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HIGH COURT OF JUSTICE.

LATCHFORD, J. SEPTEMBER 28TH, 1910.

RE CITY OF OTTAWA AND TOWNSHIP OF NEPEAN.

Municipal Corporations—Annexation of Part of Township to City—Valuation of Assets and Liabilities—Bridges—"Property and Assets"—Municipal Act, 3 Edw. VII. ch. 19, sec. 58 (1)—Arbitration and Award—Valuation of Bridges—Liability and Interest—Set-off.

Appeal by the Corporation of the Township of Nepean from an award of arbitrators appointed to determine the reciprocal rights and liabilities of the two municipal corporations, arising out of the annexation of certain parts of the township of Nepean to the city of Ottawa, upon the ground that the amount found payable by the township corporation to the city corporation should be reduced by $1,642.91.

Wentworth Greene, for the township corporation.

T. McVeity, K.C., for the city corporation.

LATCHFORD, J.:—The issue between the parties is, whether or not certain bridges erected by the township on original road allowances fall within the words "property and assets" used in sub-sec. 1 of sec. 58 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, which, so far as material, is as follows:—

"After an addition has been made to a . . . city by the annexation of an adjoining . . . portion of a township, the city . . . whose limits has been so extended shall pay to the township . . . from which the additional territory has been taken, such part, if any, of the debts of the township . . . as may be just, and shall be entitled to receive from and be paid by the said township the value of the interest which at the time of

making such additions the added territory had in the property and assets of the township."

Paragraph 3 of the award contains two findings. The first is: "We find that there is due from the City of Ottawa to the Township of Nepean, in respect of the debentures issued under by-laws 624 and 665 of the Township of Nepean for the construction of certain bridges mentioned therein, the sum of $1,642.91 as a debt coming within the terms of sec. 58 of the said Municipal Act, being that portion of the said debenture indebtedness or debt which we consider just to be paid by the City of Ottawa to the Township of Nepean in respect thereof. . . ."

This part of the award is not questioned.

The second finding is: "And we further find that the sum of $1,642.91 is the sum which the City of Ottawa is entitled to receive from and be paid by the said township as the value of the interest which, at the time of the annexation in question, the added or annexed territory had in the said bridges as property and assets of the township; and we therefore set off one sum against the other."

The appeal is brought against the latter finding. By setting off against the amount found payable by the city to the township an equal amount as due by the township to the city, the arbitrators have, it is said, taken away with one hand what they had given with the other. But, when the reason for the equality in amounts is considered, the objection mentioned is seen to be untenable. The value of the bridges was, by arrangement between the parties, settled at the amount owing upon the debentures issued for their construction, the township reserving, however, its right to contend that the bridges should not be valued at all by the arbitrators. As the annexed part of the township had thus the same proportionate liability and interest (if it had any interest) in equal amounts, the liability and interest (if there was any interest) were necessarily equal and properly set off one against the other.

The only issue is whether the bridges fall within the meaning of the words "property and assets" used in sec. 58.

Under sec. 599 of the Act, the soil and freehold of every road allowance is vested in the Crown "unless otherwise provided." It is argued that the freehold right cannot co-exist with a right of property in a municipality in a bridge erected by the municipality on an original road allowance. But it is surely needless to point out that, while the freehold may be in one person, rights, proprietary and otherwise, over the same property, may exist in others. Moreover, the Act itself, sec. 640, sub-sec. 11, enables municipalities to pass by-laws for selling original road allowances, and, by

thus "otherwise providing," vests, I think, in the municipality the freehold in original road allowances just as fully as the freehold in other roads is vested in the proper municipality by sec. 601. Possession is in the municipality, and full control and responsibility for repairs.

The bridges in question were built by the township of Nepean, and the township may sell them under the powers conferred by sec. 637. They are, in my opinion, "property and assets" of the township. Granolithic sidewalks were in Re Town of Southampton and Township of Saugeen, 12 O. L. R. 214, considered by the learned Chief Justice of the King's Bench to be assets, within the meaning of sec. 18 of the Municipal Act.

The appeal should be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 30TH, 1910.

* ONTARIO LIME ASSOCIATION v. GRIMWOOD.

Mechanics' Liens—One Claim against Lands of Separate Owners—Entire Contract—Changes in Title—Registry Laws—Summary Application to Vacate Lien—Costs.

Appeal by the defendant Grimwood from an order of the Master in Chambers dismissing the appellant's motion to vacate the registry of a claim of lien and certificate of lis pendens.

R. H. Greer, for the appellant.

H. H. Shaver, for the plaintiffs.

MIDDLETON, J.:—James and George Bell owned the land. They made an agreement to sell the entire parcel, consisting of four adjoining lots, 9, 10, 11, and 12, to Baxter and Skipper. Baxter and Skipper agreed to sell the same lands to Grimwood. Grimwood erected a pair of houses on lot 9 and the north 11 ft. of lot 10. He then sold these houses to Baxter and Skipper. As the land had never been conveyed by the Bells, they then conveyed this parcel to Baxter and Skipper. None of these documents are produced, and the only date that can be ascertained is the date of the conveyance which the registrar's abstract shews as the 7th April, 1910. This was registered on the 12th April. The consideration is stated to be $534. Grimwood is said to have received $3,500 for the houses. The remaining land, lots 11, 12, and the southerly 8 feet 10 inches

* This case will be reported in the Ontario Law Reports.

of lot 10, was leased by Grimwood to Slingsby for 99 years; the lease is dated the 25th March, 1910, and is registered on the 11th April, 1910. Slingsby on the same day mortgaged this land to Grimwood for $13,200. The Bells do not appear to have yet conveyed these lands to any one.

The situation, when it ultimately comes to be dealt with, is complicated by mortgages made by Baxter and Skipper and by Grimwood to the defendants the Hastings Loan Co. and the London Life Co. These are not now before me for consideration.

By the lease Slingsby agreed to erect four houses upon the parcel leased to him. Upon the argument it was said Slingsby had surrendered this lease, but there is no evidence of that, and the mortgage to Grimwood—which is not produced—might prevent any such surrender becoming effectual.

It is said that these four houses are now built.

According to the registrar's abstract, 34 mechanics' liens have been registered against the four lots, and 8 certificates of lis pendens based upon certain of these liens. These liens are claimed upon the estate of the Bells, Grimwood, Baxter and Skipper, Slingsby, and the several mortgagees. One of these liens is that of the Ontario Lime Association, being that now in question. This purports to be based upon a contract with Grimwood for the sale to him of lime to be used in the erection of certain houses upon the four lots, the contract being made on the 1st April. The lien was registered on the 11th May, and the only thing said in the statement of claim as to the defendants other than Grimwood is that they "or some or one of them" own the lands. The lien itself claims against Grimwood's estate in the lands as well.

