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APPELLATE DIVISION.

JULY 22ND, 1913.

EADIE DOUGLAS LIMITED v. H. C. HITCH & CO.

*Mechanics' Liens—Account—Cross-claims—Items in Dispute—
Findings of Master—Appeal.*

Appeal by the defendants H. C. Hitch & Co. from the judgment of the Local Master at Ottawa, in a mechanics' lien action; and cross-appeal by the plaintiffs from the same judgment.

The matters in dispute upon both appeal and cross-appeal were as to the allowance and disallowance of items going to make up the amount claimed by the plaintiffs as due in respect of their lien and sums charged by the defendants H. C. Hitch & Co. to the plaintiffs by reason of delay and otherwise.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. E. Caldwell, for the defendants H. C. Hitch & Co.

H. M. Mowat, K.C., for the plaintiffs.

The judgment of the Court was delivered by CLUTE, J., who made an examination of the various items in dispute, and concluded that the appeal of the defendants H. C. Hitch & Co. should be dismissed with costs and the cross-appeal of the plaintiffs allowed, except as to \$542.19, with costs fixed at \$50.

HIGH COURT DIVISION.

MIDDLETON, J.

JUNE 7TH, 1911.

ECKERSLEY v. FEDERAL LIFE ASSURANCE CO.

Life Insurance—“Homans” Plan—Fraud and Misrepresentation—Construction of Policy—Action for Rescission—Dismissal without Costs.

Action by a policy-holder in the defendant company for rescission of the contract of life insurance evidenced by the policy, on the ground of fraud and misrepresentation.

J. H. Ingersoll, K.C., and A. C. Kingstone, for the plaintiff.

G. H. Watson, K.C., and T. C. Haslett, for the defendant company.

MIDDLETON, J.:—I have read very carefully all the correspondence, and considered the evidence given by the plaintiff, and conclude that there was no fraud or misrepresentation inducing the contract.

At the trial I was somewhat impressed by the statement made by the plaintiff that he was assured that the premium could never exceed the maximum named in the policy, and, from 60 on, the premium would be level. No such claim is made in the pleadings or in the long correspondence prior to the action, in which the plaintiff many times set forth his grievances.

The policy must be construed as it is written, and both parties are bound by its terms.

The Homans plan of insurance has been generally misunderstood by policy-holders, and is one that readily lends itself to misrepresentation, and hence has been discredited in practice. Life insurance has come to be regarded as investment, and in the case of ordinary level premium insurance this is the case. In that type of insurance the members pay premiums which, when invested, would, if the member lived exactly the average life, produce the sum agreed to be paid. Those who do not reach the expected age gain, those who exceed the age lose, but in the long run there cannot be either gain or loss. The policy-holder takes his chances of being a gainer or loser, but the fundamental idea is investment.

In the Homans plan, the fundamental idea is quite different. Out of a certain number of persons of a given age alive to-day experience has shewn that so many may be expected to die within the next year—e.g., to take the age of this insured, 48: of 7,495 persons living at the beginning of the year, experience shews that 106 would be expected to die within the year and 7,389 survive.

On this plan, the company propose to exact a premium from the 7,495 which will enable them to meet the death claims of the 106, and this premium, with a loading as a factor of safety and to cover expense and profit, is what is demanded.

The insurance is for the year and the year alone. There is no element of investment; the money received is to be paid out on the death claims, and not to be retained for investment. This is what is called a natural premium plan.

The plan is in practice modified. The policy in this case contains two important provisions. Seventy-five per cent. of the premium is to be placed in a "death fund," so that, if "experience" varies from "expectation" more than twenty-five per cent., this will operate as a reservoir or balance wheel, and neutralise any adverse experience which, upon the law of average, may be expected. And, secondly, the expenses are limited, and the company is made to some extent "mutual," by providing for an abatement from the stipulated premium for the next year of the profit of the last year.

As the age of the insured increases, manifestly the annual premium must increase as the chance of an older man dying during the next year is greater; and the actuaries' tables shew that from about 1 in 75, the ratio at 48, when Eckersley insured, the ratio has changed to 249 in 3,307, or about 1 in 13, at his present age of 72.

