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MEREDITH, C.J. FEBRUARY 14TH, 1903.

CHAMBERS.

TRADERS BANK OF CANADA v. SLEEMAN.

Discovery—Examination of Parties—Creditors' Action under 13 *Eliz. ch.* 5—*Fraud—Pleading—Specific Attack—General Charges—Transfer of Assets of Debtor—Scope of Discovery.*

Appeal by defendants from the order of the Master in Chambers (ante 127) requiring defendants George and Sarah Sleeman to attend for further examination for discovery.

W. M. Douglas, K.C., for appellants.
W. R. Riddell, K.C., for plaintiffs.

MEREDITH, C.J.—I think it is a pity that the order was not drawn up before the appeal came on to be heard, but I may as well dispose of this case now. It seems to me I can do as well now as after further consideration.

It may be that the pleading is not well drawn; and, very minutely criticized, it is perhaps open to some of the objections which have been urged against it by Mr. Douglas; but, looking at it as one must under the modern and somewhat loose system of pleading which prevails, and looking at it fairly and not too critically, I think the case which plaintiffs present is this. They make an attack upon a transfer of the lands which are mentioned in paragraphs 8 and 13 of the statement of claim—make a specific attack upon these. They also make a specific attack upon the moneys which have been employed in erecting the brewery upon these lands. They also, in a general way, by paragraph 6, attack transfers of property which is not described officially, at all events, but the particulars of which, they say, they are unable to ascertain; and these transactions they seek to attack as fraudulent as against creditors.

Paragraphs 5 and 7 allege the insolvency of defendant George Sleeman, the debtor, long before the transactions of 1902 which are impeached in paragraphs 8 and 13. There is

also the allegation that defendants have all conspired to withdraw the property of Sleeman from the reach of his creditors by transferring it in various ways, and by ultimately putting parts of it, at all events, in the properties specifically mentioned, which plaintiffs are seeking to reach.

It is not necessary to say whether plaintiffs have made, in paragraph 6, a case which would entitle them to any specific relief as to the matters that are there dealt with. I think it is unnecessary for me to determine that on this motion. Plaintiffs are entitled to full discovery as to the matters that they specifically attack, and the transfers of the lands attacked in paragraphs 8 and 13, and also the dealings with the moneys which plaintiffs allege were employed in putting up the building.

I think it is relevant, also, to the inquiry to ascertain whether dispositions were made by the debtor of his property to these defendants, and, possibly, to others than these defendants, at a time and in circumstances that would tend to throw light upon what the intent was in making a transfer or disposition which is specifically attacked.

There are many instances in which that kind of evidence is admissible. Where the intent of the party is the subject of inquiry, you may shew other acts done, under similar circumstances, and about the same time, for the purpose of shewing the intent in a particular transaction.

Now, so limited, it seems to me that plaintiffs have the right fully to interrogate all these defendants. There must be considerable latitude allowed in these fraudulent conveyance cases in the examination, but care must be taken not to permit the examination to be made use of as a cloak to cover the purpose of examining into any business other than the debtor's with which a plaintiff has no concern. It is impossible to define just what questions may be put, and it will be open to defendants upon the further examination of any of the deponents, if they think the examination is not one fairly directed or relevant to the issues, as I have mentioned, to object to answer that question, and to ask for the determination of the Court as to it.

But, as I say, there must be a good deal of latitude allowed in these examinations. At the trial, I have no doubt, even supposing the claim were confined to the attack upon the specific transactions which are impeached, the Court could not shut out any evidence that was offered of dealings by Sleeman with his property, which would tend to shew that his motive in dealing with the particular property was to

withdraw it from the reach of his creditors; and it is important to plaintiffs to show what the result was of the withdrawal of these properties, upon the financial position of the debtor.

I think the order ought not to be drawn up generally, as apparently it was intended to draw it up; but it should be limited so as to shew that the examination must be based upon the right of plaintiffs being what I have indicated, and the limit of the right to examine being that which I have mentioned.

I think the costs of the appeal should be costs in the cause to the successful party.

MEREDITH, J. FEBRUARY 16TH, 1903.

CHAMBERS.

RE GILBERT.

Will—Construction—Bequest to Grandchildren—Whether Including Grandsons as well as Granddaughters—Devise of Land—Bequest of Money to Improve Land—Revocation of Devise—Effect on Bequest—Bequest of Money Invested in Shares—Specific Bequest—Increased Value of Shares.

