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HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. APRIL 14TH, 1913.

REX EX REL. GARDHOUSE v. IRWIN.

Municipal Corporations—Commissioner of Water and Light—Disqualification of High School Trustee—Quo Warranto Application—Municipal Waterworks Act—Municipal Act.

Appeal by E. F. Irwin, the respondent, from the order of WINCHESTER, Co.C.J., ante 1043.

H. H. Dewart, K.C., for the appellant.
C. W. Plaxton, for the relator.

MIDDLETON, J.:—The respondent was elected to the office of commissioner of light and water in the Village of Weston, and was unseated because at the time of his election he was a member of the High School Board of that village.

The Municipal Waterworks Act, R.S.O. 1897 ch. 235, sec. 41, as amended by 3 Edw. VII. ch. 24, sec. 5, and 6 Edw. VII. ch. 40, sec. 2, provides for the constitution of the Board; and sub-sec. 5 provides that the place of a commissioner—that is, of a commissioner who has been appointed— "shall become vacant from the same causes as the seat of a member of the council of the corporation:" and sec. 43 provides that no commissioner shall be interested, directly or indirectly, in any contract. There are no sections expressly providing for the disqualification of commissioners. Elections are to be held in a manner similar to other municipal elections; and certain provisions are made by which the commissioners retire in rotation.

Section 207 of the Municipal Act provides that certain things shall cause a municipal councillor to vacate his seat in the council, and that a new election may thereupon be ordered. This provision is quite apart from sec. 80 of the Municipal Act, disqualifying certain persons from holding office in the municipal council. Section 80 provides, inter alia, that no High School trustee shall be qualified to act as a councillor; but it contains no provision preventing him from holding the position of water commissioner.

Section 54 of the Municipal Waterworks Act provides that "this Act shall be read and construed as part of the Municipal Act," and the learned Judge has held that the effect of this section is to make applicable to water commissioners all provisions found in the Municipal Act with reference to the disqualification of councillors, mutatis mutandis.

I cannot follow him in this reasoning. Assumed that the 53 sections of the Municipal Waterworks Act had been embodied in the Municipal Act; I do not see how that would enable the sections dealing with the qualification and disqualification of municipal councillors to be read as applicable to water commissioners. It is significant that sec. 53 makes applicable to the election of commissioners the sections of the Municipal Act relating to "elections." These sections, if regard is had to the divisions of the Municipal Act, commence with sec. 95, and are quite independent of the sections relating to qualification and disqualification of councillors.

In my view, the appeal must be allowed, and the original application dismissed with costs.

Both parties proceeded upon the assumption that the quo warranto sections of the Municipal Act applied to this case. I have not investigated that matter.

MIDDLETON, J. APRIL 14TH, 1913.

ROBERTS v. BELL TELEPHONE CO. AND WESTERN COUNTIES ELECTRIC CO.

Negligence—Death of Employee of Telephone Company from Electric Shock—Liability of Electric Light Company—Proximity of Wires—Sagging Wires Causing Contact—Neglect of Precautions and Inspection—Duty of Electric Light Company—Use of Dangerous Substance—Authority of Legislature—Proximate or Effective Cause of Injury—Intervention of Wrongful Act of Third Party.

Action by the widow of Herbert Roberts, on behalf of herself and infant children, to recover damages for his death on the 16th September, 1912.

The action was tried before MIDDLETON, J., without a jury, at Hamilton, on the 1st April, 1913.

G. S. Kerr, K.C., and G. C. Thomson, for the plaintiff.

M. J. O'Reilly, K.C., for the defendant the Western Counties Electric Company.

MIDDLETON, J.:—The action was settled between the plaintiff and the Bell Telephone Company. That company paid $1,200 damages; this sum being accepted by the plaintiff in full of that company's liability; and, the electric company consenting, without prejudice to her claim against the latter company.

At the time of the happening of the accident, Roberts was engaged as an employee of the Bell Telephone Company, in the stringing of a wire called "a messenger wire," along Dufferin street, Brantford. A messenger wire is a naked steel wire, from which a telephone cable is suspended. This particular messenger wire, at the intersection of Dufferin street and St. Paul street, passed over another messenger wire, which carried a cable running along St. Paul street. In the course of his work, Roberts came in contact with the latter wire, and received from it an electric shock which caused his death. It was afterwards found that, a block away from this point, the messenger wire on St. Paul street was in contact with a primary electric wire of the electric company, carrying 2,200 volts.

This electric wire was strung along Blake street, which runs parallel with Dufferin street; and, when near the intersection of Blake and St. Paul streets, the wire was strung diagonally across St. Paul street, above the Bell messenger wire, to the

opposite side of the street, where it joined the main electric line passing up and down St. Paul street. The poles carrying this particular span were 29 feet high, and the span was 113 feet. At the time of the accident, it was found that the messenger wire was 4 feet 6 inches below a straight line between the electric light insulators.

The electric wire was put up in August, 1911, or earlier. The telephone messenger wire was not placed in position until some time in 1912. The evidence as to the relative positions of the two wires at the latter date is exceedingly meagre and unsatisfactory. The electric wire, when placed in position, had, it is said, a sag of two feet. This would bring the wire within 2 feet 6 inches of one another, assuming that no further sagging took place between the time of the stringing of the electric light wire and the time of the placing of the messenger wire.

It was shewn that the stretching of the copper wire on a span of this kind would be infinitesimal. The increase in the sag between the time of stringing and the time of contact was occasioned by the settlement or bending of the electric light poles, which were not sufficiently guyed to prevent the sagging. Experts stated that, as a matter of calculation as well as of experiment, if the tops of the poles each moved two inches inwardly, this would bring the wire down from the 2 feet to the 4 feet 6 inches. It is altogether probable that most of this settlement took place when the poles were newly erected; so that I am satisfied that there was not anything like a clearance of 2 feet 6 inches when the messenger wire was placed in position.

All parties agree that to insure safe construction wires should not be placed closer than 3 feet, as some sagging is inevitable, and there is always danger of extra sagging being caused by sleet and ice.

I find as a fact that the electric company, in the erection of its poles, did not take adequate precautions, by guying or otherwise, to prevent the increase of the sag in their wire, and that they did not inspect the wire, or they would have discovered the contact, which existed from early in the summer until the time of the accident.

It was shewn in evidence that throughout the summer this wire, when swung by the breeze or otherwise, emitted sparks when it came in contact with the messenger wire; and some children were called to testify that their summer evening amusement was the making of fireworks by swinging on the guy wire so as to cause the wires to separate and come in contact, and to emit flames.

It is contended on behalf of these defendants that, however short of perfection their construction may have been, and however negligent their inspection may have been, they had no duty to the telephone company or its employees to protect the wire improperly placed by the telephone company in a dangerous position; and that, the accident being in truth caused by the negligence of the telephone company, in placing its wires in undue proximity to the electric wires, neither the telephone company nor its employee is entitled to recover.

With some regret, I find myself compelled to give effect to this contention; for two reasons.

In the first place, I do not think that the construction which permitted the wires to sag to the extent they did amounts to negligence. Negligence must be founded upon a breach of duty; and, when these wires were placed upon poles 29 feet above the highway, no wires being then under them, I do not think that there was any duty owing to the telephone company or its employees calling for such stability of construction as to prevent what was, after all, a very slight increase in the sag of the wire. The same reasoning leads me to think that there was no duty to inspect the wires periodically for the purpose of seeing that other wires had not been improperly placed in undue proximity.

During the course of the argument it was suggested that there would be liability apart from negligence, because the electric current was a dangerous substance within the principle of Fletcher v. Rylands. This argument ignores the fact that the erection of poles on the highway is authorised by the Legislature, thus giving an authority which relieves from liability unless negligence is shewn: National Telephone Co. v. Baker, [1893] 2 Ch. 186; Eastern and South African Telegraph Co. v. Capetown Tramways Co., [1902] A.C. 381.

In the next place, the injury sustained by the plaintiff was, I think, the direct and proximate result of the negligence of the telephone company, and there was no reason why the electric company should anticipate and guard against that negligence. The question of the liability of the defendant for its negligence where the wrongful act of a third party intervenes has been the subject of much discussion recently. In Urquhart v. Farrant, [1897] 1 Q.B. 241, it is laid down by the Court of Appeal that the question whether the original negligence was an effective cause of the damage is to be determined in each case as a question of fact. In McDowell v. Great Western R.W. Co., [1902] 1 K.B. 618, the railway company was held liable where some boys loosed the brakes of a car which had negligently been

left near an incline, so that it ran down the incline; because the railway company knew or ought to have known of the danger of this interference, and negligently omitted to take reasonable precautions to prevent the consequences of that interference. But, upon appeal, this decision was reversed, the Court taking the view that, upon the principle of Urquhart v. Farrant, the negligence of the defendants could not be regarded as the effective cause of the accident.

The question is also discussed in Dominion Natural Gas Co. v. Collins, [1909] A.C. 640; and the cases are well collected and reviewed in Lothian v. Richards, 12 C.L.R. 165.

This principle appears to me to be fatal to the plaintiff's case here. The action will, therefore, be dismissed as to the electric company, without costs.

BRITTON, J. APRIL 14TH, 1913.

LESLIE v. CANADIAN BIRKBECK CO.

Company—Partly Prepaid Shares—Representation — Profits — By-law—Account.

Action for an account of profits earned by the defendants or their predecessors, the Birkbeck Investment Security and Savings Company of Toronto, in respect of or on the moneys paid in by the plaintiff, and for a declaration that such profits should be applied upon the plaintiff's shares until payment should be made in full of the plaintiff's shares so that her shares should rank as fully paid-up to the amount of $1,000.

J. R. Roaf, for the plaintiff.

Wallace Nesbitt, K.C., Britton Osler, and E. D. Wallace, for the defendants.

BRITTON, J., referred to the incorporation of the first company on the 10th May, 1893, under the Building Societies Act, R.S.O. 1887 ch. 169; to the rules and by-laws of that company; to the allotment to the plaintiff, in 1895, of ten shares of the prepaid six per cent. stock of the first company, upon which she paid $50 per share; to the regular receipt by the plaintiff of dividends at the rate of six per cent. per annum upon the money paid for the shares; and to the following statement

issued by the company and received by the plaintiff: "Partially prepaid stock of the par value of $100 is issued at $50 a share, on which a portion of the profits earned, not to exceed six per cent. per annum upon the original sum invested, is paid to holders in cash semi-annually. This stock is entitled to receive, in addition, its proportionate share of the entire profits of the company. Profits earned in excess of the six per cent. so paid are retained and loaned by the company to hasten the maturity of the shares."

The learned Judge then proceeded:—

On the 11th August, 1899, the present defendants were incorporated by 62 & 63 Vict. ch. 103(D.) By sec. 5 of that Act, "shareholders of the old company . . . are hereby declared to be holders respectively of shares in the fixed and permanent capital stock of the new company to the same extent and with the same amounts paid-up thereon as they are holders respectively of such shares in the old company. . . ."

