendens on her property and to get in ahead of other creditors. I do not think that Homer Kinsman had any intention to defraud Emily Kinsman or any one else; but I think he, in a muddled sort of way, did not distinguish between his two projects and objects—one to get security for his wife's debt from Emily Kinsman and the other to recover back money from the bank for the benefit of all concerned. I do not think, even at the trial, he had these two matters disentangled in his own mind.

By similar representations, he procured the signature of E. Palmer Kinsman, son of R. E. and Emily Kinsman, to the new note. Having secured the signatures of mother and son, he went away. Shortly after, these signatures were repudiated.

In all the transactions (from the conduct and demeanour of the witnesses) the evidence of Homer Kinsman and his wife, Maria Kinsman, is to be fully believed—the recollection of E. Palmer Kinsman is not to be relied upon.

Maria Kinsman brings action upon the note for $2,500 against Emily Kinsman and her son. They counterclaim for cancellation of the notes. Emily Kinsman and her son also bring action against Homer Kinsman and his wife for cancellation of the notes; Maria Kinsman counterclaims for the face value of the stock, which she contends (and, as I find, rightly contends) Emily Kinsman agreed to pay her for.

Both actions were tried before me at Hamilton.

In the view I take of the case, the notes must be cancelled, except so far as the signature of R. E. Kinsman to the $1,000 note is concerned.

There was, indeed, no fraud on the part of Homer Kinsman, nor was there any threat of criminal prosecution, nor anything in the way of wilful misrepresentation such as is stated in the pleading; but there is no doubt, I think, that he represented the taking of the notes as an integral part of the scheme for securing $18,000 for the shareholders.

Of course, fraud—fraudulent intent—must be proved in an action for deceit: Derry v. Peek (1889), 14 App. Cas. 337; Smith v. Chadwick, 9 App. Cas. 157, 190; a principle which has been reiterated by the Judicial Committee in Tackey v. McBain, [1912] A.C. 186. And an executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent: Angel v. Jay, [1911] 1 K.B. 666, and cases cited; Abrey v. Victoria Printing Co. (1912), ante 868. But the rule does not extend to executory contracts: Reese River Co. v. Smith (1869), L.R. 4 H.L. 64; Angus v. Clifford, [1891] 2 Ch. 449; Adam v. Newbigging (1888), 13 App. Cas. 308.

E. Palmer Kinsman, is consequently relieved from liability; but Emily Kinsman should pay the amounts for which Maria Kinsman counterclaims.

There will be no costs to any party.

DIVISIONAL COURT. APRIL 3RD, 1912.

EMERSON v. COOK.

Trial—Jury—Questions Left to Jury—Disagreement as to Certain Questions—Unsatisfactory Findings—New Trial.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Halton.

Action by a farmer against his former farm-servant for damages for injury to a horse by the defendant's negligence, as alleged. Counterclaim for wages and wrongful dismissal.

The action was tried by the Judge with a jury, who answered some questions, but disagreed as to others. The trial Judge treated this as a disagreement upon the whole case, and directed that no judgment be entered, leaving the case to be tried again.

Each party claimed judgment upon the findings.

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

W. Proudfoot, K.C., for the defendant.

E. H. Cleaver, for the plaintiff.

FALCONBRIDGE, C.J.:—None of the questions submitted was specifically answered by the jury—the first two, which related to the alleged disobedience by the defendant of his master's orders, involved an issue not raised in the pleadings.

When questions are put, the Judge does not always consider it necessary to give as specific instructions on the law as he would do if he were asking for a general verdict; and, therefore, a general verdict has been held inappropriate in certain cases where questions have been put, e.g., in Reid v. Barnes, 25 O.R. 223.

I agree with the learned trial Judge that the finding of the jury here is unsatisfactory as not answering the issues raised between the parties; and so he was right in directing a new trial.

It is unnecessary, in this view, to determine whether an appeal lies in this case.

There was a cross-appeal; and, therefore, there should be no costs.

I think that the appeal and cross-appeal should be dismissed without costs.

BRITTON, J.:—It must, I think, be conceded that the defendant's appeal cannot succeed in any view of this case unless the original questions submitted to the jury were withdrawn, and the jury charged having regard to their finding, and with permission to find a general verdict.

This was not done. The learned trial Judge did not consider the finding actually made by the jury as consented to by the plaintiff's counsel so as to determine the case. The trial Judge treated the matter, and I think properly, as a disagreement of the jury, and he simply stated, in ordering a new trial, that, before the issues could be determined, a new trial would be required, and that would follow in due course. There was a distinct announcement by the jury of their being unable to agree as to the answer to the first question. The plaintiff was entitled to a finding upon that issue. There should not be any judgment upon what was at most only an answer in part to the liability alleged by the plaintiff.

I agree that the appeal should be dismissed, and that a new

trial should be had—as upon a disagreement of the jury upon all points.

Both appeal and cross-appeal dismissed without costs.

SUTHERLAND, J.:—I agree in the result.

MCNAUGHTON v. MULLOY—MASTER IN CHAMBERS—APRIL 2.