Motion by the executors of the will of Jacob Gilbert for an order under rule 938 declaring the construction of the will and codicils as to three matters.

E. Meredith, K.C., for executors.

T. G. Meredith, K.C., for Absalom Gilbert.

T. W. Crothers, St. Thomas, for Harman Crouse.

C. F. Maxwell, St. Thomas, for Hannah Thompson, formerly Crouse.

J. Farley, K.C., for Ernest Gilbert.

MEREDITH, J.—"I charge the devises and bequests to Absalom with the payment of $1,000 to be paid to each of my grandchildren, daughters of the said Hannah Crouse, such sums to be paid to each of them when he or she becomes of age or marries, whichever event shall first happen." These words, notwithstanding the use of "he or she," do not include a son of Hannah Crouse. Daniel's Settlement Trusts, 1 Ch. D. 175, distinguished.

"Also pay to my grandson, the said Harmon Crouse, $500, which is to be paid by my said son Absalom to my said executors, and which shall be employed by them in giving him a start when he shall begin farming by putting up a house on the premises hereinbefore devised to him and making

such improvements thereon out of the surplus as they may think he requires." By a codicil the testator revoked the devise referred to in these words, by giving the lands to that grandson's mother, instead of to him, but the testator did not otherwise indicate any intention to recall, annul, or transfer the gift of $500. The legacy does not fall with the devise. Lockhart v. Hardy, 9 Beav. 379, referred to.

"I give to my daughter Hannah . . . the sum of $4,000 . . . being that amount of stock in the South Western Farmers and Mechanics' Loan and Savings Society as her own property absolutely." At the time of the making of the will and of the testator's death he owned 120 shares of the capital stock of the society, of the par value of $50 each, in all $6,000, but which were and are saleable at a premium. By the same codicil in which this bequest was made the testator gave to his grandson Ernest $2,000 stock in the same society. The words are sufficient to indicate that the legatee was to take four-sixths of the testator's shares in the capital stock of the society. Broadbent v. Barrow, 20 Ch. D, 676, 8 App. Cas. 812, referred to.

Order accordingly. Costs of all parties out of the estate; those of the executors as between solicitor and client.

BRITTON, J. FEBRUARY 16TH, 1903.

TRIAL.

HUTCHINSON v. McCURRY.

Costs—Action for, by Attorneys—Costs Incurred in Quebec Court—Distraction in Favour of Attorneys—Rights against Unsuccessful Party—Interest.

Action by attorneys in the Province of Quebec, who acted as attorneys for one W. G. Reed in an action brought against Reed by the present defendant, to recover the taxed costs of that action. The point raised was one entirely novel in this Province, viz., the right of attorneys of the Province of Quebec to bring an action, in their own name, without the intervention of their own client, who was successful in the action there, against the unsuccessful party for the taxed costs of the action.

W. E. Middleton and W. R. Cavell, for plaintiffs.

C. E. Hewson, K. C., for defendants.

BRITTON, J.—To entitle plaintiffs to succeed in this action they must have, either in form or by operation of law, a judgment in their own favour in the Province of Quebec. Section 553 of the Code of Civil Procedure of the Province of

Quebec provides that "every condemnation to costs involves, by operation of law, distraction in favour of the attorney of the party to whom they were awarded." "Distraction of costs" was proved to mean "the diverting of costs from the client or party who would in the ordinary course be entitled to them, and their ascription to his attorney or other person equitably entitled." The plaintiffs are entitled to judgment for the amount taxed, $238.20. These costs would carry interest in Quebec, but in this case there is no claim for interest, and no evidence of any demand in Ontario before action.

Judgment for plaintiffs for $238.20 with costs.

FALCONBRIDGE, C J. FEBRUARY 16TH, 1903.

TRIAL.

PAGE v. GREEN.

Building Contract—Damages for Delay—Both Parties Guilty of Delay—Account.

Action by Bessie Page, of Toronto, trading under the name of Page & Co., against John M. Green, of St. Thomas, trading under the name of J. M. Green & Co., to recover $2,559.67 for work done upon the new armoury buildings at St. Thomas under a sub-contract, and for $1,000 damages for breaches of contract by defendant. The defendant also counterclaimed for damages for breach of the contract.