[Reference to sec. 10 of the same Act.]

It is clear that if the plaintiff had or has any cause of action against the old company, not barred . . . the same can be enforced against the present defendants. . . .

As this case was presented to me, it is not necessary for the determination of it that I should say anything about the liability of the plaintiff to the defendants for any further payment on the $50 prepaid stock, but my opinion is, and I need not refrain from expressing it, that there is no such liability. . . . There is nothing to shew that the defendants intend to treat that stock as liable for any unpaid balance against the holders. If there are profits . . . they are not obliged to pay excess in cash to the holders of the stock in question, but may put that excess to the credit of those shares until the shares amount to $100 each, as mentioned. Neither the six per cent. dividends, if left to the credit of the shares, nor the profits, if any, put to the credit of these, carry any interest to the holders of these shares until $50 are added to each share. It so happens that . . . the sum of $36.43, over and above the $500 prepaid, was placed to the credit of these shares.

So far, I am dealing with the matter as it stood with the old company; but I may mention here that this amount of $36.43 was by these defendants transferred to the reserve fund. Up to the present time that can make no difference to the plaintiff, as she cannot get interest on the $36.43—no interest or dividend being payable on any amount in excess of $50 until that excess reaches the sum of $50 on each share. . . .

The plaintiff did understand all about the $50 prepayment, and that she was to get semi-annual dividends upon that, at the rate of six per cent. per annum, but she did not understand, as the company understood, what was meant by the sentence "This stock is entitled to receive in addition its proportionate share of the entire profits of the company." The plaintiff did not expect to pay any more in cash.

She could have allowed her dividends to remain, instead of taking the money, but she did not. She expected that profits would flow in so that she would soon have a dividend on $100 a share, instead of on $50. Her expectations were not realised; and the question is, simply, has she now, upon the evidence, any right to the account asked for? . . .

This stock may not be preference stock, as properly defined, but it is in reality preference stock as to dividend. If there are profits sufficient, the three per cent. semi-annual dividend upon it is assured and must be paid in preference to the other stock. To use the words of the company, "this dividend is to be deducted from profits earned," the balance of the earnings being credited to the stock. When the profits (net profits) shall be sufficient to permit of a dividend in excess of six per cent. per annum, she will get the increased dividend, not in money, but by a credit to these shares until the amount so credited will amount in all to $50 for each share. . . .

The defendants admit that the business carried on by the old company down to the 27th June, 1900, and then transferred to and subsequently carried on by the defendants, has produced gross earnings in excess of the dividend at the rate of six per cent. per annum from time to time declared and paid on the capital stock of the companies from time to time outstanding.

I am not able to agree with the plaintiff's interpretation of the contract. . . .

I am not able to find any promise, express or implied, on the part of the company, that the money paid in on these shares would be kept separate, and profits made on that money appropriated and credited to these shares; no company would undertake such a task.

Even if the old company had not been merged in the new—if it had continued to do business in its own name and under the old Act—the plaintiff, upon the facts disclosed, would not be entitled to have an account for the purpose mentioned. There being nothing in the contract to compel the company to set aside a part of the gross earnings, and put the same to the credit of the plaintiff's shares, the case is governed by Bain v. Ætna Life Insurance Co., 21 O.R. 233.

The old company carried on business down to the 27th June, 1900. On that day, all its assets were, with the consent of all its shareholders, including the plaintiff, conveyed and transferred to the defendants. By the Act incorporating the defendants, all the shareholders of the old company became shareholders in the defendant company. On the 3rd March, 1902, the directors of the defendant company passed a new by-law in regard to the stock of the company. This by-law was approved and confirmed by the shareholders at their meeting on the 5th March, 1902. A by-law was also passed and confirmed authorising the creation of a reserve fund. The by-law in regard to stock dealt with stock already issued and that to be issued—dividing it into two classes, permanent and terminating. Permanent was subdivided into: (1) fully paid shares of $100 each; (2) fully paid ordinary shares of $100 each; and (3) part paid ordinary shares of the par value of $100 each, issuable at $50 per share, payable in advance, the holders of which shall be entitled to receive in cash out of the net earnings of the company dividends as declared by the directors, not exceeding such rate per cent. per annum as may be named at the time of issue. "Holders of ordinary shares shall participate in such surplus profits of the company beyond the rate per cent. so named as may be deemed available for distribution by the directors. When the amount standing to the credit of any part paid ordinary shares, consisting of the amount paid thereon, exclusive of premiums, and the surplus profits apportioned thereto, together equal $100, such share shall rank thereafter as a fully paid ordinary share of the company."

In my opinion, this by-law places the plaintiff's stock in the defendant company exactly as it was and as it was intended to be in the old company. It makes clear what was obscure—and it was within the power of the defendants to pass it.

There was not, in my opinion, any such contract as the plaintiff alleges—either with the old company or the defendants. If any such with the old, it was broken by the new in passing the by-law of the 3rd March, 1902.

The matter of surplus profits available for distribution must be determined by the directors, in the honest administration of the affairs of defendant company. They must determine it having regard to expenses, to contingencies, to actual and possible losses, and to the necessity of keeping a reserve fund. It is not in dispute that the defendants have on hand real estate taken as security for loans, upon which there may be losses on realisation. No fraud nor improvidence is charged. The plain-

tiff for all the years since 1895 has received the directors' reports and statements, and notices of meetings of shareholders, and has made no complaint until this action.

From any point of view, this does not appear to me to a case in which an account should be ordered. This case was spoken of as a test case. It is one which interests all shareholders of the same class of stock as that held by the plaintiff; and, having regard to the want of clearness in the representations made to the plaintiff when she purchased, the dismissal of the action should be without costs.

KELLY, J. APRIL 15TH, 1913.

IRESON v. HOLT TIMBER CO.

Trespass—Floatable and Navigable Stream—Lumbering Operations—Riparian Owner—Injury to Lands—Chain Reserve—High Water Mark—Access to Water—Saw Logs Driving Act, R.S.O. 1897 *ch.* 43—*Unreasonable Obstruction of Stream—Timber Licensees Exceeding Statutory Rights—Status of Plaintiff—Special Damage—Encroachment on Plaintiff's Land—Location of Boundaries—Flooding of Lands—Trifling Value—Damages—Injunction—Removal of Logs—Amendment—Counterclaim—Damages by Reason of Interim Injunction.*

Action for damages for wrongful entry by the defendants upon the plaintiff's lands in the township of Burton, in the district of Parry Sound, and using the same without the consent or authority of the plaintiff; for an injunction restraining the defendants from further entering upon or in any way making use of the plaintiff's lands, or any part thereof, and from destroying or otherwise injuring trees and timber; for a mandatory order for the removal of a jack-ladder, engines, and hoisting apparatus; to recover possession of the plaintiff's lands occupied by the defendants; and for other relief.

The defendants were the holders of a license from the Province of Ontario for the year ending the 30th April, 1912, to cut timber on certain lands in the township of Mackenzie, upstream from the plaintiff's lands. It was in taking down their logs that they came upon the plaintiff's lands.

W. G. Thurston, K.C., for the plaintiff.
E. B. Ryckman, K.C., for the defendants.

KELLY, J. (after stating the facts at length) :—The plaintiff's chief causes of complaint are: (1) that the defendants' operations in the river were so conducted as to prevent his using it as he had a right to use it; and (2) that the defendants committed a trespass upon his property by erecting the jack-ladder wholly or in part thereon, and caused him damage by destroying and removing trees and by flooding a portion of his land.

Dealing with the first of these objections, the defendants have placed much reliance upon their contention that the plaintiff, by reason of the one-chain reserve along the shore of the river, is not a riparian proprietor, and so is not entitled to the privileges of such an owner. This contention is based upon the assumption that the reserve is to be measured from high water mark, and that, therefore, at times of low water, land would intervene between the shore side of the reserve and the edge of the water. Even were it conceded that the measurement of the chain reserve is to be made from high water mark (a position which, on the authorities, is untenable), it cannot be admitted, as contended by the defendants, that the line of these waters in the summer of 1912, when the defendants, for their own purposes, raised the water level several feet above normal, can be considered as the high water line: County of York v. Rolls, 27 A.R. 72; Angell on Watercourses, 7th ed., sec. 53, p. 50, note 1.

The further contention that the chain reserve itself cuts off the plaintiff's right of access to the water cannot prevail. A case much similar in this respect to the present is Metropolitan Board of Works v. McCarthy, 7 H.L.C. 243, reference to which will throw some light upon the effect of the conditions existing here.

Another element to be considered in solving the question of the defendants' liability is, whether they were within their rights in using the river as they did use it. They maintain that they have not exceeded the statutory rights of those engaged in a business such as they carry on. The Saw Logs Driving Act, R.S.O. 1897 ch. 43, relates to the duties of persons floating logs and their obligations to break jams and to clear the logs from the banks and shores of the water with reasonable despatch, and to run and drive them so as not unnecessarily to obstruct the flow or navigation of the waters.

It is unquestionable that the defendants did so obstruct the river as to render it extremely dangerous, and at times impos-

sible for it to be used by those having the right to navigate it; and, conceding the rights given by statute to float logs and use the water for that purpose, I am of opinion that the evidence establishes that the defendants exceeded their rights and unreasonably obstructed this river.

In reaching this conclusion, I have not disregarded the statement that permanent settlers and those residing in this region during the summer months are but few, and are located at considerable distances from each other. To these any interference with or improper use of the river, which would obstruct their passage over it, is a serious matter, especially as other means of transport are not readily available.

In the early tsages of the defendants' operations in 1912, and prior to the commencement of this action, discussion took place between the plaintiff and the defendants' representatives about modifying the conditions created by the defendants, so far as was necessary to enable the plaintiff to navigate the river safely and to pass through the booms with his boats. Though promises were given him, nothing was done that resulted in any improvement. . . .

It is also urged that the plaintiff did not suffer any special damage such as entitle him to maintain this action. My view is quite the contrary. He was deprived of the reasonable and proper means of using the river, as well as of reaching places where it was necessary for him to go. His own statement is, that for days at a time he and his family were practically prisoners on his property. He had such special interest and sustained such special damage as gave him an actionable right. . . .

[Hislop v. Township of McGillivray, 17 S.C.R. 479, at p. 489, referred to.]

Dealing now with the claim that the defendants have trespassed on the plaintiff's lands, removed trees therefrom, and built their jack-ladder thereon, not a little evidence was given tending to shew that the ladder does not encroach on the plaintiff's lands, and that it is situated entirely on the one-chain reserve. When the plaintiff became aware that the defendants were building the ladder, he notified their representatives that it did so encroach.

The raising of the waters by the defendants created an abnormal condition; a fact which to a considerable extent entered into the evidence on the question of the location of the plaintiff's property. . . .