One Oliver Mowat Moore, an agent of the plaintiff, swears that, "to the best of his knowledge and belief," the facts set out in the statement of claim are true.

Grimwood now moves to vacate the lien, basing his motion on an affidavit of his own, not contradicted save in so far as Moore's affidavit may be taken as a contradiction, in which he sets out that he has no interest in the four houses on the leased portion of the land save as landlord under the lease, and that the four houses on this part of the land were commenced by Slingsby. He has apparently forgotten his $13,200 mortgage, if it is still in existence, and also fails to explain how he came to make several mortgages upon the land leased, unless these may be inferred to be mortgages of his reversion.

The point argued was that there could be no valid lien upon several buildings, and the lien must therefore be vacated.

Sections 6 and 8 of the Mechanics' Lien Act give a lien upon the estate or interest of the owner in the building and appurtenances and the land occupied thereby and enjoyed therewith.

The framers of the Act probably did not have present to their minds the case of an owner making a contract covering several distinct buildings. The applicant's attitude is that, the right to a lien being a statutory right, the statute must be strictly construed, and, unless the claimant can bring himself within the strict words of the Act, he is without remedy. He seeks to have applied to this Act the same process of reasoning as was adopted with reference to the Act making an equity of redemption exigible under execution, as indicated by Wood v. Wood, 16 Gr. 471, Donovan v. Bacon, 16 Gr. 472, Wood v. Hurl, 28 Gr. 146, Bank of Commerce v. Rolston, 4 O. L. R. 106, and similar cases, which have rendered the statute of little practical use. There is no binding authority compelling me so to hold; Dunn v. McCallum, 14 O. L. R. 249, the only Ontario case having even a remote resemblance, being clearly distinguishable, and I prefer to adopt a mode of dealing with the question which will not defeat the spirit of the statute by a too literal adherence to its letter. . . .

[Reference to the facts in Dunn v. McCallum.]

This differs materially from the case where one owner chooses to enter into an entire contract for the supply of material to be used upon several buildings. From the nature of the contract, the onus is here shifted, and the claimant can ask to have his lien follow the form of the contract, and that it be for an entire sum, upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, which must be peculiarly within his own knowledge, and if, as often must be the case, the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the legislature apparently intended a lien to exist.

Some aid is obtained from the provisions of the Interpretation Act, by which words used in the singular may be read as plural.

When, after the lien has attached to several distinct buildings, the owner has sold one or more, the equities which then arise between the owners of the several buildings may well be worked out upon the principles applied where part of a property subject to a mortgage is sold and the mortgagee seeks to enforce his remedy against both parcels.

Although this is the first case of the kind in this province, the question has arisen in many of the United States Courts upon

similar statutes—great care is necessary in dealing with these cases, as many turn upon particular provision not found in our statute, and the result is by no means uniform. . . .

[Reference to Lewis v. Saylors, 73 Iowa 504; Livingston v. Miller, 16 Abbott's P. R. 371; Wall v. Robinson, 115 Mass. 429; Childs v. Anderson, 128 Mass. 108.]

On the material before me, I cannot say that the applicant has so clearly demonstrated that the lien is bad as to enable me to say that it should be vacated upon a summary application. Were it certain that none of the material supplied had been used in the four houses on the leased portion of the land, then the lien would be bad as to these houses, but would remain upon the two erected upon the remaining land. Claiming a lien upon too much property will not invalidate it altogether.

The motion is made by Grimwood, who is not in a position to invoke the protection of the Registry Act. This statute may be found to be an important factor when the rights of the other parties come to be considered.

While I dismiss this motion, the argument has probably contributed something toward the adjustment of the rights of the parties, so I make the costs here and below in the cause—a course which meets the approval of the learned Master.

MIDDLETON, J. OCTOBER 1ST, 1910.

RE BOLSTER.

Will—Construction—Precatory Words—Restraint—Trust.

Motion by a devisee under the will of Lancelot Bolster, deceased, for an order determining the question whether the land devised to him is vested in him in fee simple free from any trust or restraint.

G. Waldron, for the applicant.

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

MIDDLETON, J.:—By his will the testator devised the property known as Eastview to the applicant, "with the wish that he may keep the same free from mortgage as a summer residence for himself and children." The applicant, in view of changed circumstances, finds the property unsuitable as a summer residence, and seeks to have it declared that he is the owner in fee simple so that he can sell it.

Save the words quoted there is nothing in the will to cut down the absolute gift.

In Bank of Montreal v. Bower, 18 O. R. 226, the cases are reviewed, and the rule is thus laid down: "If the entire interest in the subject of the gift is given with superadded words expressing the nature of the gift, or the confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created."

Since then the whole question was very fully discussed in In re Williams, [1897] 2 Ch. 12. Lord Justice Lindley says: "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to shew an intention to impose an obligation and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it it to be performed. . . If property is left to a person in confidence that he will dispose of it in a particular way, as to which there is no ambiguity, such words are amply sufficient to impose an obligation." Rigby, L.J., who dissents in the application of the law to the will then under discussion, adopts as the guiding principle the words of Lord St. Leonards: "Clear words of gift to a devisee, for his own benefit, free from control, shall not be cut down by subsequent words which may operate as an expression of a desire without disturbing the previous devise."

Two cases came before the Court of Appeal in 1904 in which the matter was discussed, In re Oldfield, [1904] 1 Ch. 549, and In re Hanbury, [1904] 1 Ch. 415. In each case the Court accept In re Williams as practically adopting what Lord St. Leonards had called "the not unwholesome rule that, if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form."

Although In re Hanbury was reversed in the Lords, [1905] A. C. 84, nothing was then said at all qualifying the law laid down in the Court of Appeal upon the matter now under discussion; in fact, the decision upon this question is affirmed, the view being taken that, though the gift was absolute, it was, in the events that had happened, subject to an executory devise. This agrees with the view expressed by Joyce, J., in In re Burley, [1910] 1 Ch. 215.

This will creates no obligation or trust, and the applicant is the owner in fee.

I do not discuss the question of the validity of the provision against mortgaging, as the applicant's intention is to sell.

The applicant should pay the costs of the Official Guardian.

BOYD, C. OCTOBER 1ST, 1910.