W. Laidlaw, K.C., for plaintiff.

J. A. Robinson, St. Thomas, for defendant.

FALCONBRIDGE, C.J., found that each party had been guilty of such delay in performing his own part of the contract as to disentitle him to claim damages from the other on this ground. After going through the items of the accounts between the parties, the Chief Justice found $1,114.08 due to plaintiff. Judgment for this sum with costs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

CENTRAL CANADA LOAN AND SAVINGS CO. v. PORTER.

Title to Land—Registered Title—Real Property Limitation Act.

Appeal by defendant from judgment of ROBERTSON, J. (1 O. W. R. 482), in favour of plaintiffs in an action of ejectment tried at Peterborough. The trial Judge found as a

fact that defendant's title by possession never matured so as to displace the paper title of plaintiffs.

E. B. Stone, Peterborough, for appellant.

D. W. Dumble, K.C., for plaintiffs.

THE COURT (STREET, J., BRITTON, J.) held that, upon a perusal of the evidence and exhibits, there seemed no reason for disturbing the result arrived at by the trial Judge, the whole question being one of fact, the onus being on defendant, and he having, in the opinion of the trial Judge and of the Court, failed to satisfy the onus. The plaintiffs were purchasers for value with a registered title and without notice of the paper title of defendant, which was not registered till after this action was brought. Plaintiffs' paper title must, therefore, prevail also. Appeal dismissed with costs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

ONTARIO ELECTRIC LIGHT AND POWER CO. v. BAXTER AND GALLOWAY CO.

Contract—Supply of Electric Current—Destruction of Building on Premises to which Current to be Supplied—Impossibility of Performance—Defence to action for Price—Readiness and Willingness to Perform—Damages for Breach.

Appeal by defendants from judgment of County Court of Wentworth in favour of plaintiffs in action tried without a jury. The plaintiffs' claim was upon a written agreement for the supply of an "electric current to the extent of fifty horse-power," to recover three instalments (less $85.39 paid on account) alleged to be due by defendants under a provision in the agreement whereby defendants "agree to pay for the electric current . . . $1,250 per annum . . . in equal monthly payments," for five years. The defence was that the agreement, according to its true construction, was for the supply of electric current for a particular specified mill, and that the mill having been destroyed by fire on the 25th April, 1901, without default, and before any breach of the agreement on the part of defendants, performance of the agreement had become impossible, and the parties were excused. The agreement of plaintiffs for the supply of the current was that they would, "upon the conditions and for the purposes and within the limits" stated in the agreement, supply it for and to defendants "in the premises" of defendants. The second paragraph was: "It is understood and agreed that the said electric current so to be supplied shall

be used by the customers for the purpose of operating their machinery and for the purpose of obtaining power for use in their business as millers, and for no other purpose.

J. V. Teetzel, K.C., for defendants.

G. Lynch-Staunton, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J.) held that the object of the provision in the second paragraph was to guard against the current being used for any other than power purposes, and there was nothing to prevent the customers using the current for these purposes in any place to which they might choose to transmit it, and nothing to confine the use of it by the customers to any existing mill on the premises. Therefore, the performance of the agreement has not become impossible, and the rule in Taylor v. Caldwell, 3 B. & S. 826, was inapplicable. But the plaintiffs were not entitled to recover the monthly payments claimed. The current was not supplied after 25th April, 1901, it having been on that day cut off, if not by plaintiffs, at least with their consent. Readiness to supply the current is not enough to entitle them to recover. The plaintiffs are entitled to damages for the refusal of defendants to perform their contract, but that is not the form of the action, and there is no evidence upon which the damages can be assessed.

Appeal allowed and judgment reversed without costs, and new trial directed, with leave to plaintiffs to amend. Costs of the former trial to be costs in the cause unless the trial Judge otherwise directs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

HOGG v. TOWNSHIP OF BROOKE.

Way—Non-repair—Injury to person—Accumulation of Snow—Responsibility of Township Corporation.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 568) dismissing action to recover damages for injuries sustained by plaintiff by reason of the alleged negligence of defendants in permitting an accumulation of snow to remain on part of number 9 side road in the 3rd concession of the township of Brooke, in front of one Pellow's farm, by reason of which, it was alleged, the highway became out of repair and unsafe to travel, and owing to the bad and dangerous state of the highway the horses drawing a waggon in which plaintiff was travelling became imbedded in the snow, and were unable to proceed, and plaintiff in assisting the

horses to get out of the snow-drift was stepped upon and thrown down and his knee seriously injured.