Practice—Dismissal of Action for Want of Prosecution—Delay — Counterclaim—Terms—Costs.]—This action—to wind up a partnership and for payment by the defendant to the plaintiff of a promissory note for $500 given in connection therewith—was commenced on the 24th November, 1910. The statement of defence was delivered on the 23rd March, 1911. Since that time nothing had been done, though there had been admittedly three sittings of the High Court at North Bay at which the case could have been entered. The defendant now moved to dismiss the action for want of prosecution. The defendant supported the motion by his own affidavit, in which he said that through the partnership with the plaintiff he had lost all his property, and the costs of defending the action were greater than he was financially able to sustain. He also said that he had made arrangements to remove from Petrolia to a portion of the province of Ontario much less accessible, and that he must move in the course of the next six weeks. The plaintiff in answer said that he had instructed his solicitors to serve notice of trial to proceed with this action (presumably for the sittings at North Bay on the 20th May next); but, in view of the admitted poverty of the defendant, he was willing to discontinue on payment of his costs. Counsel for the defendant did not accede to this disposition of the case—nor did he give a more favourable reception to the Master's suggestion that the plaintiff should be allowed to take a dismissal without costs, and that the whole question between the parties should end now. He offered to discontinue the counterclaim without costs, but pressed for a dismissal of the action with costs. This counterclaim was for completion of an alleged settlement of the partnership, under which the plaintiff was to pay the defendant $500 cash and surrender the defendant's note for $500, the plaintiff taking the assets and liabilities. The Master said that, except in a case where a dismissal would enable a defendant to set up the Statute of Limitations, such an order would be in

effect only for payment of all costs forthwith, instead of giving the costs of the motion to dismiss to the defendant in any event, or even, sometimes, forthwith. [Reference to Finkle v. Lutz (1892), 14 P.R. 446; Milloy v. Wellington (1904), 3 O.W.R. 37.] The best order to make in the interest of both parties, in the Master's opinion, would be to dismiss both the action and counterclaim without costs, which order the plaintiff should take out. But, if this should not be accepted by the parties within a week, an order should go requiring the plaintiff to set the case down and proceed to trial at the next sittings; and, in default of so doing, the action should stand dismissed without further notice. The costs of this motion in that case to be to the defendant in any event. Grayson Smith, for the defendant. D. Inglis Grant, for the plaintiff.

MORGAN v. GORDON—DIVISIONAL COURT—APRIL 2.

Sale of Goods—Action for Balance of Price—Evidence—Set-off—Damages—Findings of Trial Judge—Appeal.]—An appeal by the defendant from the judgment of the Judge of County Court of the County of Grey in favour of the plaintiff, in an action in that Court, for the recovery of $152.48, the balance due on a sale of poles by the plaintiff to the defendant. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ. CLUTE, J., who delivered the judgment of the Court, said that, on a perusal of the evidence, and having regard to the credit given by the trial Judge to the evidence of the plaintiff as against the defendant, and taking into consideration the surrounding circumstances, there was nothing which would justify an interference with the judgment pronounced by the trial Judge. The defendant made no demand on the plaintiff to replace the rejected poles, nor did he send the plaintiff any statement of account, nor make any effort to replace the poles when he found those delivered not to be up to contract, nor did he give any evidence as to what it would cost to replace the poles at Dundalk, where they were to be delivered free on board. In short, he made no case which could be sustained in law for a set-off or for damages. Appeal dismissed with costs. R. S. Robertson, for the defendant. W. H. Wright, for the plaintiff.

RAMSAY v. GRAHAM—MASTER IN CHAMBERS—APRIL 3.

Mechanics' Liens—Motion to Dismiss Proceeding to Enforce Lien—Default of Plaintiff in Making Discovery——Rights of Other Lien-holders—Absence of Plaintiff—Opportunity to Proceed.]—A statement of claim was filed under the Mechanics' Lien Act in December, 1911, the plaintiff seeking to recover about $500 as due to him as a sub-contractor, and to enforce a lien therefor. The defendant Graham (the owner) filed her statement of defence on the 2nd January, 1912; and now moved for a dismissal of the action and to vacate the certificates of lien and lis pendens for the plaintiff's default in making discovery. On the argument it appeared that both the plaintiff and the defendant Farrell (the contractor) had left the city of Toronto and could not be found. The Master said that the plaintiff was, no doubt, in default, and in an ordinary action the motion would be entitled to prevail, unless the omission was repaired or accounted for. Here, however, the rights of others, who might be entitled to take the benefit of this proceeding to enforce similar claims, might be injuriously affected. It further appeared that on the 19th January, 1912, an order was made in an action against Ramsay (the plaintiff in this action), whereby the Sheriff of Toronto was ordered to proceed as provided by Con. Rule 1059. The Master said that it did not seem right to impair that order at present. It must, however, be conceded that no party to an action can complain of anything done while he is absent and not keeping in touch with his solicitor. Here, the action could either proceed without the plaintiff or it could not. In the latter case, it must be ultimately dismissed. On the other hand, if the necessary evidence could be given in the plaintiff's absence, there was no reason why the matter should not be prosecuted forthwith. The defendant Graham was entitled to have the matter disposed of one way or the other. Unless this was done in two weeks, or such further time as might be thought just, the action must be dismissed—and with costs. If an appointment should be taken out for trial, the costs of this motion should be to the defendant Graham in any event. The Master added that, in his experience, to ask a plaintiff in such an action to make discovery before service of notice of trial was not usual. In the present case, this course was perhaps adopted to obtain a dismissal, instead of moving to dismiss for want of prosecution. T. Hislop, for the defendant Graham. H. E. Rose, K.C., for the plaintiff.