MOFFATT v. LINK.

Costs—Scale of—Slander—Malicious Prosecution — Damages — Amount Claimed more than $500—Assessment by Jury at less —9 Edw. VII. ch. 28, sec. 21 (1) (b)—Con. Rule 1132— Jurisdiction of County Court—Set-off.

This was an action for malicious prosecution and slander brought in the High Court, and tried with a jury at Toronto.

The action was begun on the 30th August, 1909, and was tried on the 27th and 28th September, 1910.

The plaintiff claimed $5,000 damages. The jury, in answer to questions, made findings in favour of the plaintiff, and assessed the damages at $110—$10 for the malicious prosecution and $100 for the slander.

The Chancellor refused a motion for a nonsuit, and gave judgment for the plaintiff on the findings of the jury, reserving the question of costs.

By 9 Edw. VII. ch. 28, sec. 21 (1), the County and District Courts have jurisdiction in . . . (b) personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $500.

By sec. 43, the Act was not to come into force until a day to be named by the Lieutenant-Governor by his proclamation..

This part of the Act was brought into force on, from, and after the 10th June, 1909, by proclamation in the Ontario Gazette of the 22nd May, 1909.

A. B. Morine, K.C., for the plaintiff.

Alexander MacGregor, for the defendant.

BOYD, C.:—The plaintiff in an action for slander or for malicious prosecution cannot, by claiming more than $500, now since 9 Edw. VII. ch. 28, get rid of the effect of Con. Rule 1132, which provides for the taxation of costs in cases where actions of County Court competence are brought in the High Court. The test as to the quantum of costs is measured by the amount recovered, and not by what is claimed. If such an action of comparatively trifling importance is brought in the High Court, the plaintiff has to run the risk of being amerced in costs, unless he can get the Judge to certify that the provisions of the General Order should not apply.

This is clearly not a case for giving such a direction, and therefore the plaintiff has to tax only County Court costs, with a set-off to the defendant of his costs on the High Court scale. This set-off will apply, if necessary, to reduce the $110 recovered by the plaintiff.

MIDDLETON, J., IN CHAMBERS. OCTOBER 3RD, 1910.

* PETTIGREW v. GRAND TRUNK R. W. CO.

Third Parties—Relief over—Indemnity — Relation to Plaintiff's Claim—Negligence—Breach of Contract—Issues for Trial.

An appeal by the Knechtel Lumber Company, third parties, from an order of the Master in Chambers giving directions for the trial of the issues between the defendants and the third parties.

The plaintiff sued the defendants for damages for the death of her husband, who was killed upon a siding running from the defendants' main line of railway to the yards of the third parties. A train was backing into the siding to connect with a car standing there. The deceased, as the plaintiff alleged, for the purpose of making the coupling, descended from the train, and, because lumber had been piled close to the track, was compelled to walk along the track itself, and was knocked down and killed. It was said, also, that snow and ice had accumulated, and this sloped down to the track, making it impossible to use such small space as there was between the lumber and the rails. It was also alleged that the frog at this point was packed, and that the deceased in walking along the track caught his foot in it. It was also alleged that the train was not in charge of a skilled person, and was run recklessly and at too high a rate of speed.

The foundation for the claim over against the third parties was an agreement of the 16th March, 1903, under which the defendants constructed the siding, and the third parties paid interest on the cost, and also paid the cost of maintenance and repair. The third parties agreed to keep the siding free from snow, ice, and obstruction, and also agreed to keep a space six feet wide on each side of the siding free from all obstructions.

G. H. Kilmer, K.C., for the third parties.

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

S. G. Crowell, for the plaintiff.

* This case will be reported in the Ontario Law Reports.

MIDDLETON, J.:—Upon the plaintiff's case it may be found that the accident was caused by the failure of the lumber company to observe their contract. . . . On the other hand, the plaintiff may be entitled to recover against the railway company in respect of matters quite apart from those indicated.

In my view, the defendants do not lose their right to have their claim against the third parties determined in this action because the plaintiff, in addition to basing her claim to recover upon grounds as to which there is or may be a right of indemnity, also alleges that she can recover upon other grounds with which the third parties have no concern.

The rights of the parties are not to be finally determined on the interlocutory motion for directions, except in the plainest cases; and it is enough that the plaintiff has made a claim against the defendants in respect of which there is a prima facie right to relief over. . . .

Unless the third party proceeding can be made use of in a case like this, it has very largely failed in its object. The third parties are manifestly interested in the questions to be determined between the plaintiff and the defendants, and ought to be heard at the trial so as to see that this question is duly tried, and that the ground of liability is definitely ascertained. There ought only to be one trial of the question of the defendants' liability, and at that the facts ought to be so ascertained that the question between the defendants and the third parties will be in train for adjustment. This can be accomplished by questions being submitted to the jury.

In the result, the appeal is dismissed with costs to be paid by the third parties to the plaintiff and defendants in any event.

MIDDLETON, J. OCTOBER 3RD, 1910.

ROWE v. CROSS.

Mortgage—Power of Sale—Default—Interest—Payment to Mortgagee of Compensation-money for Part of Premises—Application on Principal Debt.

Motion by the plaintiff for an injunction to restrain the exercise by the defendant, mortgagee, of the power of sale contained in the mortgage deed, turned by consent into a motion for judgment.

Glyn Osler, for the plaintiff.

Featherston Aylesworth, for the defendant.

MIDDLETON, J.:—The motion is based upon the case of Gibbons v. McDougall, 26 Gr. 214. The plaintiff assumes for the purpose of the argument that default occurred on the 21st July, 1910, and the notice given on the 13th August, 1910, would, therefore, he alleges, be premature, even though the sale is advertised for the 3rd October.

The mortgage is in the statutory form, providing for sale on default for one month or one month's notice.

The mortgagee alleges default in interest from January, 1909, as justifying the notice. The principal fell due on the 21st July, 1910. Interest is payable half-yearly. No interest has been paid since January, 1909, but in April, 1910, $100 was received by the mortgagee from the township as compensation for lands taken or injuriously affected. This sum the mortgagee seeks to apply on principal, and the mortgagor says should be applied upon interest. Unless the mortgagee distinctly agreed to place this sum at the mortgagor's disposal, there is no doubt that it stands as security for the mortgage debt and in lieu of the lands, and must be regarded as principal.

Upon this short ground the plaintiff fails, and his action must be dismissed with costs.

MIDDLETON, J. OCTOBER 5TH, 1910.