I have with great care gone over the evidence of the various witnesses, and am convinced that the testimony on this point is in favour of the plaintiff. . . .

The exact superficial area of the lands encroached on by the jack-ladder, I do not determine, but it is at least 320 feet, and there is also the triangular piece to the east cut off from the plaintiff's other lands. Trees which had been on the site of the jack-ladder were removed by the defendants. What these were worth was not made clear; but I do not think, on the evidence generally, that their value was great.

Another result of the rising of the water was the flooding of a small portion of the plaintiff's lands west of the ladder, on which are growing trees.

Effect cannot be given to the defendants' contention that, if there is an encroachment or trespass on the plaintiff's lands, the value of this land is so small as not to be cognizable by the Court in a claim for damages. Authorities are not wanting to shew that, under such circumstances, the owner of the land is entitled to a right of action and to damages, even though nominal: Wright v. Turner, 10 Gr. 67; McGlone v. Smith, 22 L.R. (Ir.) 559.

The plaintiff claims damages for the wrongful entry and trespass on his lands, and an injunction restraining the defendants from further entry, and from destroying and injuring his trees and timber, and from storing logs in the river; and an order compelling them to remove the jack-ladder and its apparatus, an order to remove the booms or so arrange them as not to interfere with his use and enjoyment of the river, and to re-arrange the logs. He is entitled to this relief.

Damages for the trespass and entry and the trees cut and removed, I fix at $15.

Judgment will go accordingly, with costs of the action, including costs of and incidental to the granting of the injunction.

In his argument the plaintiff's counsel applied for leave to amend the claim by adding a claim for damages for the obstruction of the river. I grant this application, and allow the claim, with a reference to the Master in Ordinary to ascertain the amount of damages, if the plaintiff so desires; costs of the reference to be reserved until the Master shall have made his report.

With reference to the defendants' counterclaim for damages for being restrained by the injunction from the 16th August to the 20th August, when, on their application, the injunction was dissolved: in view of the conclusion I have arrived at, that

claim must be dismissed with costs. The plaintiff was entitled to the injunction, and the dissolving of it, in the circumstances under which the order for that purpose was made, does not conflict with that view.

I have taken occasion to refer to the learned Judge who made the order dissolving the injunction, and I have learned that he adopted that course, not because he believed that the plaintiff was not entitled to the injunction, but because he considered it convenient and desirable that the logs should be removed by means of the ladder (apparently then the most speedy means of disposing of them), even though it trespassed on the plaintiff's lands, rather than that they should remain untouched, and so continue to interfere with the use of the river and its branches.

During the trial, I became impressed with the belief—and a more deliberate consideration of the evidence confirms this—that, had the defendants been more heedful of the plaintiff's wishes, when in the early part of the summer he requested their representatives so to conduct their operations as not to deprive him of reasonable means of access to the water and of the right to navigate the river, an amicable working arrangement could easily have been arrived at. They acted, however, high-handedly, and without due regard for the inconvenience and hardships which their operations caused him, and thus brought about the dissatisfaction on his part which resulted in the present proceedings.

MASTER IN CHAMBERS. APRIL 17TH, 1913.

SWALE v. CANADIAN PACIFIC R.W. CO.

Third Parties—Order Giving Directions for Trial of Third Party Issue—Amendment—Leave to Third Parties to Appeal in Name of Defendants against Judgment in Favour of Plaintiff—Terms—Indemnity—Con. Rules 312, 640.

Motion by the third parties, Suckling & Co., to amend an order of the Master dated the 4th March, 1912, giving directions as to the trial of the third party issue.

M. L. Gordon, for the third parties.
Shirley Denison, K.C., for the defendant.
W. M. Hall, for the plaintiff.

THE MASTER:—In this case, after the decision reported in 25 O.L.R. 492, an order was issued, on the application of the defendants made on the 4th March, 1912, for directions as to the trial of the third party issue. This order, though dated on the 4th March, was not really issued on that day. The entry made in my book is, "Order to go in usual form when settled by parties." This was apparently not done until the 30th March, which is the date of entry and of admission of service on the solicitors of the plaintiff and the third parties.

The case came on for trial about a year later, and the judgment then given is to be found in 4 O.W.N. 884.

From this judgment the third parties launched an appeal, in the name of the defendants—who thereupon moved to quash the appeal, on the ground that the order of the 4th March, 1912, did not give any such right. The defendants' motion to quash was thereupon enlarged to allow the third parties to move before me to amend the order as to directions so as to conform to the order made in Deseronto Iron Co. v. Rathbun Co., 11 O.L.R. 433. In my understanding and use of this term, this is what was meant by "the usual form," it having been settled by Sir William Meredith, C.J., in that case.

The motion to amend my order was then made, under Con. Rule 640. But I hardly think that that Rule applies, upon the facts of this case. There was no "accidental slip or omission." What was done was done after a good deal of discussion and various attempts at settlement of the order, as is shewn by the lapse of over three weeks between the 4th and 30th March.

But, perhaps, a remedy can be given under the very wide language of Con. Rule 312 and the decisions on that Rule and the provisions of 36 Vict. ch. 8, where it originally appeared. I refer especially to the judgments of the Court of Appeal in Gilleland v. Wadsworth, 1 A.R. 82, and Peterkin v. MacFarlane, 4 A.R. at pp. 44 and 45. In both of those cases an appeal was allowed from the refusal of the trial Judge to allow an amendment. "To do otherwise would be to avow that a decision by which a party was finally bound was given, not according to the right and justice of the case, but according to what may have been an error or a slip:" per Patterson, J.A. I refer also to what I said in Muir v. Guinane, 10 O.L.R. 367, on a similar question. See, too, Yearly Practice, 1912 (Red Book), vol. 1, p. 352, and cases cited.

As the order of the 4th March, 1912, provided, in cl. 1, that "the third parties shall be bound by the result of the trial between the plaintiff and the applicants (defendants)," the

third parties desire leave to appeal, not only against the defendants' judgment as against them, but also to be allowed to shew, if they can, that the judgment in favour of the plaintiff is excessive.

It would seem contrary to natural justice that any party should be bound by a judgment without the right to appeal therefrom, unless he has expressly consented to do so.

Here there is no such consent, and it does seem that this is just a case in which Con. Rule 312 should be applied to allow the third parties to question the judgment by which they are bound.

This can be done on proper terms—which will be to give to the defendants proper indemnity, both as to the judgment and the costs which they have been ordered to pay to the plaintiff, and those which the third parties are to pay to the defendants, to be settled by one of the Registrars of the Court, or by myself, if the parties so desire.

The costs of this motion will be costs in the appeal to the plaintiff and defendants in any event.

MIDDLETON, J., IN CHAMBERS. APRIL 18TH, 1913.

REX EX REL. MARTIN v. JACQUES.

Municipal Corporations—Office of Water Commissioner—Windsor Waterworks—37 Vict. ch. 79, sec. 39—61 Vict. ch. 58, sec. 24—Disqualification of Commissioner—Municipal Act, 1903, sec. 80—Contract with School Board—Unseating of Water Commissioner upon Quo Warranto Application—Municipal Act, secs. 207, 215a, 233—Discretion—New Election—Claim to Seat by Unsuccessful Candidate at Election.

Appeals by both the relator and the respondent from the judgment of the Judge of the County Court of the County of Essex, unseating the respondent as a water commissioner for the City of Windsor and directing a new election.

F. D. Davis, for the relator.

Featherston Aylesworth, for the respondent.

MIDDLETON, J.:—It will be convenient to deal with the appeal of the respondent first. The Windsor waterworks is

governed by private Acts—37 Vict. ch. 79, 57 Vict. ch. 87, 61 Vict. ch. 58. By sec. 39 of the first-named Act, provision is made for the election of commissioners at the same time and in the same manner as the mayor and reeve; "and all the provisions and remedies by the Municipal Act at any time in force with respect to councillors shall apply, in all particulars not inconsistent with this Act, to the said commissioners, as to election, unseating, filling vacancies, grounds of disqualification, and otherwise."

By section 24 of the last-named Act, a commissioner who has been elected "may resign his office and shall cease to hold office for the same cause as by municipal law the seat of a member of the city council becomes vacant; and, in the case of a vacancy in the office of water commissioner, during the term of his office, the vacancy shall be filled in the same manner as provided by the Act in force respecting municipal institutions at the time of such vacancy, as to vacancies in the council of a city;" but, if the vacancy occurs by death or removal within six months from the expiration of the term of office, the council may appoint a successor.

The election of the respondent was attacked on two grounds: first, by reason of the fact that he had a contract with the Public School Board of the town for the erection of a schoolhouse; secondly, because, at the time of his nomination, he owed taxes to the municipality, and untruly made a declaration that there were no arrears of taxes against the lands in respect of which he qualified.

There is no doubt as to the facts. The contract existed; the taxes were in arrear; and a declaration was made as stated.

The Municipal Act does not lay down any general principle governing disqualification; and the case must be determined upon the letter of the law. Section 80 of the Municipal Act disqualifies any person having "an interest in any contract with or on behalf of the corporation, or having a contract for the supply of goods or materials to a controller for work for which the corporation pays or is liable directly or indirectly to pay." before the County Court Judge did not ask for this relief. I think the school board must be taken to contract on behalf of the corporation, within the meaning of the section. The words "for which the corporation pays or is liable directly or indirectly to pay" are not grammatically connected with the words which here apply, as they relate only to work done for contractors; but they indicate the meaning of the statute, and that a wide meaning should be attached to the words "a contract with or

on behalf of the corporation." The municipal council and the school board are two administrative bodies charged with the care of different departments of municipal affairs; but the school board is, after all, one of the governing bodies of the municipality.

This renders it unnecessary for me to consider the second alleged ground of disqualification.

The relator's appeal is based upon the contention that, under the law applicable to this matter, a new election should not have been ordered, but the candidate having the next largest number of votes should have been declared elected.

It would, perhaps, be sufficient to say that the application before the County Court Judge did not ask for this relief. I prefer, however, to deal with the matter upon the law. Section 215a provides that, in the case of a vacancy in the office of aldermen in a city, occasioned by death or resignation or by any cause, where the aldermen are elected by a general vote, the unsuccessful candidate who received the highest number of votes at the last municipal election shall be entitled to the office. It is argued that, although the aldermen in Windsor are elected by wards, the water commissioners are elected by general vote.

The learned Judge has taken the view that the section applies only to a city where aldermen are elected by a general vote, and has no application to the case in hand. I prefer to base my judgment upon the view that the section in question applies to a vacancy arising under sec. 207 of the Act, or for some cognate reason, and does not apply to a vacancy created by quo warranto proceedings, which is governed by sec. 233, giving a discretion to the Judge either to declare a claimant duly elected or to order a new election.

I agree with the result arrived at by the learned County Court Judge; and both appeals will be dismissed. As both fail, there will be no costs.

MIDDLETON, J. APRIL 18TH, 1913.