T. G. Meredith, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants.

MEREDITH, C.J.—It is unnecessary to determine whether or not defendants would have been chargeable with actionable negligence for not removing the snow from the highway so as to make the usually travelled part of it fit for travel. Not only did defendants fail to remove the snow from the travelled part of the highway, but, having in effect provided and invited the public to use as a substitute for it a way on the side of the road which they knew would become dangerous to those using it for the purpose of driving over with wheeled vehicles, as soon as the thaw set in, permitted it to remain for three days in a condition dangerous to persons so travelling, a thaw having set in making it dangerous for three days before the accident to plaintiff. In these circumstances, it was the duty of defendants to have made the highway reasonably fit for travel either upon the usually travelled part of it or upon the substituted way, which could have been accomplished at a trifling expense, or, failing that, have stopped the use of the road or given warning against the danger to those travelling upon it, and in omitting to do this they made default in keeping the highway in repair within the meaning of sec. 606 of the Municipal Act and are answerable to plaintiff in damages.

MACMAHON, J., gave a written opinion reviewing the facts and coming to the same conclusion. He referred to Boswell v. Yarmouth, 4 A. R. 353; Savage v. Bangor, 40 Me. 176; Stickney v. Maidstone, 30 Vt. 738; Page v. Bucksport, 64 Me. 51; McKelvin v. London, 22 O. R. 70; and LaDuke v. Exeter, 97 Mich. 450.

Appeal allowed with costs, and judgment to be entered for plaintiff for $600 and costs of action.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

GREAR v. MAYHEW.

Vendor and Purchaser—Action for Purchase Money—Evidence—Trespass to Goods.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 529), dismissing without costs an action to recover $400, the price of certain land which, as plaintiff

alleged, she agreed to sell to defendant, and of which defendant obtained a conveyance without payment of the purchase money, and also for damages for forcible ejection from her land, and injury done to plaintiff's furniture. The plaintiff alleged that the deed of the land was obtained fraudulently from her by the defendant, and that he refused to pay the purchase money, and subsequently entered on her lands, forcibly ejected her, and placed her goods in a barn, thereby doing injury to them.

John McGregor, for plaintiff.

No one appeared for defendant.

THE COURT (MEREDITH, C.J., STREET, J.) dismissed the appeal with costs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

ELLIOTT v. HAMILTON.

Execution—Sale of Land under—Assignment for Benefit of Creditors—Priorities—Costs.

Appeal by the defendant from the judgment of BRITTON, J. (4 O. L. R. 585, 1 O. W. R. 705) in favour of plaintiff in an action for a declaration that plaintiff was entitled to the possession of certain lands in the township of Darlington and for possession. The plaintiff purchased the land at a sale under execution. There was a question as to priority between the execution and an assignment by the defendant for the benefit of the creditors.

The defendant entered an appeal, which came on for hearing in due course, but no one appeared to support it.

D. B. Simpson, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., STREET, J.) dismissed the appeal with costs.

MEREDITH, C.J. FEBRUARY, 17TH, 1903

CHAMBERS.

RE PINKNEY.

Parent and Child—Custody of Infant—Petition of Parents—Dismissal—Special Circumstances—Direction for Sealing up of Papers.

Petition by Thomas Pinkney and Emily Jane Pinkney, the father and mother of Leland Pinkney, an infant, for an

order directing the return of the infant to the custody and control of the petitioners by William Corbett and his wife.

W. E. Middleton, for petitioners.

Shirley Denison, for William Corbett and wife.

P. H. Drayton for the infant.

MEREDITH, C.J., held that, under all the circumstances of the case, and in view of a report of the official guardian, the petition should be dismissed with costs. The affidavits and papers, included in the exhibits, must, after the time for appealing from this order has expired, if an appeal is not taken, be sealed up and remain sealed, and be indorsed with a memorandum that they are not to be opened unless by order of the Court or a Judge.

BRITTON, J.

FEBRUARY 17TH, 1903.

TRIAL.

FLETT v. COULTER.

Negligence—Injury to Infant from Kick of Horse—Horse Getting out of Pasture—Reasonable Result—Contributory Negligence of Infant—Nonsuit—Answers of Jury.