WADE v. ROCHESTER GERMAN FIRE INSURANCE CO.

Fire Insurance—Statutory Condition 4—Assignment of Policy for Benefit of Creditors—Retention of Insurable Interest—Policy not Void.

Action upon a fire insurance policy.

N. W. Rowell, K.C., and G. Wilkie, for the plaintiff.

G. Larratt Smith, for the defendants.

MIDDLETON, J.:—This case, tried before me at the present sittings, was excellently argued by counsel for both parties.

The neat question for determination is whether the assignment by the assured, a limited company, for the benefit of their creditors, by virtue of clause 4 of the statutory conditions, voids the policy. That clause provides that, "if the property insured is assigned," without the written permission of the company, "the policy shall thereby become void; but this condition does not

apply to change of title by succession or by the operation of the law, or by reason of death." There was no consent, and the assignment does not come within the exception.

Had the matter been res integra, I might have had much difficulty in upholding the plaintiff's contention. The words of this condition have been the subject of much litigation, and the Courts of this province and the Supreme Court have determined that these words must be construed strictly, and all that they prohibit is an absolute assignment which divests the insured of all his property in the goods and by which he does not retain to himself an insurable interest: Sands v. Standard Insurance Co., 26 Gr. 115, 27 Gr. 167; Sovereign Fire Insurance Co. v. Peters, 12 S. C. R. 33; Pinhey v. Mercantile Fire Insurance Co., 2 O. L. R. 296, at p. 300. In all these cases the "assignment" was a conveyance by way of mortgage. I cannot discover any logical distinction between an "assignment" by way of mortgage to secure the payment to one creditor of the amount of his claim and a general assignment to secure payment of all the creditors' claims. In each case there remains a beneficial and insurable interest in the assignor or mortgagor. His debts are to be paid, and the residue is to be held in trust for him.

Assuming, as the defendants contend, but I am not prepared to hold, that I am not bound by the opinions expressed by individual Judges in McQueen v. Phoenix Mutual Fire Insurance Co., 4 S. C. R. 660, I have no hesitation in following the opinions so given when they appear to be in accord with all the other Canadian cases. What is said by Henry, J., on p. 689, is sufficient to dispose of this action.

In nearly all the American cases cited the wording of the policy was widely different from that now in question, quite apart from the interpretation placed upon it by our Courts. Many cases to the contrary effect and in accord with our Courts may be found collected in 19 Cyc. 637, and People v. Belgler, Lalor (N.Y.) 133, may be set off against some others.

Mr. Smith argues that the cases in which an assignment has been held to be "absolute," in the construction of the provision of the Judicature Act relating to the assignment of choses in action, shew that this is an absolute assignment. I agree that it is, so far as this is necessary to confer upon the assignee the right to sue in his own name; but I cannot see that these cases have any relevancy to the matter now in question.

There will be judgment for the plaintiff for the amount claimed, with interest from the time when it became payable, and costs.

DIVISIONAL COURT. OCTOBER 5TH, 1910.

HUNTER v. PATTERSON.

County Court Appeal—Extension of Time for Appealing—Power of Divisional Court after Time Expired—County Courts Act, 10 Edw. VII. ch. 30, sec. 44 (2)—Adoption of Decision of another Divisional Court.

Motion by the plaintiff to extend the time for appealing from a judgment in a County Court action.

The motion was heard by FALCONBRIDGE, C.J.K.B., MACLAREN, J.A., and RIDDELL, J.

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

A. C. McMaster, for the defendant.

The judgment of the Court was delivered by RIDDELL, J.:—A motion to extend the time for appealing in a County Court case. On the merits, a case is made out for so extending the time, but it is objected that we have no power so to do, the appellant not having served notice of appeal and set down the appeal in time.

Several authorities were cited, amongst them: Purcell v. Kennedy (1887), 14 S. C. R. 453; Reekie v. McNeil (1899), 31 O. R. 444; Re Rogers and McFarland (1909), 19 O. L. R. 622; Con. Rule 353; 28 C. L. J. 99, 101, etc.

I do not think it of advantage to discuss these authorities as though the case was of first instance.

In Re Molson, Ward v. Stevenson, this Divisional Court on the 7th April, 1910, granted an extension of time in a Surrogate Court case. The only statute discussed before us was 4 Edw. VII. ch. 10, sec. 16 (2). Counsel for the respondent discovered subsequently that this Act had been, before the making of the order and on the 19th March, 1910, repealed by 10 Edw. VII. ch. 31; and moved before the Chancery Divisional Court (5th May, 1910), to quash the order extending the time, as having been made per incuriam. The Act in force had not been distributed, and had not come to the notice of the King's Bench Divisional Court, and, unless the order could be supported under the Act of 1910, 10 Edw. VII. ch. 31, it would have been proper to quash the order. The Chancery Divisional Court, applying sec. 34 (3) of that Act, which provides that "the practice and procedure upon and in

relation to an appeal shall be the same as is provided by the County Courts Act as to appeals from the County Court," required to interpret 10 Edw. VII. ch. 30, the present County Courts Act. The Divisional Court held that under this Act last named the Divisional Court had in County Court cases power to extend the time, &c., whether the application to extend the time, &c., for appealing was made before or after the lapse of the time mentioned in the statute,* as in cases in the High Court. The application was therefore refused. The appeal was argued upon the merits before another Divisional Court on the 17th May, 1 O. W. N. 1038, 21 O. L. R. 289, and disposed on the merits by that Divisional Court.

The decision as to the effect of the County Courts Act, 10 Edw. VII. ch. 30, was necessary to the decision of the Chancery Division. Whether this decision is binding upon us or not, it gives a satisfactory and reasonable interpretation to the Act, and should be followed. Even if there were any doubt as to the decision—and I have none—it would be a matter to be regretted if the practice of Divisional Courts should not be uniform.

I think the motion should be granted on proper terms. There is no reason why the respondent should be put to costs by the neglect or oversight of the appellant, and his opposition to the motion is not sufficient to deprive him of costs, which otherwise would be awarded to him.

The appellant should pay the costs of this motion as a term of the indulgence he asks; these costs to be paid to the respondent in any event upon the final taxation.

* Section 44 of 10 Edw. VII. ch. 30 is as follows: (1) The appeal shall be set down for argument at the first sittings of a Divisional Court which commences after the expiration of thirty days from the judgment, order or decision complained of. (2) Subject to Rules of Court, a Divisional Court, or a Judge of the High Court, notwithstanding that the Judge of the County or District Court has not certified the pleadings and other papers, or that they have not been filed in the High Court, may extend the time for setting down or for doing any act or taking any proceeding in or in relation to the appeal: and may, if the certificate is incomplete or incorrect, direct the same to be amended or to be sent back to the Judge for amendment.