RE SMITH.

Will—Construction—Codicil—Substituted Legacy to Daughter—Annuity—Income—Corpus—Division of Estate—Decease of Daughter—Right of Daughter's Representative to Share of Corpus.

Motion for an order determining certain questions arising upon the construction of the will (and a codicil thereto) of Emma Josephine Smith, deceased.

R. J. McLaughlin, K.C., and S. S. Smith, for the executors.

E. D. Armour, K.C., D. C. Ross, and A. H. Beaton, for Elias Smith, Carl Smith, and Vernon Smith.

C. A. Moss, for Dale M. King.

MIDDLETON, J.:—The testatrix died on the 9th August, 1896, having made her will on the 19th October, 1889, and added a codicil on the 16th July, 1894. She left surviving her husband, three sons, and one daughter. The daughter was the youngest member of the family. At the time of the making of the will, she was about ten years old, and at the time of the codicil about fifteen.

The will itself presents no difficulty. It is a well-drawn document, prepared by a solicitor. The testatrix, after some minor gifts, divides her estate into two parts: the first covering property recently transferred to her by the trustees of the estate of the late Robert Charles Smith. A deed is produced dated the 6th August, 1889, which was very shortly before the date of the will, shewing that certain Port Hope property is what is so designated. This property is dealt with by clause 7 of the will. It is given to the husband, the executor, in trust, to receive the income for his own use during his life. After his death it is to be equally divided among the children, to be transferred to them after the death of the husband as they respectively attain age. The income—presumably after the husband's death—is to be used for the maintenance of any child under twenty-one. If any child dies before attaining age, leaving a child or children, such issue shall take the parent's share.

By clause 8, furniture, books, etc., are to be divided among the children.

By clause 9 the residue of the property of the testatrix is dealt with. This consisted of some Toronto property, of very

considerable value, and the investments of the testatrix. It is given to the trustee to be held till the youngest surviving child attains the age of twenty-one years. The income is to be a fund to provide for the maintenance of the minor children. If there is a surplus, the husband may retain what is necessary to make up his income, derivable from the first trust devise, to $600; and any residue then remaining is to go for the benefit of the child or children out of whose prospective shares the same may have arisen. When the youngest child attains the age of twenty-five, this second trust fund is to be then realised and the proceeds divided equally among the children and the issue of such of the children as may then be dead; a sufficient fund being set apart to maintain the income of the husband at $600.

The will also contains a provision authorising the husband to spend $150 per annum in continuing his life insurance.

The codicil appears to have been prepared by the testatrix herself, or by some one entirely unskilled in the preparation of legal documents. It is prefaced by the statement: "Not feeling satisfied with the provision made in my will for Bertha Hope Smith, my only daughter, I hereby add this codicil." This would lead one to expect that the codicil would confer an additional benefit upon the daughter. The testatrix proceeds: "I desire the sum of $600 to be paid to her out of my estate . . . until she attains the age of twenty-five years. If at that time she should be married, then for the remainder of her lifetime to pay her $400, unless the income realised through or by my property on division should yield more to each surviving child. Should such be the case, then I authorise such division to be made." The testatrix then proceeds: "Bertha having attained the age of twenty-five years as aforesaid, should Bertha remain unmarried then she is to be paid the sum of $600 a year . . . for the remainder of her life."

These provisions, I think, concern entirely the income derived from the estate, save that Bertha is to receive her $600 either from the income or from the corpus. The division referred to is a division of income and not a division of corpus. The estate of the testatrix, it is said, yielded by way of income about the sum necessary to pay the $600 to the husband, the $150 for life insurance, and the $600 to Bertha; $1,350 in all; so that the effect of this provision, unless the estate greatly increased in value, would be practically to tie up the whole estate during the lifetime of Bertha.

Bertha attained the age of twenty-five in the year 1905, and was then unmarried. She married on the 10th October, 1911,

and died on the 13th September, 1912. Her husband, Dale M. King, as her executor, is entitled to receive her share in the estate. No question arises as to arrears of income. The question which presents itself is the right of King, as the executor of Bertha, to a share of the corpus.

The difficulty is occasioned by the clauses of the codicil following the provisions dealing with Bertha's annuity. These are as follows: "Whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband and executor in my will, is to be equally divided between my surviving sons or their surviving child or children as provided in my will. This bequest to Bertha is to supersede all those made in my will, with the one exception of the provision made for J. D. Smith, my husband."

It appears to me that the result is plain. The whole will is abandoned except in so far as it provides for the husband. The annuity to Bertha is substituted for her quarter interest, and whatever remains after providing for the husband and providing for the daughter is to go to the surviving sons or their children "as provided in the will," which is referred to to explain this substantial gift, but for no other purpose.

The only thing that causes hesitation is the question suggested by the preamble to the codicil; but this cannot override the plain words used; and it may well be that the testatrix thought that she was making a more satisfactory provision for her daughter when she gave her an annuity, and made this a first charge upon her estate.

I cannot surmise why no provision is made for possible issue of the daughter, while careful provision was made for the issue of the sons. All I can say is that no such provision is found in the will; and it may be that the testatrix preferred that her estate should pass to her sons and their issue rather than by any possibility to a son-in-law whom she had never seen.

The costs of all parties may come out of the estate.

MIDDLETON, J. APRIL 18TH, 1913.

RE NORTHERN ONTARIO FIRE RELIEF FUND TRUSTS.

Trusts and Trustees—Relief Fund—Surplus in Hands of Committee of Subscribers—Disposition of—Erection of Hospitals—Terms and Safeguards.

Motion by the trustees of the fund for an order determining the disposition of a surplus remaining in their hands after payment of all claims in respect of the purposes for which the fund was primarily contributed.

A. C. McMaster, for the trustees.

H. E. Rose, K.C., for the Corporation of the Township of Tisdale, for the Dome Mines Limited, for the South Porcupine Board of Trade, and for the Corporation of the Township of Whitby.

S. A. Jones, K.C., for the Corporation of the Town of Cochrane, for the Cochrane Board of Trade, and for the Cochrane Hospital Board.

J. B. Holden, for the mine-owners at Porcupine.

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

MIDDLETON, J.:—In July, 1911, a disastrous forest fire took place in Northern Ontario, extending over the whole territory known as the Porcupine district and for many miles north, covering the Cochrane district. An appeal was made for contributions to relieve the sufferings thereby occasioned, and, in the result, $56,590 was received by the committee. After all proper claims had been met, there remains in the hands of the committee a balance of about $18,000.

The committee has devoted much time and energy to the consideration of the purpose to which this sum should be applied, and various resolutions have been from time to time passed, and much negotiation has taken place with those concerned, looking to the propounding of some satisfactory scheme. During the course of these negotiations, there has been some fluctuation of opinion on the part of the committee. In the result, no scheme satisfactory to all parties has been evolved, and the matter is placed before the Court, upon notice to those more particularly concerned; the trustees by their counsel desiring to take a position of neutrality.

Mr. Gourlay, one of the trustees, expressed his own view—possibly shared by his colleagues—that the fund ought to be distributed by allotting two-fifths in aid of an institution or

institutions in Porcupine; three-fifths in aid of an institution or institutions in Cochrane.

Upon the argument, all seemed agreed that the fund—having regard to the purposes for which it was contributed—could best be used by aiding in the establishment of a hospital or hospitals. This idea commended itself to the Attorney-General; and I think it may be taken for granted that this is the proper destination.

Upon the argument it appeared that at or near Porcupine different mine-owners had established hospitals in connection with their mines. They desire that the fund, or so much of it as may be diverted in that way, should be used to aid these hospitals. With this idea I do not at all agree. I do not think that the fund was contributed in ease of mine-owners who maintain hospitals in connection with their work.

As an alternative, the mine-owners suggested that the fund should be invested and the income applied in paying for the maintenance of indigent patients who might be cared for in these private hospitals. I do not think that this scheme would be satisfactory.

After reading the material and weighing as best I can the arguments presented, I think that justice would be more nearly done by directing the division of the fund between the two contending territories; the $1,000 as to which Porcupine sets up some particular claim to be regarded as part of its one-half share, and the material now at Cochrane to be turned over to Cochrane on account of its share, at the figure suggested by Mr. Gourlay, namely, $300.

I think that these funds should be used to establish a hospital at or near Cochrane and a hospital at or near Porcupine; the title of the hospitals to be vested either in a board of trustees or the municipality; but the funds should not be paid over until satisfactory provision is made by the respective municipalities for the furnishing of a free site and for adequate maintenance. The municipalities by their counsel offer this. This offer, however, should be implemented in some formal way to the satisfaction of the Attorney-General. These hospitals should be held upon a proper trust, securing the admission of the indigent and unfortunate upon reasonable terms. If counsel for the applicants, for the respective municipalities, and for the Attorney-General, cannot agree, then I may be spoken to upon the subject.

The costs may come out of the fund.

MIDDLETON, J. APRIL 18TH, 1913.

MYERS v. TORONTO R.W. CO.

Street Railways—Injury to Person Crossing Track—Car Travelling at High Speed—Proximate Cause of Injury—Negligence of Person Attempting to Cross—Evidence—Finding of Trial Judge—Costs.

Action for damages for injuries sustained by the plaintiff by being struck by a street car of the defendants, while she was attempting to cross Queen street, in the city of Toronto, on foot, by reason, as she alleged, of the negligence of the defendants' motorman.

The action was tried before MIDDLETON, J., without a jury.

W. E. Raney, K.C., for the plaintiff.

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

MIDDLETON, J.:—The plaintiff is a woman, fifty years of age, who maintains herself by her own exertions. On the 15th January, 1912, walking down Simcoe street, she was struck by a street car travelling east along Queen street. She was seriously injured, and, if entitled to recover, should receive a considerable sum.

The plaintiff's case was supported by the evidence of one Robert Sinclair, who said that he was a passenger on the car, and, intending to get off at University avenue, rose and went to the vestibule so that he could ascertain how near he was to the corner, as the windows of the car were frosted. On opening the vestibule door, the first thing that attracted his attention was this woman crossing the street. The car was then three hundred feet west of her. He said to the motorman, "You are going to hit that woman." The motorman responded, "Let her get out of the way;" and did not slow the car at all until after the woman was struck, nor did he sound the gong to warn her of his approach. The car was then travelling, according to this witness, at from 20 to 27 miles an hour.

If I could accept this evidence, there could be no doubt as to the result of the action. The motorman was not present at the trial. His evidence was afterwards taken by commission, the trial being adjourned for that purpose. He contradicts Sinclair. At the time the evidence was given, I found myself

unable to believe Sinclair. I cannot account for his giving the evidence he did, but it did not impress me as being a true story.