Action by Hugh Flett, an infant, and his father, for damages for injuries received by the boy on 12th May, 1902, by the kick of a horse owned by defendant. Certain questions were submitted to the jury, but the Judge reserved for consideration a motion for a nonsuit.

J. G. O'Donoghue, for plaintiffs.

S. B. Woods, for defendant.

BRITTON, J., held that, apart from the question of contributory negligence on the part of the boy, the plaintiffs were not entitled to recover. The horse was a quiet one; there was not a particle of evidence to shew that defendant knew of the horse being accustomed to stray or that he had any vicious propensities; nor was the horse shewn to have had any such fault. Even if the horse got out of the pasture by reason of defective fences, what occurred is not the reasonable result of the horse getting upon the highway. Patterson v. Fanning, 2 O. L. R. 462, distinguished. In this case the negligence, if any is proved, is not connected with the damage complained of. The boy fully understood what he was doing and the danger of interfering with the horse. The case was, upon the facts, altogether outside of the cases in which contributory negligence cannot be imputed by reason of tender age. Upon the evidence and upon the answer

of the jury as to the question in reference to contributory negligence, action dismissed with costs.

FALCONBRIDGE, C.J. FEBRUARY 17TH, 1903.

TRIAL.

HARRINGTON v. SPRING CREEK CHEESE MFG. CO.

Water and Watercourses—Right to Flow of Water—Artificial Waterway—Prescription—Interruption—Defence—Amendment.

Action for a declaration that defendants have not acquired and do not possess as against plaintiff any right to the continued flow of water through an artificial waterway in the township of East Zorra, and that plaintiff is entitled to have it removed from his lands, and to have the waters flowing to his lands from a certain spring flow in their natural channel, and for an injunction and damages and other relief.

A. B. Aylesworth, K.C., and W. T. McMullen, Woodstock, for plaintiff.

E. D. Armour, K.C., and G. F. Mahon, Woodstock, for defendants.

FALCONBRIDGE, C.J., held that the merits were with defendants, who with their predecessors had enjoyed the rights now impugned for over 30 years, and, as they supposed, by express grant since 1878. There had been no interruption in the exercise of their supposed rights since their factory was built, about 1870, although plaintiff began complaining in 1895. Defendants should be allowed to amend the 6th paragraph of the defence, and defence as amended held to be established by the evidence and good in law. Action dismissed with costs.

BRITTON, J. FEBRUARY 18th, 1903.

CHAMBERS.

CAVANAGH v. CASSIDY.

Security for Costs—Residence of Plaintiff—Ordinary Residence Out of the Jurisdiction—Temporary Residence in Ontario.

Appeal by plaintiff from order of Master in Chambers (ante 27) requiring plaintiff to give security for costs, on the ground that he is ordinarily resident out of the jurisdiction of the High Court of Justice for Ontario, and only temporarily resident within it.

S. B. Woods, for plaintiff.

J. E. Cook, for defendants.

BRITTON, J., held, following Allcroft v. Morrison, 19 P.R. 59, and Michiels v. Empire Palace, Limited, 66 L. T. 132, that plaintiff's residence in Ontario, as shewn by the material, is not merely temporary—is certainly not for the purpose of bringing an action—and there is no reason to apprehend that he will not be here when wanted. There is no doubt that plaintiff up to September last was not only ordinarily, but altogether, since childhood, resident out of Ontario. But, upon the affidavit and cross-examination of plaintiff, he does not come within the class intended by Rule 1198 (b) as those "temporarily resident within Ontario." Plaintiff came to Toronto in September, 1902, under special employment, and for what might fairly be called a temporary purpose. His relations with his then employers are changed. He is in Ontario, resident here, with no home or employment or business connection or property of any kind out of Ontario. He is an unmarried man and has no one depending upon him. Since coming here to reside, the present alleged cause of action arose in Ontario. That he would be willing to accept a good situation and return to the United States, if opportunity offered, is not material. Appeal allowed and order for security set aside, without prejudice to any application for security, if, pending the action, plaintiff goes to reside out of Ontario. Costs in cause to plaintiff.

MEREDITH, J.

FEBRUARY 18TH, 1903.

CHAMBERS.

CAMPBELL v. SCOTT.

Discovery—Examination of Defendants—One Defendant Withdrawing after being Sworn—Order to Appear Again—Excuse.

Appeal by defendant McTavish from order of local Judge at Stratford requiring appellant to appear for examination for discovery at his own expense.