MIDDLETON, J. OCTOBER 6TH, 1910.

RE HOPE.

Will—Construction—"Family"—Children—Insurance Moneys—Identification of Policy by Will — Infants — Exoneration of Fund—Creditors.

Motion by James W. White, executor of the will of Frederick Beresford Hope, deceased, for payment out of Court of the moneys arising from a policy of insurance upon the life of the deceased, which moneys were paid in by the insurers.

R. G. Agnew, for the executor and for the widow of the deceased.

J. R. Meredith, for the Official Guardian.

M. Lockhart Gordon, for the executrix of Amanda Hope Francis, mother of Frederick Beresford Hope.

MIDDLETON, J.:—The policy by indorsement is made payable to Amanda Hope Francis, mother of the insured.

The insured died on the 30th March, 1910, and by his will directed that $500, the balance remaining due upon the policy—$500 having been paid him in his lifetime—be paid to his executor to invest and retain all the interest earned by the investment as a fund to which the mother might resort in the event of her having exhausted her own money. Her funeral expenses are also to be paid from this fund. After the mother's decease, this sum is directed "to be applied for the general support of my family."

The mother survived the insured a few days only, and died on the 11th April, 1910, leaving an estate of $800, and debts which, with funeral and testamentary expenses, amount to $217.55. Her will is an exhibit to an affidavit, but (following the usage now generally adopted) is not put in with the papers.

I am told that, after paying debts, her estate is left to the grandchildren, who will take under their father's will if the word "family" is construed as children. The mother assents to this construction being adopted, and waives any claim she may have in favour of her children. The case is thus in effect narrowed to the question whether the fund of the infants in the hands of the Court is to be resorted to to exonerate the fund of the infants in the hands of the executrix of their grandmother. In law the question of to the right of the executrix must, as she insists on it, be determined.

The policy is sufficiently identified by the will, and the disposition made of the insurance moneys is authorised. It is said that the disposition is not within sec. 160 of the Insurance Act, because that does not in terms permit insurance money to be apportioned between the wife and children, but only to be given to the wife alone and the children or any one or more of them. That question does not arise here, as "family" may well mean children alone; indeed, that is its primary meaning, and the Court would only attach a secondary meaning which would invalidate the gift when driven to do so by the context. See the discussion as to the meaning of the word in In re Williams, [1897] 2 Ch. 12.

The claim of the executrix fails, and the money must remain in Court to the credit of the infants, and be divided among them share and share alike, and the shares paid out to each on attaining majority. An affidavit shewing dates of birth must be put in before the order issues.

The mother and Official Guardian may have their costs out of the fund, but I make no order as to the costs of the grandmother's executrix, but this is not to prejudice her claim to have her costs allowed out of the estate on passing her accounts, or the infants' right to object thereto.

In the view taken, the agreement of the 28th December, 1909, is immaterial; but the infants or any one claiming under the insured cannot base any claim on it which will come into competition with the creditors of the estate of the grandmother. That agreement evidently assumed that the grandmother would receive the insurance money.

MIDDLETON, J. OCTOBER 6TH, 1910.

*RE FOSTER AND TOWNSHIP OF RALEIGH.

Municipal Corporations—Powers of Licensing and Regulating—Billiard Tables—By-law—License Fee—Prohibitive Amount—Motives of Members of Council—License Fee Imposed for Revenue Purposes.

Motion by Foster to quash a by-law of the township, passed under sec. 583, sub-secs. 4 and 5, of the Municipal Act, for the licensing and regulating the keeping of billiard tables for hire, and fixing a license fee, upon the following grounds:—

1. That the by-law was not a fair and proper exercise of municipal legislative power, but was in truth aimed at the applicant, and was passed for the purpose of putting him out of business.

2. That the tax, $100 per table, is so large as to amount to prohibition; the applicant had twelve tables, and his net income, without deducting the license fee, was under $400 per annum.

3. That the license fee was more than necessary to cover the expenses incident to the granting of the license and inspecting the premises, and was fixed for the purpose of creating a municipal revenue; this was plain from the fact that the fee was so much per table; it could not cost three times as much to license and inspect premises with three tables as premises with one table only.

J. M. Ferguson, for the applicant.

J. G. Kerr, for the township corporation.

MIDDLETON, J.:— . . . In my view, the Court cannot too carefully refrain from entering into matters that by law are made the subject of municipal control. When it is made to appear that the municipal council is acting fraudulently or maliciously, and has in fact abdicated its real function, and is exercising its powers for the attainment of private ends or the gratification of private revenge, then the Court may well interfere; but with respect to all matter delegated to the municipality the council is supreme, and the Court has no power to supervise or criticise. . . .

* This case will be reported in the Ontario Law Reports.

Nothing is really shewn or charged against the members of the council; they have heard those in favour of free billiards and those in favour of high taxation, and they have considered and dealt honestly with a matter entirely within their jurisdiction. See City of Montreal v. Beauvais, 42 S. C. R. 211, 216.

Then is the tax prohibitive? The legislature has not given the power to prohibit, and the subordinate municipal council . . . cannot, under the cloak of regulation, prohibit, and do indirectly that which they cannot do directly. The tax is not so large as to be in its very nature prohibitive; and the fact that the applicant . . . cannot make any adequate profit is quite beside the mark: Re Pang Sing and City of Chatham, 1 O. W. N. 238, 1003. I cannot, upon the material, find that this by-law is in its nature prohibitive, even though the result may be that no one may undertake to establish a billiard-room in the township. . . .

[Reference to In re Talbot and City of Peterborough, 12 O. L. R. 358; Re Rowland and Town of Collingwood, 16 O. L. R. 272; In re Neilly and Town of Owen Sound, 37 U. C. R. 289.]

There then remains the third ground of attack—the fee is a "revenue charge." Is it competent to a municipality to impose a license fee with a view to revenue?

I have not been referred to any Ontario case upon the question, and have found none in which it is discussed.

There is, no doubt, a large volume of American law shewing that a legislative grant to a municipality of the power to license and regulate does not necessarily include a power to exact a license fee for revenue purposes. . . . I have been able to reach a conclusion which does not necessitate a review of these cases. I . . . proceed to consider our own municipal law in the light of those authorities.