Other evidence was given, which I did not find of much assistance; and the case ultimately falls to be determined upon the plaintiff's own story. I am satisfied that the plaintiff gave her evidence with perfect honesty and fairness. At about half-past eight in the evening, she went down the east side of the street on her way home. The night was clear and very cold. There was little traffic upon the street, and the car in question was the only vehicle in sight. The plaintiff, at Simcoe street, saw the car, as she thought, west of Duncan street. She bases the latter part of this statement upon the fact that she could see the Duncan street lights; but these would be visible even if the car were east of Duncan street. She says she realised that the car was getting close, yet she thought it was far enough away to enable her to cross safely. Before she succeeded in getting across, the car had struck her. She did not hurry, because she thought the car was so far away that she would be safe. She did not look a second time, as she did not think that there was any occasion to do so. She did not hear the gong, and is sure that it was not rung. Just as she was almost clear of the car-track, she was struck and thrown to the south. She says, "If I had looked again I would not have been caught."

I think the plaintiff was guilty of negligence, and that her negligence was the proximate cause of the accident. When one ventures to cross in front of a moving car, rapidly approaching as this was, I think it is incumbent on the person to keep the car in sight, and not to trust blindly to the opinion formed on leaving the sidewalk that there is ample time to cross. If the plaintiff had exercised any kind of care, she could readily have escaped the disaster which overtook her.

I think it my duty to assess damages; and, in the event of the plaintiff being held entitled to recover, I assess them at $2,500.

As I understand the defendants not to ask for costs, the action will be dismissed without costs.

MIDDLETON, J., APRIL 18TH, 1913.

OLLMAN v. CITY OF HAMILTON.

Municipal Corporations—Liability for Flooding Land—Construction of Ditch—Natural Watercourse—Surface Water—Costs.

Action for damages for flooding the plaintiff's land, tried before MIDDLETON, J., without a jury, at Hamilton.

W. M. McClemont, for the plaintiff.
S. F. Washington, K.C., for the defendants.

MIDDLETON, J.:—Mrs. Ollman, the plaintiff, has a life estate in about five acres of land, in Hamilton, upon which she carries on business as a brick-maker. The property is bounded by Macklin street, King street, Paradise road, and Hunt street; the latter not being opened out; and, according to the plans, is crossed by Athol street and Dufferin street. A deep ravine extends across the north-west portion of the land and to the west.

In the summer of 1911, a building was erected in this ravine, almost immediately opposite Paradise road where it crosses the ravine. This building contained the machinery for the manufacture of bricks, a furnace-room, and drying-room; the furnace and tunnels to carry the heat to the drying-room being some seven or eight feet below the level of the soil at the bottom of the ravine: the floors of the machine-room and of the drying-room being on a level with the surface of the soil there.

In the spring of 1912, water from the thawing of the snow upon the plaintiff's own land and the unopened streets which she uses for her own purposes, together with some water from Macklin street and possibly from King street where these streets adjoin her property, flowed through a ditch upon the lands and was emitted upon Paradise road just about at the bank of the ravine, flowed down the slope of the road a short distance, and then re-entered the plaintiff's own land and flooded the buildings at the bottom of the ravine, doing considerable damage. It is for this that the action was brought.

Some five or six years ago, an endeavour was made to grade Paradise road where it crosses the ravine. The crests of the hills were cut down, and the earth therefrom was used to construct an embankment at the lowest place. No complaint is made of this; and any injury that was sustained from the con-

struction of the embankment would not have been the subject of arbitration.

On the western part of the southern portion of the plaintiff's land, the whole surface has been removed for the purpose of using the clay to make bricks. This has resulted in cutting down the top of the high land by about eight feet. The water from this land would naturally flow to the north, seeking the ravine; but a ditch has been constructed which intercepts this water before the ravine is reached. As the excavation of the clay progressed from time to time, this ditch was lowered; and it is now much below what is said to have been an original natural watercourse draining the water to the west.

When this ditch neared Paradise road—the water flowing in a westerly direction—a channel some years ago existed through a high bank on the plaintiff's land east of the road. The course of this channel has recently been changed—it is said because of some small cutting made to enable teams to drive up on to the plaintiff's land for the purpose of obtaining some earth to be used in repairing the road; and the water now passes through a channel three or four feet deep, cut through this bank where the teams passed, and is discharged on the surface of the road.

In the spring of 1912, this water had cut a channel across the road and was flowing into the ravine west of Paradise road. This water flowing across the road made the place most dangerous to passers-by; in fact, quite impassable. The city officials being notified, men were sent to the place. They had some suspicion that the water had been intentionally diverted across the road. This was denied by the sons of the plaintiff. It appears that part of the bank beside the road had fallen into the channel along the roadside where the water would otherwise have gone. All that was done by the city officials was to remove this obstructing earth, so that the water continued to flow, as it would otherwise have done, down the side of the roadbed, and to repair the roadbed. When opposite the building in question, the water made for itself a channel down the bank, and did the damage.

I fail to see that by removing this fallen earth and by filling in the channel cut across the road, the defendants were guilty of any misconduct. Since this occurrence, a box drain has been placed in the road. This conducts the water across the road, and the water flows into the ravine west of the embankment. This has prevented the occurrence of any further injury.

To me the case seems plain. The water in question was the

drainage of the plaintiff's own land, augmented by some slight flow of surface water from King and Macklin streets, confined in this ditch constructed by the plaintiff herself, and allowed by her to flow on to Paradise road. All that the defendants did in the spring of 1912 was to remove the earth that had fallen and to fill the excavation that had been made, so that the water which the plaintiff had thus brought on the road would flow in its natural course either down the road or back into the ravine on the plaintiff's land.

The action will be dismissed. Costs must follow the event if they are demanded. In view of the fact that the city officials might well have constructed the box drain in the first instance, and might well have made a ditch which would have carried the water beyond the building, the defendants will probably see their way clear not to exact costs.

There is on the record a counterclaim and a counterclaim to the counterclaim. No evidence was given as to these matters, and as to them there will be no order and no costs—and this will not prejudice the rights of either party as to these matters.

MIDDLETON, J. APRIL 18TH, 1913.

*GRIMSHAW v. CITY OF TORONTO.

Municipal Corporations — Expropriation of Land — Expropriation By-law — Registration — Repealing By-law — Injury to Land-owner — Suspended Building Operations — Delay in Issuing Permit—Collusion of Municipal Officers —Claim for Damages—Arbitration—Costs—Municipal Act, sec. 463(1)—Effect of Repealing By-law—Necessity for Reconveyance—Action—Stay of Proceedings—Terms.

Motion by the defendants for an order staying the action, upon the ground that the statement of claim disclosed no reasonable cause of action, or, in the alternative, for an order striking out certain paragraphs of the statement of claim, as embarrassing.

Irving S. Fairty, for the defendants.
A. J. Russell Snow, K.C., for the plaintiff.

*To be reported in the Ontario Law Reports.

MIDDLETON, J.:—The facts disclosed by the statement of claim are as follows. On the 24th June, 1912, the plaintiff was the owner of certain lands in the city of Toronto, and contemplated the erection of a factory thereon. He employed an architect to prepare the necessary plans and specifications, and submitted these plans to the City Architect, pursuant to the city by-law, for approval and the issue of a permit. Contemporaneously, the plaintiff advertised for tenders for construction.

It is said that the City Assessment Commissioner and the City Architect colluded to delay the issue of the permit, and that the Assessment Commissioner recommended to the Board of Works the purchase of the lands for park purposes. On the 24th June, the defendants passed a by-law for the purpose of acquiring the lands. This by-law was registered in the 28th June, and notice of its passing was given to the plaintiff. Subsequently, on the 8th July, 1912, there having been some formal defect in the original by-law, another similar by-law was passed, and the original by-law of the 24th June was repealed. The second by-law was registered on the 17th July.

On the 24th July, the plaintiff served a notice requiring the compensation for the lands to be determined by arbitration. The plaintiff took the initiative as to the arbitration, and obtained an appointment from the arbitrator for the 26th October, and took active steps to get ready for the arbitration. On the 21st October, five days before the appointment was returnable, the defendants passed a by-law repealing the July expropriation by-law; and registered the repealing by-law on the 29th October, 1912.

The plaintiff alleges that the registration of the expropriation by-law damnified him, as it prevented him from erecting the factory and completing negotiations for a loan that he had arranged, also from otherwise using the lands in question; and, further, that the result of the delay has been to increase the cost of his contemplated building by reason of advances in the price of lumber, material, and wages. In addition, he claims damages by reason of the delay in the issue of the permit, resulting, as he says, from the collusion of the civic officials. He also claims damages because the mortgage upon the land was in arrear, and the mortgagee took proceedings which would have been avoided had the plaintiff been able to carry through his contemplated loan.

The plaintiff contends that the registration of the by-law was improper, and that the three by-laws operate as a cloud on his title, and that the registration should be vacated.

On the question of registration I am unable to follow the

learned counsel for the plaintiff. Any instrument affecting land may be registered. "Instrument" is defined by the Registry Act, 10 Edw. VII., ch. 60, sec. 2, as including, among other things, a municipal by-law. Under an expropriation by-law, the municipality certainly acquire some right; and failure to register such a by-law would enable the owner of the land to convey to a bonâ fide purchaser pending the arbitration, and thus defraud the purchaser. I can see nothing to prevent the registration or to render it unlawful, nor can I see anything improper in the registration; while the failure to record the by-law would, in my opinion, be most objectionable, and likely to lead to serious complications.

I am told in this case by the plaintiff's counsel that the by-law did not authorise or profess to authorise any use to be made of the property before an award should be made; and the case was argued upon this assumption.

Under sec. 463(1) of the Municipal Act, an award under such an expropriation by-law shall not be binding on the corporation unless it is adopted by by-law within three months after the making of the award; and, if it is not so adopted, the original expropriation by-law shall be deemed to be repealed, and the property shall stand as if no such by-law had been passed; but the corporation shall pay the costs of the arbitration. This makes it clear that the original expropriation by-law is merely a tentative proceeding, leading up to the ascertaining of the price to be paid, and that it is entirely optional with the city to take the property or to allow the three months to elapse after which the by-law is automatically repealed.

This being the nature of the expropriation by-law, there is nothing to prevent the municipality from exercising its inherent right to repeal, without waiting for the completion of the arbitration and the lapse of the three months. The by-law created no vested interests, and did not operate to transfer the property so as to bring the case within any of the exceptions to the general right of repeal.

One cannot avoid seeing that the sterilizing of property which would otherwise be productive, and the interference with plans and schemes for improvement without any liability on the part of the municipality for damages, is a great injustice: an injustice that apparently has appealed to the Legislature, for, in the draft Act now under consideration the corporation is made liable not alone for costs but for damages. . . .

[Reference to In re McColl and City of Toronto, 21 A.R. 256.]

Then it is said that the expropriation by-law operated to vest

the property in the defendants, and that the repealing by-law would not operate to divest it, so that the plaintiff is entitled to demand in this action a reconveyance from the defendants.