J. P. Mabee, K.C., for appellant.

J. H. Moss, for plaintiff.

MEREDITH, J.—The one excuse offered for appellant's failure to attend and submit to examination was that he was subpœnaed to attend at 10.30 a.m. and was not called for examination until about 2.30 p.m. The four defendants were to be examined for discovery on the same day. They were all subpœnaed to attend at 10.30 a.m., and did attend, and soon after all four were sworn by the examiner, and three of them excluded while the fourth was being examined. No objection was made, no inconvenience suggested, no request for any different mode of procedure made. Between

two and three o'clock in the afternoon, two of the defendants having been examined, the third being under examination, and the fourth, this defendant, still waiting to be examined, objection was made by counsel for defendants to the presence of one Peter Campbell at the examination, and, the examiner refusing to exclude him, counsel for defendants refused to proceed, and he and the defendant under examination left the room, and being joined by this defendant, all left the Court house. Under these circumstances, the defendant MacTavish was properly ordered to attend for examination at his own expense. Appeal dismissed with costs.

WINCHESTER, MASTER. FEBRUARY 19TH, 1903.

CHAMBERS.

LIDDIARD v. TORONTO R. W. CO.

Parties—Joinder of Plaintiffs—Distinct Causes of Action—Injuries Received in Same Collision—Adding Plaintiff.

Motion by plaintiff to add his infant son as a co-plaintiff. The action was brought for damages for personal injury to plaintiff and for injury to his horse and waggon by the negligence of the servants of defendants in running an electric car into and colliding with plaintiff and his horse and waggon. The plaintiff's son was with his father on the waggon, and it was said that he received serious injury.

J. E. Cook, for plaintiff.

J. W. Bain, for defendants, contended that the son had a distinct cause of action, if any.

THE MASTER.—Rule 206 is to be read in connection with Rule 185: Edwards v. Lowther, 21 W. R. 434; Smith v. Haseltine, W. N. 1875, p. 250; Long v. Crossley, 13 Ch. D. 388. The facts stated shew that the right to the relief claimed arose out of the same transaction or occurrence, and that there is a common question of fact or law, and the case is within Rule 185: Stroud v. Lawson, [1898] 2 Q. B. 44; Universities of Oxford and Cambridge v. Gill, [1899] 1 Ch. 55; Walters v. Green, [1899] 2 Ch. 696. Order made as asked upon filing the consent of the proposed plaintiff and his father as next friend. Costs of application and amendment to defendants in any event.

MACMAHON, J. FEBRUARY 19th, 1903.

TRIAL.

HENEY v. OTTAWA TRUST & DEPOSIT CO.

Mortgage—Action to Enforce—Defence—Collateral Security—Acceptance of other Security—Reservation of Rights—Intention

Action by executors of will of John Heney against the

administrators of the estate of John Stewart and his widow and children, upon mortgages of lands in the city of Ottawa made by John Stewart, for immediate possession and foreclosure or sale. There was no dispute as to the right of plaintiffs to recover in respect of the balance due upon one of the mortgages, that made in 1878 to the North British Canadian Investment Company and assigned to John Heney. The defence as to the other mortgage, made in 1892 to John Heney, was that it was given as collateral security for a loan represented by a promissory note for $16,000 made by Archibald Stewart and indorsed by Catharine and John Stewart, and that, after the last renewal of that note went to protest on 12th January, 1894, the amount thereof was included in a note for $39,760.53, at three months, made by Archibald Stewart and indorsed by Catharine Stewart, and thereby John Stewart's estate was discharged from any liability on the mortgage. The question was whether the creditor's remedy was intended to be reserved.

J. Christie, Ottawa, and W. Greene, Ottawa, for plaintiffs.

G. F. Henderson, Ottawa, and A. E. Fripp, Ottawa, for adult defendants.

C. J. R. Bethune, Ottawa, for the official guardian.

MacMahon, J., referred to Wyke v. Rogers, 1 DeG. M. & G. 408; Owen v. Homan, 4 H. L. C. 997; Muir v. Crawford, L. R. 2 Sc. App. at p. 457; Gorman v. Dixon, 26 S. C. R. 87; and said that the question was as to the intention of the parties, to be gathered from the terms of the agreement, having regard to the position of the parties at the time; and the fair inference to be drawn in this case was that the rights of Heney against the estate of John Stewart on the mortgage were intended to be reserved. Judgment for plaintiffs as prayed with costs. Reference to Master at Ottawa.