By the B. N. A. Act, sec. 92 (9), power is given to the province to make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, and municipal purposes." When the province delegated to the municipality the power to make laws regarding "licensing," and also the express power to fix a license fee, without any restriction or limitation, it must be taken to have handed over to the municipality the full power conferred by the section quoted —the right to exact a license fee for raising a revenue for municipal purposes. . . . When it has been deemed wise to limit the amount to be charged as a license fee, this limitation has been expressly made. When no limit, the discretion of the council is the only guide—subject to the qualification above indicated,

that the fee must be honestly imposed as a license fee, and not with the view of prohibiting. . . .

[Reference to Pigeon v. Recorder's Court and City of Montreal, 17 S. C. R. 495, per Strong, J., at pp. 501-503.]

The motion fails on all grounds, and must be dismissed with costs.

DIVISIONAL COURT. OCTOBER 6TH, 1910.

*RE SOLICITOR.

Solicitor—Retention of Client's Money—Order for Delivery of Bill of Costs—Promise to Pay "Retainer."

An appeal by the solicitor from the order of MIDDLETON, J., 21 O. L. R. 255, 1 O. W. N. 837.

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

E. Meek, K.C., for the appellant.

R. McKay, for the client.

The judgment of the Court was delivered by RIDDELL, J.:—Whatever the form, the substance of this application is to have a declaration that a solicitor obtaining money for his client is entitled to retain thereout an amount promised him—agreed in writing to be paid to him—by his client as a "retainer." . . . Its meaning is, a preliminary fee given to secure the serivces of the solicitor and induce him to act for the client. . . .

A client may give his solicitor or counsel a preliminary fee in this sense—if so, it is a present; it does not at all diminish the fees properly chargeable and taxable against the client, and does not appear in the bill. . . . A promise to pay a "retainer" is not enforceable—and if the professional man is content to take a promise to pay a "retainer," instead of insisting upon payment in cash, he must rely upon the honour and generosity of his client. A promise to pay a retainer is void. . . .

The appeal should be dismissed with costs.

* This case will be reported in the Ontario Law Reports.

LATCHFORD, J. OCTOBER 6TH, 1910.

MAY v. MAY.

Husband and Wife—Action for Declaration that Marriage Void—Judicature Act, sec. 55 (5)—Jurisdiction — Defendant not Personally Served — Service by Publication — Insufficient Grounds—Absent Defendant—Cause of Action not Sustained by Evidence.

Action by a woman against her husband for a declaration under sec. 55, sub-sec. 5, of the Judicature Act, that their marriage at Toronto on the 1st July, 1893, was null and void. At the date of the marriage the plaintiff was the widow of one William May, to whom she was married at Glasgow, Scotland, in 1870. She alleged that the defendant was a brother of her first husband, and that, in procuring the license for the marriage at Toronto, the defendant made affidavit that the plaintiff was a spinster; and on these grounds she asked for a judgment declaring the marriage void.

E. Meek, K.C., for the plaintiff.

The defendant was not represented.

LATCHFORD, J.:—The decision of the Chancellor in Lawless v. Chamberlain, 18 O. R. 297, that the Court has jurisdiction to try a matrimonial cause of this kind, and declare a marriage null, is binding on me; and the only question I am called upon to determine is whether the plaintiff has made out a case entitling her to the relief claimed.

The action is remarkable in many respects. It is undefended. The defendant was not personally served with the writ of summons or statement of claim. There is nothing, in fact, to indicate that he has any knowledge whatever of the proceedings taken against him by the plaintiff. He is described in the writ of summons as "of city of Toronto." Two days after the issue of the writ, the plaintiff made an affidavit, with a view of obtaining an order for service of the writ substitutionally or by advertisement, that the defendant at some unstated time subsequent to December, 1901, "left the city of Toronto, and I heard nothing from him until the month of September, 1908, when he came to the house where I was living . . . I refused to recognise him in any way, and I have not since heard from him directly or indirectly. . . . The said Robert May, after leaving me, went

to the city of Rochester, in the State of New York, as I am informed, and I have never heard of his living in any other place, or whether he is alive or dead." The plaintiff had lived with the defendant as his wife from 1893 until December, 1901.

The precise time when Robert May left Toronto—whether in the interval between December, 1901, and September, 1908, or after his abortive call upon the plaintiff—is not stated even approximately; nor is any explanation given of the statement indorsed on the writ, obviously by her instructions, that Robert May was two days previous to the date of the jurat a resident of Toronto. A second affidavit was made by plaintiff, that her solicitor had written certain letters to the Chief of Police of Rochester and had received a reply. She further deposed that she had "no knowledge whatever and no information as to the present whereabouts of the defendant Robert May."

Upon this material, which shewed clearly enough that the defendant was not resident in Toronto, an order was made that good and sufficient service of the writ on the defendant might be effected by the publication of the order for three successive weeks in the Saturday issue of the Toronto "World," beginning with the 25th December, 1909, and ending on the 8th January, 1910, and that the defendant should have until the 19th January, 1910, to enter an appearance to the writ. A subsequent order, rendered necessary by an omission to publish the advertisement on the 1st January, provided that the advertisement might be published on the 22nd January, and gave the defendant until the 8th February to appear.

There is not among the material filed in support of the application for the order for service by advertisement the least suggestion that notice of the proceedings would thereby be likely to reach the defendant, if indeed he was then living. I have no hesitation in saying that the order for service by advertisement should not have been made.

The principle applicable in such cases is admirably stated by Mr. Justice Street in Alexander v. Alexander, 1 O. L. R. 639, at p. 643: "A plaintiff should not be permitted to proceed as if personal service had been effected when it has not, without some substantial ground upon which it may reasonably be presumed that the defendant has received notice of the proceedings; for it is contrary to the first principles of justice that proceedings should be taken against him without giving him notice of them."

There are other grounds upon which I think the action should be held to fail. The only evidence that the defendant is the brother of the plaintiff's first husband is her own unsupported oath.

Her source of information was not stated, nor her means of knowledge. Moreover, her statements upon oath are not to be relied on. In her affidavit of the 24th November, 1909, she stated that when the defendant procured the marriage license he "swore that I was a spinster." The license itself, which is in evidence, describes the plaintiff as a widow. I regard her as an unreliable witness, upon whose uncorroborated evidence a judgment declaring her marriage with the defendant void should not be given, even if proper service of the writ had been effected.

The action should be dismissed.

DIVISIONAL COURT. OCTOBER 6TH, 1910.

FARROW v. McPHERSON.