Counsel for the defendants, upon the argument, expressed readiness to have any necessary reconveyance at once made, as the defendants do not desire to inflict any further injury upon the plaintiff. . . . .

[Reference to In re Prittie and Toronto, 19 A.R. 503, and Re Macpherson and City of Toronto, 26 O.R. 558.]

The right of entry arose immediately the by-law was passed; and, if the arbitration had proceeded, the result would follow that compensation should be assessed as of that date. . . .

The defendants ought to do everything necessary to remove any shadow of doubt or any possible difficulty that might be suggested even to an unreasonable mind; and, if the defendants are now ready to execute a reconveyance and to pay the costs incurred by the land-owner in the expropriation proceedings—which costs would, as I understand, be the full solicitor and client costs of the land-owner—and the costs of this action, I think the proceedings may be stayed; as I do not think an action will lie in respect to any of the other matters set forth in the statement of claim.

LENNOX, J., IN CHAMBERS. APRIL 19TH, 1913.

RE COLEMAN AND McCALLUM.

Municipal Corporations—Regulation of Erection of Buildings in City—Apartment House—Lodging House—Hotel—City By-laws—Municipal Act, 1903, *sec.* 541 *A—Amendment by* 2 *Geo. V. ch.* 40, *sec.* 10—*Mandamus for Approval of Plans —Conditions—Undertaking.*

Motion by Alfred B. Coleman for a mandamus requiring Robert McCallum, the City Architect, and the Corporation of the City of Toronto, respondents, to approve the plans and specifications submitted by the applicant for the erection of a building at the south-west corner of Sherbourne and Rachael streets, in the city of Toronto.

W. N. Ferguson, K.C., for the applicant.

Irving S. Fairty, for the respondents.

LENNOX, J.:—I think the applicant is entitled to a mandatory order, but not unconditionally.

On the 11th March, 1907, the respondents the Corporation of the City of Toronto passed by-law No. 4861, "A By-law for regulating the erection and to provide for the safety of buildings;" and, subject to certain amendments not material to this application, this by-law continued in full force until the 1st April instant. Under the head of "Definition of Terms," it was enacted by sec. 14: "The following terms of this by-law shall have the meaning assigned to them respectively. . . . "*Apartment or tenement house* (32), a building which, or any portion of which, is or is intended to be occupied as a dwelling by three or more families living independent of one another and doing their cooking upon the premises." . . . "*Lodging House* (34), a building in which persons are accommodated with sleeping apartments, including hotels and apartment houses, where cooking is not done in the several apartments." The punctuation perhaps obscures the meaning a little, but at all events it is plain that, for the purpose of "regulating the erection . . . of buildings" in the city of Toronto, suites or groups of apartments are divided into two classes, namely: (a) suites in which the occupants do their own cooking—the building containing these is an apartment or tenement house; and (b) suites in which the occupants do not do their own cooking—the building containing these is a lodging house.

Having thus eliminated from "apartment house" a class of building which might otherwise have been called—which, I think, would otherwise have been called—an apartment house, sec. 42 proceeds to provide for a special method of construction to prevent the spread of fire in all apartment houses which are not fire-proof, and to offset the additional risk incident to the multitude of kitchens permitted in this class of building—precautions which are not enacted and which are obviously not so necessary in the case of a lodging house. This was the building law in Toronto when the Legislature in 1912 amended sec. 541A of the Consolidated Municipal Act of 1903, as enacted by sec. 19 of the Municipal Amendment Act of 1904, by adding after clause (b) the following clauses:—

"(c) In cities having a population of not less than 100,000, to prohibit, regulate, and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

"(d) For the purposes of this section, an apartment house shall mean a building proposed to be erected or altered for the

purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons:" 2 Geo. V. ch. 40, sec. 10.

Subsequently, on the 13th May, 1912, and without repealing or amending the definitions of "apartment or tenement house" and "lodging house" above set out, and with by-law 4861 still in force "for regulating the erection of buildings" in this city, the respondents the Corporation of the City of Toronto passed No. 6061, "A by-law to prohibit the erection of apartment or tenement houses, and of garages to be used for hire or gain, on certain streets," and, by clause 1, prohibited, as the council had power to do, the erection of any apartment or tenement house upon property fronting upon Rachael, Sherbourne, and other streets.

With this provincial law and the by-laws referred to in force, the applicant, in the month of March last, filed plans and specifications and applied to the city council for permission to erect what he calls a "Temperance Hotel" upon the property fronting upon Rachael and Sherbourne streets. There have been several alterations in the plans. Coleman originally intended and the application was launched for permission to erect a building in which cooking would be done in the several suites—clearly an apartment or tenement house as defined by by-law 4861; a class of building prohibited upon these streets by by-law No. 6061. The plans as now on file shew only provision for one kitchen and dining-room in the building, and the applicant swears that, finding that his first application was contrary to by-law 6061, "I decided to erect and conduct on the said premises an hotel conducted as an ordinary licensed hotel is conducted, excepting that I have no license for the sale of liquor and do not intend to apply for the same. 3. Following out my changed scheme, I had the plans altered so as to cut out all the separate kitchens, sinks, etc., and provided on one floor reading-rooms, dining-rooms, lavatories, baths, wash-house, catering department, and servants' quarters and lavatories, similar to that provided for in the ordinary licensed hotel, and it is my intention, and the plan of my building is drawn for use in this manner only, that none of the guests at my hotel shall be allowed to wash in my rooms or to cook in my rooms, and that the work of their rooms shall be done by my servants, and the light shall be furnished by me, and heat shall be furnished by me, and the meals shall be furnished by me in the general dining-room, and in general the whole building shall be under my control and supervision."

As shewn by . . . affidavit, in the end, as at the beginning, the permit was refused, upon the ground that the erection of the proposed building "would constitute a contravention of by-law No. 6061." Upon the argument it was mentioned, but only as affecting the size of the bed-rooms, that a new by-law was passed on the 1st April instant. I have obtained a copy of this by-law, 6401. It, too, is "a by-law for regulating the erection and to provide for the safety of buildings," and it repeals No. 4861. Passed at a time when this motion was standing for argument, it may be that the respondents are not entitled to rely upon it; but, as there were several stages in the applicant's proceedings, I have decided to take this by-law into consideration in arriving at a conclusion.

The only points to be noted are: (1) for "apartment or tenement house" this by-law adopts the definition contained in 2 Geo. V. ch. 40, sec. 10, above quoted. Under this definition, if the council had chosen to leave the matter there, the narrowing effect of the definitions in the old by-law would have been avoided; and, by a re-enactment of prohibitory by-law 6061, the probable object of the council might have been accomplished. (2) But, instead of this, this repealing by-law re-enacts, word for word, the definition of the former by-law as to what constitutes a lodging house, and thus again excludes from "apartment or tenement house" any building of the apartment house class in which cooking is not done or provided for in the several apartments. (3) Under the new by-law, bed-rooms shall have a floor area of at least one hundred square feet, in hotels, apartment, tenement, and lodging houses. And (4) section 42, for special safeguards against fire in apartment houses, is re-enacted.

After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a "Temperance Hotel." Hotels, of course, are not prohibited. I prefer, however, not to rest my decision wholly or mainly upon this view of the question.

Take it, however, that it is not an hotel, is the applicant entitled to be permitted to erect the proposed building upon the proposed site? I am of opinion that he is. The refusal, as I have stated, was based upon by-law No. 6061, but the question cannot be determined by this by-law alone. It prohibits the erection of an "apartment or tenement house" upon the site in question. When it was passed, building by-law No. 4861 was in force, and this latter defined and constituted an apartment house where separate cooking is not done, as I have already

quoted, "a lodging house." The proposed building, as now shewn by the plans and specifications and described in the affidavits, is a lodging house within the meaning of this definition. That it is called an hotel is immaterial, as an hotel, by the same definition, is also a lodging house. It is manifest, then, that by-law 6061 prohibited apartment and tenement houses as defined under this caption in the building by-law, only, and not those designated lodging houses in the same building by-law.

It was argued that you must adopt the unlimited description of the statute of 1912, but this contention is based on a misconception of the function of the statute. The statute is not intended to prohibit anything. It gives the power to prohibit, and limits its extent. Within that limit the council can act, short of that limit they may stop—as they did here. Beyond that limit they cannot go. To adopt the full measure of the statutory definition, or rather limitation, the council had only to repeal the definitions quoted; and, failing to do this, these definitions govern.

Is the situation altered by the new by-law? I cannot see that it is, and I have already indicated the reason, namely, that it re-enacts the former definition of a lodging house. A lodging house, as defined under the former by-law, was not prohibited by No. 6061. A lodging house under the new by-law is just what it was under the old, and is nowhere prohibited.

The wisdom or unwisdom, or the fairness or unfairness, of the powers conferred by the Legislature, or the exercise of these powers by the council, are not matters for me to deal with, but statutes, and a fortiori by-laws, purporting to control or take away rights ordinarily incident to ownership, quasi-expropriation without payment, confiscation as it is often called, must be construed strictly, and the meaning must not be left in doubt—they must be definite and certain to all intents.

On the other hand, having regard to the easy stages by which the applicant has developed his present proposals, there should be some guarantee of the good faith of the applicant, and that not only will a building be erected of the character now indicated but that afterwards it will be used for the purposes and in the manner declared.

Therefore, upon the applicant amending the plans on file so as to provide that each of the bed-rooms shall have a clear floor area of 100 square feet at least, and upon his undertaking by his counsel that the building in question shall not at any time, without the consent of the municipality or the Court, be diverted from the uses and purposes or be occupied or used in a manner inconsistent with the uses and purposes now declared by the

applicant, and that, in the event of the sale of the property, due notice of this undertaking and of the order now to be made shall be given to the purchaser, and he will be required, in and by the conveyance to him, to bind himself and his heirs and assigns to observe and abide by the conditions above set out and such order as the Court may make, and the applicant, for himself and his heirs and representatives in estate, undertaking to abide by such order or judgment as the Court may make or pronounce touching the matters hereby provided for, an order of peremptory mandamus, reciting or embodying the foregoing conditions and undertaking, will issue to the purport and effect in the notice of motion claimed.

There will be no costs.

KELLY, J. APRIL 19TH, 1913.

UNITED NICKEL COPPER CO. v. DOMINION NICKEL COPPER CO.

Contract—Mining Agreement—Right of Entry—Agreement not Executed by all the Joint Owners—Rescission of Agreement—Finding of Fact—Interim Injunction—Damages by Reason of—Counterclaim—Reference—Costs.

Action by the United Nickel Copper Company Limited and S. G. Wightman for an injunction restraining the defendants, the Dominion Nickel Copper Company Limited, from operating or trespassing upon certain lands referred to in a certain agreement, and from allowing their plant, machinery, and chattels to remain on the lands, and for damages for trespass.

J. T. White, for the plaintiffs.

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

KELLY, J.:—The agreement, which bears date the 28th January, 1911 . . . purports to have been made between B. Howard Coffin and his associates, of the one part, and the plaintiff Wightman, of the other part.