FEBRUARY 19TH, 1903.

DIVISIONAL COURT.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence— Injury to Linesmen of Electric Company—Negligence of Strangers— Duty owed by — Precautions against Danger — Findings of Jury.

Motion by defendants Ahearn & Soper (Limited) for judgment dismissing the action, and motion by plaintiff for judgment in his favour on the findings of the jury, in an

action by a linesman in the employment of defendants the Ottawa Electric Company to recover damages for injuries sustained in the course of his employment by the alleged negligence of defendants. The trial Judge nonsuited plaintiff as against defendants the Ottawa Electric Company, but as against Ahearn & Soper left three questions to the jury, in answer to two of which they found that negligence of Ahearn & Soper was the proximate cause of plaintiff's injury, and that the negligence consisted in using uncovered wires and careless construction of tie-wires. They did not answer the third question, which was, whether the plaintiff might, by the exercise of ordinary care, have avoided the injury. The trial Judge treated what occurred as a disagreement of the jury and discharged them.

W. Nesbitt, K.C., and C. Murphy, Ottawa, for defendants Ahearn & Soper.

H. M. Mowat, K.C., for plaintiff.

THE Court (MEREDITH, C.J., MACMAHON, J.) held that the standard for measuring the duty which Ahearn & Soper owed to plaintiff was not the same standard as that which would have been applicable if the line the current from which as it was alleged, caused the injury to plaintiff, had belonged to his employers, and the action had been against the employers; but the duty which was owed by Ahearn & Soper to plaintiff was to take reasonable care that he should not suffer injury from the dangerous current of electricity which they were conducting on their line in close proximity to the place where he was working: Thrussell v. Handyside, 20 Q. B. D. 359; Carr v. Manchester Electric Co., 7 Am. Electrical Cas. 746. It was for the jury to say whether there was "absence of care according to the circumstances," having regard, on the one hand, to the highly dangerous character of the element which Ahearn & Soper were dealing with, and the means that were open to them of avoiding altogether or reducing to a minimum the danger, and, on the other hand, to the obvious and ordinary means of protection and of avoiding injury that were available to plaintiff in the circumstances. The circumstance that bare wires were used for tie wires, which was apparent to the eye, and the circumstance that plaintiff was not wearing gloves when he was engaged in the work, were not sufficient to justify the withdrawal of the case from the jury: Paine v. Electril Co., 7 Am. Electrical Cas. 651.

Both motions dismissed, and case to go down for a new trial. Costs of both motions and of the last trial to be costs in the cause, unless the trial Judge otherwise orders.

FEBRUARY 19TH, 1903.

DIVISIONAL COURT.

LANZ v. MCALLISTER.

Patent for Invention—Infringement—Apple Syrup—Novelty —Burden of Proof.

Appeal by plaintiff from judgment of MACMAHON, J. (1 O. W. R. 455) dismissing the action, which was brought to restrain the defendant from infringing plaintiff's patented process for manufacturing apple syrup.

A. B. Aylesworth, K.C., for plaintiff.

E. P. Clement, K.C., for defendant.

THE COURT (MEREDITH, C.J., STREET, J.) dismissed the appeal with costs.

BRITTON, J.

FEBRUARY 20TH, 1903.

CHAMBERS.

BEDDELL v. RYCKMAN.

Discovery—Examination of Party—Action by Shareholder against Directors of Company for Discovery and Account—Fraud—Scope of Examination.

Appeal by defendant Cox from order of Master in Chambers (ante 86) directing the appellant to attend for re-examination for discovery and to answer certain questions.

W. H. Blake, K.C., for appellant.

W. R. Riddell, K.C. for plaintiff.

BRITTON, J., held that, unless an order should be made under Rule 472 for the determination of some issue or question in dispute before deciding upon the right to discovery, the order of the Master ought not to be interfered with. It would be difficult to select any one issue or question. It is true, the plaintiff's action is in part for discovery. And now, before there is any trial of the action, by this examination plaintiff is about to get a part at least of what he asks. This is somewhat anomalous: but the plaintiff says he requires the information for the purposes of the trial; that it may be most important in determining the issues. While the question whether the defendants, or any of them, were trustees or not does not depend upon the amount paid by any of them to the different companies, or upon what if anything, defendant Cox got for underwriting any of the preference shares, or what the Canada Cycle and Motor Company paid, it cannot be said, in view of the whole statement of claim, that defendant Cox ought not to answer. These answers may, in

the event of plaintiff being entitled to recover at all, assist in the determination at the one trial, just to what extent and against whom recovery may be had. Evans v. Jaffray, 3 O. L. R. 327, distinguished.