Bill of Exchange—Acceptance for Accommodation of Third Person—Evidence—Admissibility — Rejection at Trial—Admission by Affidavits on Appeal—Indemnity—Implied Contract—County Court—Jurisdiction — Removal of Action into High Court—Costs.

Appeal by the defendant from the judgment of the County Court of Carleton in favour of the plaintiff in an action to recover $525, in the circumstances mentioned below.

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

Glyn Osler, for the defendant.

A. E. Fripp, K.C., for the plaintiff.

RIDDELL, J.:—The plaintiff resided in Ottawa. One Millar, brother-in-law of the defendant (who resides in Stratford), came down with a stock proposition and asked the plaintiff to help him to start a company. The plaintiff did so, and introduced him to another person, who supplied $1,000 apparently to float the company. Millar then asked the plaintiff to allow him and the defendant to make a draft on the plaintiff for $1,500. Millar said that "he and McPherson were in together." The plaintiff did not accede to this request. He then said: "You know McPherson is good; allow me to put through one for $750, and McPherson for $750." The plaintiff knew both Millar and the defendant,

and knew they had been in deals before this together—and, without making any inquiry of or any communication to the defendant, but accepting Millar's statement, he agreed to accept the drafts. The plaintiff denies at first that he had business dealings with Millar, and says that he was only helping him as a friend, but subsequently says that he was to get $1,000 (at first he thought in cash) for introducing Millar to various gentlemen to whom he might sell stock. As he did not get cash, he got $1,000 in stock, but this apparently was after the acceptance of the drafts.

There is no evidence that the defendant and Millar were in this deal together, and the defendant specifically denies it—of course the statements of Millar to the plaintiff are not evidence against the defendant. At the trial the defendant was not allowed to give evidence of the circumstances under which he made the draft upon the plaintiff. This ruling was clearly wrong; and we have received evidence upon affidavit, without objection, shewing what the facts were. The defendant was aware that Millar and the plaintiff were acting together in the sale of stock, and in January, 1908, he was informed by Millar that the plaintiff was collecting considerable sums of money on joint account for the stock, and Millar asked him to assist him financially. Millar told him to draw on the plaintiff for $500, which he did; and he gave all the proceeds to Millar; and this draft was paid at maturity. Then in February, 1908, Millar asked the defendant again to help him. At Millar's direction the defendant drew on the plaintiff for $750, and gave Millar the proceeds, $748.15; the draft was not paid, but, to retire the unpaid draft, a new draft was, at Millar's direction, made at one month; this was accepted, but not paid; and on the 31st March, at the instance of Millar, the draft in question was made to retire the previous renewal draft. This was unpaid.

The bank claimed from the plaintiff, and, after some negotiations, the plaintiff settled with the bank for $500, and sued the defendant for this amount and $25 paid to his own solicitor.

This action was brought in the County Court of Carleton, and was tried before His Honour Judge Gunn, Junior Judge of that Court, without a jury, on the 24th June, 1910. The learned Judge found for the plaintiff, and directed judgment to be entered for the plaintiff for $500, interest, and costs. No written reasons were given, and we are informed that no reasons were given by the learned Judge for his decision.

Upon the appeal it was agreed by all parties that the case should be removed nunc pro tunc into the High Court and treated

as though it had been tried by the County Court Judge for a High Court Judge.

The right of action is in such a case upon the implied contract of the party for whose accommodation a bill of exchange was accepted, to indemnify the accommodation acceptor in case he is obliged to pay: Reynolds v. Doyle, 1 M. & Gr. 753, and other cases cited in Falconbridge, p. 566.

It is necessary to prove that the bill was accepted for the accommodation of the defendant; and it is not sufficient that it be accepted for the accommodation of some one else. Here not only the evidence of what took place when the arrangement was made between Millar and the plaintiff for the drawing of the bill by the defendant, but also the letters of the plaintiff subsequently, shew clearly that it was for the accommodation of Millar, and not of the defendant, that the bill was accepted.

I am of opinion that the judgment is wrong, and should be reversed with costs and the action dismissed with costs. As the point as to the jurisdiction of the County Court to deal with this action was not raised, the costs should be on the County Court scale.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

IRWIN v. MCFEE—MASTER IN CHAMBERS—SEPT. 30.

Venue—Change — District Court Action — Preponderance of Convenience — Witnesses — View by Jury.]—Motion by the defendant to transfer the action from the District Court of Algoma to the County Court of Lambton, so as to have the trial at Sarnia. The action was for the price of an omnibus, which was shipped from Sault Ste. Marie to Sarnia. The negotiations leading up to the sale were at Sarnia. The Master said, as to the number of witnesses on each side, that no preponderance was shewn. The vehicle in question and another as to which there had been negotiation were both at Sault Ste. Marie, where they could be seen by the Judge or jury: Canada Carriage Co. v. Down, 1 O. W. N. 444. Motion dismissed; costs in the cause. Featherston Aylesworth, for the defendant. T. D. Delamere, K.C., for the plaintiff.

CAHILL v. TIMMINS—DIVISIONAL COURT—SEPT. 30.

Principal and Agent—Option Secured by Agent—Payment for Services—Commission—Condition—Quantum Meruit.] — Appeal by the defendants from the judgment of BRITTON, J., 1 O. W. N. 889, in favour of the plaintiff. The action was brought to recover a commission for securing an option on certain mining claims in the district of Nipissing at $250,000. Judgment was given for the plaintiff, upon a quantum meruit, for $2,185 and costs. The Court (MEREDITH, C.J, TEETZEL and CLUTE, JJ.) allowed the appeal with costs and dismissed the action with costs. The Court did not agree with the trial Judge in allowing the plaintiff a stated sum on a quantum meruit for services rendered to the defendants. The plaintiff's claim was made in such a way as to exclude a right to recover on a quantum meruit. The evidence established that the plaintiff would be entitled to remuneration only in the event of the defendants obtaining the property and turning it over or effecting a resale, and, in such event, the plaintiff would be paid $5,000 out of the first payment on account of the purchase-price. But, as the option secured by the plaintiff lapsed by reason of the proposed purchasers secured by the defendant Timmins attaching a condition to their first payment of $5,000, there was nothing out of which the $5,000 payment to the plaintiff could be made. From the plaintiff's admissions in evidence, and the letter of the 20th October, 1908, sent by the defendant Timmins to the plaintiff, it was clear that any payment to the plaintiff was wholly contingent on the deal going through. There was nothing in the evidence to indicate bad faith on the part of the defendant Timmins. Appeal allowed with costs, and action dismissed with costs. G. H. Watson, K.C., for the defendants. T. W. McGarry, K.C., for the plaintiff.