Coffin and five associates were the owners of these lands; the agreement was signed by Coffin and three of his associates; the others, Eastbrooke and Hetzel, did not sign it; Eastbrooke at that time was out of the country; Hetzel refused to enter into the agreement.

I do not consider it necessary to set out in detail all the facts, but the evidence establishes the following. The agreement was intended to grant to Wightman a right of entry upon the property, which was known as "the Mount Nickel Mine," in the Sudbury district, "for the purpose of operating the same in such manner and by such methods, together with the right to mine and use the ore therefrom and in such quantities as the party of the second part" (Wightman) "may elect." Wightman was to begin operations within twelve months from the date of the agreement, and was to pay quarterly to Coffin and his associates $2 per ton for the ore mined until payment should be made, thereout and out of the proceeds of the sale of certain stock of the Nickel Alloys Company, of the sum of $80,000. Wightman was also to pay to the other parties to the agreement $5,000 out of each $50,000 of stock of the Nickel Alloys Company sold. Coffin and his associates who made the agreement agreed that the deeds of the property should "remain in escrow to be released" to Wightman as soon as he should have completed the payment of the $80,000. It was also provided that "the party of the second part, as a part of his duties herein, in order to hold the parties of the first part, agrees to have the said Nickel Alloys Company legally bind itself to the party of the first part to have all the duties of the party of the second part herein fully performed."

At the trial it was admitted that the defendants went upon the property prior to the commencement of the action, under a right which they claim to have acquired by written agreement from Coffin and his associates; and, while admitting this to be so, the plaintiffs' counsel did not admit that this latter agreement (which was not produced at the trial) had any effect.

The plaintiffs set up that on the 14th February, 1911, Wightman agreed to transfer to his co-plaintiffs his title and interest to and in these lands, and that on the 14th February, 1912, he executed to them an assignment of his agreement of the 28th January, 1911. They also allege that they thus acquired the exclusive right to the property and to mine upon it.

I have grave doubts as to the agreement being sufficient in form to give Wightman such exclusive right; but, even if it had such effect, another circumstance in connection with it is fatal to the plaintiffs' claim.

The agreement was clearly intended to be made by all the persons who were owners of the property at that time, namely, Coffin and his five associates; four only entered into the agreement, the other two, for the reasons stated above, not having

executed it; and it is not shewn that it was ever brought to Eastbrooke's attention. On this ground, I am of opinion that the owners of the property were not bound. In Halsbury's Laws of England, vol. 7, p. 336, it is laid down that "where a promise is intended to be made by several persons jointly, if any of such persons fail to execute the agreement, there is no contract, and no liability is incurred by those who have executed the agreement." In making this summary of the law, the author refers to a number of leading cases on the subject (some of which on the argument were cited by counsel for the defendants); but, apart from this, I find the further fact that, even if the agreement had been binding, it was put an end to in February, 1912.

Up to that time, Wightman had not paid anything to Coffin or his associates out of the proceeds of the mining operations, nor in respect of the sale of stock in the Nickel Alloys Company, though he had in the meantime sold a considerable amount of that stock; nor had he procured from the Nickel Alloys Company anything to bind that company for the performance of his obligations as contemplated by the agreement.

This was the state of affairs about the end of January and the beginning of February, 1912, when Coffin and his associates, Flint, Parsons, and Riley, who had signed the agreement, complained of Wightman's default and declared their intention of repudiating the agreement and considering it at an end.

Wightman, with one Gilder, who was associated with him, met Coffin and his three associates mentioned above, in Boston; and, on the evidence of what took place at that meeting, I find that they then agreed to the cancellation and rescission of the agreement. Wightman was evidently moved to this course by his failure to carry out several important and essential terms of the agreement.

Following this rescission and on the same day, negotiations were opened up by Wightman or on his behalf with these other parties with the object of making a new agreement, and he then made a proposal which was to be taken into consideration by them.

Wightman and Gilder then returned to New York, but before the other parties had sent a formal reply to the proposition for a new agreement, the Nickel Alloys Company—through its secretary—forwarded to them a copy of a resolution of that company passed on the 14th February 1912, purporting to

ratify the contract of the 28th January, 1911, which it declared had been accepted on the 14th February, 1911, by the stockholders of the plaintiff company. What right that company had to accept at that time is not made clear. In view of the fact that the written assignment by Wightman to his co-plaintiffs, which was produced at the trial, bears date the 14th February, 1912 (not 1911), I cannot see that the plaintiff company had any status in the matter on the 14th February, 1911. One witness, it is true, stated that this was an error for the 14th February, 1911. I have doubts of that being the fact.

On the 15th February, 1912, Coffin wrote Wightman expressing surprise at the action taken, in view of what was understood and agreed upon at the meeting held on the 12th, and repeating the understanding arrived at at that meeting. No reply or communication of any kind came from the plaintiffs afterwards.

This seems to have been the end of the negotiations. On the 14th April, Coffin wrote for himself and his associates to Wightman requesting him to discontinue all operations on the property, as nothing further had been heard from him with reference to any new negotiations, and as no business relations existed between them.

I am satisfied that there was a rescission of the agreement of the 28th January, 1911 (if any such existed) at the meeting of the 12th February, 1912. So far as the evidence shews, no further action was taken by the plaintiffs by way of operating the property down to the commencement of this action. Their conduct indicated that they treated the agreement as at an end. I see no grounds on which they can establish a claim to an injunction or damages, and the action must be dismissed with costs.

The defendants had entered upon the property in November, 1912. On the 22nd of that month, the plaintiffs obtained an interim injunction restraining the defendants from operating or trespassing upon the property, and on the return of the motion to continue the injunction it was dissolved, on the 17th September. The defendants having counterclaimed for damages for being prevented by the interim injunction from carrying on their mining operations, this counterclaim is allowed with costs. Evidence of the amount of damage was not gone into at the trial; and, if the defendants think it of sufficient importance to pursue this claim, there will be a reference to the Master in Ordinary to ascertain the amount. Costs of the reference are reserved until after the Master's report.

RICHARDSON v. ALLEN—MASTER IN CHAMBERS—APRIL 14.

Writ of Summons—Order for Service out of Jurisdiction—Writ not Conforming to Order—Irregularity—Waiver—Entry of Conditional Appearance—Con. Rule 162(h)—Proof of Assets within Jurisdiction.]—On the 21st February, the plaintiff obtained an order for service of a writ of summons on the defendant in Alberta. This was granted on his affidavit alleging that the case came within Con. Rule 162(h). The time for appearance was 15 days. The writ as issued did not conform to the order, but included the plaintiff's statement of claim, and directed not only appearance but delivery of statement of defence within the 15 days. Service was apparently effected, as, on the 17th March, the defendant's solicitor obtained an ex parte order allowing the entry of a conditional appearance, and extending the time for delivery of the statement of defence for a week from the date of the order. On the 18th March, an appearance was entered for the defendant, "without prejudice to his right to dispute the jurisdiction of the Court herein." In consequence of the illness of the defendant's solicitor, the time for defence was enlarged further by the plaintiff's solicitor. On the 7th April, the defendant served notice of a motion to set aside the order of the 21st February and all proceedings thereunder, as irregular, and this motion came before the Master in Chambers. The motion was supported by an affidavit which referred to the irregularity of the writ not conforming to the order, and also to the fact of a writ for service within the Province having been issued on the 12th December, and being still in force; and it also said that the order for service under Con. Rule 162 should "specify a claim in the said writ." It was also contended that under clause (h) proof should be given of assets of the defendant within the jurisdiction. The Master said that the service of the writ was irregular: Kemerer v. Watterson, 20 O.L.R. 451. The last ground was dealt with in that case also. The practice had always been to grant the order under clause (h), if the plaintiff alleged the possession of assets. If that was denied, the question might be considered; but usually it was disposed of as was done in the Kemerer case. The possession of assets in the Province was not denied. But, whatever might have been the result if the defendant had filed a denial of assets, and moved before appearance, the obtaining of an order for conditional appearance and enlarging time for delivery of the statement of defence effectually precluded him

from making the present motion. No doubt, there would have been no difficulty in having the time for appearance enlarged pending a motion to set aside the proceedings. What had been done gave the defendant all that could be obtained even if the present motion was successful. The conditional apparance would enable him to defeat the action (as to any part, at least, that did not come under clause (e) of Con. Rule 162, if such there were), on the plaintiff failing to shew assets as alleged. Any irregularity was waived by the appearance. Motion dismissed with costs to the plaintiff in the cause. Grayson Smith, for the defendant. W. H. McFadden, K.C., for the plaintiff.

SAUERMANN v. E.M.F. CO.—MIDDLETON, J.—APRIL 14.

Settlement of Action—Interpretation of Written Memorandum—Enforcement—Repair of Vehicle Sold in Unsatisfactory Condition—Time for Making Repairs—Return of Moneys Paid.] —The plaintiff bought an automobile from the defendants; it was not satisfactory; and on the 11th October, 1911, she began an action for damages, alleging that the vehicle was worthless. That action came on for trial; and, after evidence had been given, the parties made a settlement, embodied in a written memorandum, signed by counsel. The present action—to enforce the settlement—was brought on the 27th January, 1913. By the settlement, the car was to be put in order by the defendants, to the satisfaction of one Russell. If Russell pronounced the car in a satisfactory condition, it was to be delivered to the plaintiff in settlement. If Russell pronounced the car unsatisfactory, the defendants were to repay to the plaintiff the sum originally paid by her. The defendants were to have the car ready for inspection by Russell within one month after delivery to them by the plaintiff. The defendants repaired the car, and Russell inspected it on the 17th August, 1912. He reported that the car was in a satisfactory condition with the exception of certain items; and in regard to these he requested the defendants to put the car into shape for a later inspection. On the 30th October, 1912, Russell again inspected the car, and found that, while the specific defects had been remedied, the engine was not in a satisfactory condition. He suggested that a new engine be substituted; this was done, and on the 1st November he again inspected and reported that the car was in complete repair to his satisfaction. MIDDLETON, J., said that the plaintiff must recover. When the settlement was made, the

intention was that, within thirty days, the defendants were to place the car in a condition satisfactory to Russell on his inspection. The car was found to be in an unsatisfactory condition, and the right to receive the money back then arose. Russell had not the right to allow further experiments to be made upon the car, nor was any such right given by the agreement. Thereafter, the whole engine was changed, and another substituted. This was not what was contemplated. The car that was purchased was the car referred to; that car was to be repaired; and the settlement could not be read as warranting the substitution of another engine after six months' abortive attempts to bring the car into a condition in which it would work. Judgment for the return of the amount paid, with interest from the 19th August, 1912, and costs. The amount to be settled by the Registrar or agreed upon. G. Lynch-Staunton, K.C., and J. L. Counsell, for the plaintiff. M. K. Cowan, K.C., for the defendants.