Appeal dismissed. Costs to plaintiff in the cause.

BOYD C. FEBRUARY 20TH, 1903.

TRIAL.

FAWKES v. ATTORNEY-GENERAL FOR ONTARIO.

Land Titles Act—Claim on Assurance Fund—Transfer Procured by Fraud—Subsequent Fraudulent Transfers—Forgery—Bona Fide Purchaser for Value without Notice—Deprivation of Land - Disposition of Land.

Action by Drusilla Fawkes to recover $10,000 from the assurance fund created under the Land Titles Act. The action was brought under a direction of the Master of Titles at Toronto, a claim having been made in his office. The land in question had been brought under the provisions of the Act prior to 1893. In April, 1893, the plaintiff transferred the land to one Dakin for value, represented by certain stock. The transfer was duly registered. In May there was duly registered a transfer purporting to be made by Dakin to one William McDonald. This transfer was not signed by Dakin, whose name apparently signed was forged. Later in May there was registered a transfer purporting to be signed by McDonald to one James D. Mulvena, and at the end of May Mulvena made a transfer to Catherine E. Brisley, which was registered, and in September Brisley made a transfer for value to Levi J. Clark, which was duly registered. The stock taken by plaintiff was of no value, and the transaction was altogether such a fraud as would be set aside by the Court as against Dakin and the string of transferees down to Clark, but Clark's position was impregnable as a registered purchaser for value without notice. The real wrongdoers throughout were two men, Griffin and Hawkesworth, who were convicted of this fraud, and were at the time of the trial inmates of the Penitentiary. These men were the chief actors, who deceived the plaintiff, put forward Dakin, forged his name, put forward McDonald, whose real name was McConnell, as a transferee (he had since died) and also put forward their clerk, one Mulvaney, after Italianizing his name, and the person called Brisley, who was the wife of Griffin, as ostensible transferees, and who negotiated the exchange of properties with Clark, the one bona fide person. All the

deceivers were financially worthless. The plaintiff sought compensation out of the fund.

N. W. Rowell, K.C., and Casey Wood, for plaintiff.

R. C. Clute, K.C., and McGregor Young, for defendant.

BOYD, C.—It was argued that the case was, in terms, within the scope of the Act, because plaintiff has been "deprived of her land by reason of some one else being registered as owner." (Review of the provisions of the Act) . . . It cannot be said that plaintiff suffered wrongful deprivation of the land when she made the transfer to Dakin, for that was a real transaction, and the intention was to transfer the estate and property in the land. That transaction was voidable when plaintiff discovered the imposition practised upon her, but at the time of that discovery the rights of the bona fide transferee had intervened. Clark's being registered as owner did not deprive plaintiff of the land; it may have prevented her recovering the land; she had ceased to be owner under the Act when her transfer was registered to Dakin, and the land was transferred in due course to Clark. Under the Registry Act, R. S. O. ch. 136, the forged deed would form an incurable defect, and the status of Clark as bona fide purchaser for value would not avail him: Re Cooper, 20 Ch. D. 611. But under the Land Titles Act this defect would seem to be cured in the hands of an honest holder for value: Gibbs v. Merner, [1891] A. C. 249. The plaintiff has no claim on the ground of the land being brought under the Act, for these words refer to the initial proceeding by which the particular land is brought under the provisions of the Act. Neither is their any claim under the provisions as to error in the certificate or entry on the record. There remains but the claim that she has been wrongfully deprived by reason of some other person being registered as owner. The word "deprivation" is used in contradistinction to another word used in the Act—"disposition." The plaintiff's dealing with the land falls under sec. 124. She made a transfer which was a "disposition" of the land that, if properly attacked, would be declared fraudulent and void. Her act was a "disposition of the land, a voluntary thing, and it is not to be called a "deprivation" of it. Attorney-General v. Metropolitan R. W. Co., 21 Q. B. D. 461, and Attorney-General v. Sibthorpe, 3 H. & N. 453, referred to.

Action dismissed. Costs of the defendant to be paid out of the fund.