MOFFATT v. GLADSTONE MINES LIMITED—DIVISIONAL COURT—OCT. 3.

Author—Report of Mining Engineer — Unrestricted Publication—Common Law Rights—Divestment—Broker—Ratification—Injunction.]—Appeal by the plaintiff from the judgment of TEETZEL, J., 1 O. W. N. 817. The Court (FALCONBRIDGE, C.J. K.B., BRITTON and RIDDELL, JJ.), dismissed the appeal with costs. W. H. Irving, for the plaintiff. Glyn Osler, for the defendants.

TURNER v. DOTY ENGINE WORKS CO.—MASTER IN CHAMBERS—OCT. 5.

Pleading—Statement of Defence—Embarrassment.]—Motion by the plaintiff to strike out paragraphs 3 and 4 of the statement of defence as irrelevant and embarrassing. The plaintiff alleged an agreement by the defendants to pay the plaintiff a commission of $1,000 if he procured a sale of certain material owned by them for $10,000, and that the plaintiff procured the sale and the defendants received the $10,000, but the plaintiff had not been paid the commission, which he therefore claimed. The defendants denied the allegations of the statement of claim, alleged that the sale was not carried out within the time agreed upon, and (by paragraph 3) that the plaintiff, at or after the time he was alleged to have made the arrangements for sale, entered into a secret fraudulent agreement with W., "one of the parties so interested in the said purchase," without the knowledge and consent of the others, whereby he agreed to pay W. one-half of the alleged commission. Held, that this was embarrassing and should be stricken out or amended. The 4th paragraph asserted that, if the agreement with W. was a fraud as against the defendants, the plaintiff was not entitled to recover. Held, that this might remain if the 3rd paragraph were amended, but, if not, it should also be stricken out. Costs to the plaintiff in the cause. F. Erichsen Brown, for the plaintiff. W. Proudfoot, K.C., for the defendants.

GIBSON v. TORONTO BOLT AND FORGING CO.—MASTER IN CHAMBERS—OCT. 6.

Pleading—Statement of Defence—Embarrassment—Satisfaction—Estoppel.]—Motion by the plaintiff to strike out part of the 2nd and the whole of the 6th paragraph of the statement of defence. The action was brought to recover $4,075 as the plaintiff's fees for services as an architect rendered to the defendants in 1906 and 1907. The defendants admitted that the plaintiff did perform part of the work for which he claimed to be paid, but alleged as follows: "2. At the time of the erection of the said buildings, the large majority of the stock in the defendant company was held by one Gillies, and the said plans and drawings were prepared by the plaintiff in consideration of benefits from time to time received by the plaintiff from Gillies. By paragraph 3, a disclaimer by the plaintiff of any intention to

make any charge against the company and his declining to render any account were alleged. By paragraph 4, that in the balance sheet of the defendants no such claim appeared. By paragraph 5, that in November, 1909, Gillies sold his shares, and the plaintiff then for the first time made this claim against the defendants. And by paragraph 6, that the purchasers of the shares from Gillies relied upon the statements as assets and liabilities as shewn by the books of the defendants, and upon the disclaimer of the plaintiff, and the plaintiff was estopped. The Master referred to Stratford Gas Co. v. Gordon, 14 P. R. 407, and held, with some doubt, that the paragraphs referred to were not embarrassing. Motion dismissed; costs in the cause. W. G. Thurston, K.C., for the plaintiff. M. Lockhart Gordon, for the defendants.

PRYOR v. CLIFTON HOTEL CO.—SUTHERLAND, J., IN CHAMBERS.—OCT. 6.

Discovery—Production of Documents—Relevancy—Names of Witnesses.]—Motion by the plaintiff from an order requiring the defendants to file a further affidavit as to production of documents and to produce certain documents admitted upon the examination of one Major, then manager, for discovery, to be in their possession. The plaintiff sued for damages for injuries sustained by reason, as alleged, of the negligence of the defendants in the condition or operation of the elevator in their hotel when he was a guest therein. The defendants undertook to produce the contract for the elevator, inspection papers, cards of notification, correspondence, accounts, license renewals, and hotel bill of the plaintiff; but declined to produce the pay-sheets of the employees, pay-roll, hotel register, bills of other guests, statement of names of maids in the employment of the defendants, and declined to give particulars as to the elevator since the date of the injury. The learned Judge said that it appeared to him that the sole object of the plaintiffs in seeking discovery of the matters referred to was to ascertain the names of the defendants' witnesses; and further that none of the discovery sought was relevant to the issues. Marriott v. Chamberlain, 17 Q. B. D. 154, and Williamson v. Merrill, 4 O. W. R. 528, were referred to. Motion dismissed; costs in the cause. A. McLean Macdonell, K.C., for the plaintiff. W. R. Smyth, K.C., for the defendants.

KEMERER v. WILLS AND SINGLEHURST—FALCONBRIDGE, C.J.K.B. —OCT. 6.

Broker—Contract—Partnership — Counterclaim.]—Action by a broker for $12,187.50 and for a declaration of the plaintiff's rights against the two defendants, also brokers, under an alleged agreement. The defendant Singlehurst denied the agreement, and counterclaimed for one-third of the plaintiff's demand and for $950. The learned Chief Justice said that the defendant Singlehurst had proved paragraph 5 of his statement of defence and counterclaim. The question of the existence of a partnership between the plaintiff and the defendant Wills had arisen and had been to some extent considered by other judicial officers, but never with all the convincing pieces of evidence which were presented at the trial of this action. The action failed against the defendant Singlehurst, and he was entitled to judgment on his counterclaim, with its necessary result upon the temporary credit allowed on the reference. The Chief Justice does not pass upon the alleged agreement set up in the statement of claim, because it has become unnecessary to do so. If he had to do so, he would probably hold that (treating all parties as fairly on the same plane as regards demeanour and general credibility), in view of all the discordant elements of the case, the plaintiff had failed to discharge the onus of proof. Judgment dismissing the action as against Singlehurst with costs, and giving him judgment on his counterclaim with costs. The defendant Wills joined hands with the plaintiff, who, therefore, might, if he wished, have judgment against Wills without costs. M. H. Ludwig, for the plaintiff. W. R. Smyth, K.C., for the defendant Wills. Glyn Osler and S. G. Crowell, for the defendant Singlehurst.