TRUESDELL v. HOLDEN—TRUESDELL v. HOLDEN—HOLDEN v. COLLINGWOOD SHIPBUILDING CO.—MIDDLETON, J.—APRIL 14.

Malicious Prosecution—Reasonable and Probable Cause—Jury—Right of Owner of Property to Resort to Criminal Law for its Recovery—Damages—Mortgagee of Boat—Illegal Seizure—Deprivation of Use—Conversion—Bailment—Recovery of Damages—Relief from Liability.]—The first action was for malicious prosecution; the second, for illegal seizure of a gasoline launch; the third, for conversion of the launch. The first action was tried with a jury, the other two without a jury. The actions were tried separately, but there were many facts in common. The malicious prosecution arose out of a charge laid by Holden against Truesdell of stealing the launch. Truesdell was acquitted. Truesdell had built the launch, and Holden was the mortgagee. In the action for malicious prosecution, the jury found a general verdict for Truesdell, and also answered questions which were left to them. The learned Judge said that, in view of the facts as found, and doing his best with the matters not in controversy, he thought there was reasonable and probable cause for the institution of the prosecution against Truesdell. He had agreed with the mortgagee not to remove the boat, but had taken it out in violation of his agreement, and

was about to remove it again. He had forbidden the mortgagee to remain upon the boat. He intended to use the boat without insurance, notwithstanding his agreement to insure. The refusal of the insurance company to carry the risk, and the experience that Holden had had with Truesdell, abundantly justified him in feeling "unsafe and insecure," within the meaning of the mortgage. Even if Holden had taken possession in violation of the understanding that he was not to seize, this would not justify Truesdell in his conduct. Not only was there reasonable and probable cause for the institution of a prosecution, but the failure of that prosecution reflected no credit upon the administration of justice in Collingwood. The suggestion that Holden acted improperly because "he desired to obtain the boat or his money" seemed quite untenable. The owner of property is entitled to resort to the criminal law for its recovery; and his desire to recover his property does not deprive him of protection if the circumstances justify the prosecution. In that view, the action failed; and the result was the less regrettable because the assessment of damages at $500 was, in the circumstances, absurd. Truesdell was in custody for about seven hours only before he secured his liberation; his conduct was not free from blame; and, in allowing as large a sum as they did, the jury must have been actuated by some improper motive. Action dismissed with costs.—In the second action—for damages for being deprived of the use of the boat for five days—Truesdell entirely failed. Holden had a right to possession. If Truesdell was entitled to recover at all, his damages should be assessed at $30. Besides this, at his own instance, the boat was held in the custody of the police for most of the time which elapsed from the time Holden took possession until Truesdell again stole the boat. This action was also dismissed with costs.—As to the third action, the shipbuilding company, the defendant, found itself in possession of the boat as bailee of Holden, and should have returned the boat to him. It was negligence on the part of the company to place the boat in the water and leave it unguarded and in a position from which it might readily be removed; and for this negligence the company must answer to Holden. Judgment for Holden against the company for the damages sustained by him; to be limited by the value of the boat or by the amount due upon the mortgage, whichever may be least. Upon payment, Holden to assign his mortgage to the company; and if, within two weeks, the company offers to restore the boat to Holden's possession, the company to be relieved from liability. Stay for twenty days

to allow an application for relief to be made. If this is not done, and if the parties cannot agree as to the amount for which judgment should be entered, there will be a reference. J. Birnie, K.C., for Truesdell. A. E. H. Creswicke, K.C., for Holden. R. E. Fair, for the Collingwood Shipbuilding Company.

McPherson v. United States Fidelity Co.—Master in Chambers—April 15.

Summary Judgment—Con. Rule 603—Action on Security Bond—Suggested Defences—Unconditional Leave to Defend.] —Motion by the plaintiff for summary judgment, under Con. Rule 603, in an action upon a bond given as security in interpleader proceedings. Two main defences were suggested: first, that the ground of the plaintiff's claim was destroyed by certain dealings of his with the matter out of which all the subsequent proceedings arose; second, that the plaintiff was not entitled, upon the true construction of the final judgment in the interpleader proceedings, to recover the full amount of the bond, but at most less than one-half, and that in any case the amount due had not been ascertained by legal direction. The Master said that the decisions under Con. Rule 603 rather restricted than enlarged its application. He referred to his own decision in Smyth v. Bandel, ante 425, 498, affirmed by Middleton, J., on the 20th December, 1912, and the cases therein cited; Codd v. Delap, 92 L.T.R. 510; Jacobs v. Beaver, 17 O.L.R. 496, 501; and said that the Rule could not be applied if a possible defence was alleged. Motion dismissed; costs in the cause. W. Laidlaw, K.C., for the plaintiff. G. H. Kilmer, K.C., for the defendants.

Trowbridge v. Home Furniture and Carpet Co.—Master in Chambers—April 17.

Security for Costs—Plaintiff Ordinarily Resident out of Jurisdiction — Assets in Jurisdiction — Admitted Money Claim against Defendants — Counterclaim or Set-off.] — After the Master's decision in this case, ante 910, the plaintiff cross-examined the president of the defendants upon his affidavit; and the defendants' motion for security for costs was further argued.

The president admitted that the plaintiff's share of the profits to which he was prima facie entitled was "approximately $2,500, according to the agreement;" but also said that the defendants had a counterclaim to the amount of $3,508. The Master said that the counterclaim could not be considered to offset the $2,500 admittedly due; as to the defendants' counterclaim or set-off, they were really quasi-plaintiffs. Motion dismissed; costs in the cause. H. S. White, for the defendants. J. F. Boland, for the plaintiff.

ST. CLAIR v. STAIR—MASTER IN CHAMBERS—APRIL 18.

Pleading—Statement of Claim—Libel and Conspiracy—Irrelevant Allegations—Striking out—Costs.]—The facts of this case appear in notes of previous decisions, ante 645, 731. The action was for libel and conspiracy to destroy the moral character and reputation of the plaintiff. In the 3rd paragraph of the statement of claim the plaintiff alleged: "For a number of years the defendant Stair has permitted indecent and immoral performances to be given at his theatre, and by reason of the public and evil reputation which the said theatre has acquired, and in pursuance of the objects of the committee"—that is, a vigilance committee of citizens, of which the plaintiff was a member—"the plaintiff visited the said theatre;" and in paragraph 4 it was alleged that on that occasion the plaintiff witnessed an indecent, immoral, and obscene performance. The defendant Stair moved to strike out the first part of paragraph 3, down to and including the words "acquired and" as being scandalous, embarrassing, and irrelevant. The Master said that the motion was entitled to prevail, as it could not be seriously contended that the matters alleged in the part of the paragraph complained of could be given in evidence at the trial. Any justification of the report of the plaintiff as to what actually occurred at the defendant Stair's theatre could be given under the allegation in the 4th paragraph of what the plaintiff himself witnessed. What occurred on other occasions did not come in question. The general character of the theatre or of any other performance than the one at which the plaintiff was present could not be inquired into in this action. The 4th and subsequent paragraphs of the statement of claim sufficiently alleged and explained the wrongful acts of the defendants for which the plaintiff sought redress, and offered a sufficiently wide field for

discussion and inquiry at the trial before a jury, without going behind the time of the plaintiff's visit to the theatre, and alleging matters of an earlier date with which this action had no connection, and which might prejudice the jury against the defendants if allowed to remain in the pleadings and be read to them at the opening of the case by the plaintiff's counsel. See Flynn v. Industrial Exhibition Association of Toronto, 6 O.L.R. 635; Loughead v. Collingwood Shipbuilding Co., 16 O.L.R. 64, at p. 65; Gloster v. Toronto Electric Light Co., 4 O.W.R. 532. Costs of the motion to the defendant in any event. E. E. Wallace, for the defendant Stair. E. F. Raney, for the plaintiff.

NORTH AMERICAN EXPLORATION CO. v. GREEN—MASTER IN CHAMBERS—APRIL 19.

Discovery—Examination of Officers of Plaintiff Company—Production of Books—Affidavit on Production—Practice.]—Motion by the defendant for a better affidavit on production and for examination of another officer of the plaintiff company for discovery. The action was brought to have it declared that certain land bought by the defendant was acquired by him only as a trustee for the plaintiff company, of which he was an officer, and for an account, etc. The Master said that the motion for a better affidavit was premature. No ground had yet been laid for that. See Ramsay v. Toronto R.W. Co., ante 420. As to the other branch of the motion, the examination of one officer of the plaintiff company was still pending, it having been adjourned to allow of this motion to be made to get production of the books, etc., of the plaintiff company, which were relevant to the action. The examination shewed that the purchase of the land which gave rise to this action was discussed at meetings of the directors. The examination was vague and indefinite and difficult to understand. It appeared that Mr. Ivens, the president of the plaintiff company, was in communication with the defendant about the matter in question in the action; it was he who gave instructions for the bringing of this action. The officer under examination, on being asked to produce the documents called for by the notice, said that they were not in his possession, but that they could be got from Ivens. The best course seemed to be to close the pending examination, and allow the defendant to examine Ivens and require him to produce the

documents and books of the company. The company being a limited one, the examinations were for discovery only, and that should be freely given. Costs of the motion to be costs in the cause. J. M. Ferguson, for the defendant. Tuckett (H. J. Macdonald), for the plaintiff.

RE McLAULIN—McDONALD v. McLAULIN—MASTER IN CHAMBERS —APRIL 19.

Pleading—Statement of Defence—Action to Establish Will —Claim to Property Standing in Name of Testator—Counterclaim—Amendment.]—This action was originally brought in a Surrogate Court to establish the will of a testator in solemn form. On the application of the parties, the cause was transferred to the High Court Division. The statement of defence was unusually long, and the plaintiff moved to strike out paragraphs 3 to 29, inclusive, as embarrassing and improper. By these paragraphs the defendant alleged that the testator had from the very beginning of their married life acquired complete control over his wife, the defendant, and induced her to transfer to him all her very valuable property; and that, not only was he at his decease of unsound mind and without testamentary capacity, but also all that he assumed to deal with was the defendant's property, and not his own; and a declaration to this effect was asked. The Master said that it might be a question whether, in the present condition of the statement of defence, paragraphs 3 to 29, inclusive, were relevant. But there was nothing to prevent the defendant from counterclaiming for the relief asked for. The statement of defence was really, and would then formally be, a statement of claim, and the paragraphs in question could not be struck out, as they set up facts which might well support and establish the claim asserted by the defendant that all the property over which, at his death, her husband, the testator, had any control or power, was her property, for the reasons stated in the paragraphs in question (perhaps with unnecessary fulness). The defendant should also account for the delay on her part in taking steps to obtain the relief asked for. She should amend by making the necessary allegations of a counterclaim. In other respects motion dismissed; costs in the cause. H. S. White, for the plaintiff. John Jennings, for the defendant.