The insured usually fails to understand that in a policy of this class, if the life is normal, there is nothing to gain by renewing the insurance. The premium charged is the exact equivalent of the death risk—by allowing the policy to lapse the assured is not forfeiting any accumulated revenue—he has had from year to year the protection he has purchased, i.e., insurance for the year. If an old man desires insurance for the year, he must pay a large premium; for the risk assumed by the company for that year is large.

The only merit of the system is, that it affords a young man, who desires insurance during a limited time, the maximum of temporary protection at the minimum of cost. If he survives

this period, then he will not continue the insurance at the high and practically prohibitive rates; and, realising that he has had all that he paid for, he will not continue the temporary insurance.

The trouble is, that insured persons, not understanding the theory of the policy, prolong the insurance unduly and come to regard it in the light of an investment (like ordinary life insurance), instead of temporary protection (like fire insurance).

When a man reaches mature years and the premium becomes heavy, he will not, if his life is normal or better than normal, continue the risk, and will only pay the premium demand if he expects an early death; and so there is an automatic adverse selection in old age, which has rendered the system unworkable from the standpoint of the company.

This consideration of the nature of the policy shews that the change of contract complained of by many of the insured has in no way prejudiced the plaintiff. I am clear that there is nothing in the contract to prevent any *bonâ fide* agreement between the company and other policy-holders in the same class, and there is no suggestion that the company have not in this matter acted in good faith.

There then remains the question as to the proper construction of the policy in question, and this I find by no means easy. There is, first, the insurance for six months from the 21st January, 1886, and then the provision: "And the said company further promises and agrees to renew and extend this insurance during each successive half-year from the date hereof, upon condition that the assured pays the mortuary premium herein provided for," and a further sum of \$3 for expenses.

In the conditions is found the following: "Mortuary premiums required for the payment of actual death claims among the insured according to the rates for each \$1,000 insured herein as set forth in the official schedule for each actual age printed upon the back of this policy shall be paid to the said company before renewal for any succeeding term above provided." On the back is printed a schedule: "Maximum mortuary premiums for each \$1,000 insured." And then is given the premium for each year from 15 to 60. Below this is printed: "The premiums after the first payment required to continue and extend the insurance can never exceed the maximum rates named in the above table," but may be reduced by the surplus

portion of the preceding premium not required to meet death claims.

After attaining 60, the insured contends, no greater premium than the maximum named in the schedule can be demanded as the price of renewal.

In *Provident Savings Life Assurance Society of New York v. Mowat*, 32 S.C.R. 147, the Court were enabled to come to a conclusion as to the meaning of the policy there in question by reason of an endorsement stating that the rates for ages beyond 60 would be given on application, and in each of the two United States cases cited there was found some context to guide. In *Nall v. Provident Savings Life Assurance Society*, 54 S.W. Repr. 109, it was a clause relating to insurance after the age of 60, which might be continued on the level rate plan at the premium for attained age, shewing, in the opinion of the Court, that it could not be contemplated that it continue at the stated rate as a level premium. In *Jones v. Provident Savings Life Assurance Society of New York*, 61 S.E. Repr. 388, the schedule was followed by "etc., etc., etc.," meaning "and so on," i.e., in an increasing scale.

The conclusion at which I have arrived is, that, the schedule ceasing at 60, the right to renewal then ceases to be provided for by the policy, and, in the event of renewal being desired, terms must in each case be made. No premium is bargained for in anticipation, and the policy "runs out" as a contract and can only be continued at the will of the parties. This may place the company in an unfair position where the expectation of life is less than the average; but in the case of this plaintiff, whose expectation of life seems unusually good, he will, no doubt, when once he understands the basis upon which the premiums are computed, allow his policy to lapse.

I can see no course open save to dismiss the action; and, doing so, I do not give costs—not because of any unfair conduct of those now in charge of the company (they appear to have been both fair and frank), but to shew my disapproval of the original form of policy, which seems to me to be tricky and calculated to deceive. I think that the rates should have been carried on so as to shew the great and prohibitive cost when the insured lives beyond 70.

Action dismissed without costs.

[This decision, given more than two years ago, is rather meagrely noted in 2 O.W.N. 1274. A recent inquiry for the full text of the decision suggested the advisability of publishing it.]

BRITTON, J.

AUGUST 2ND, 1913.

McDOUGALL v. PAILLE.

Gift—Sum of Money in Bank Standing to Credit of Deceased Person—Money Received from Wife of Deceased—Action by Administratrix of Wife to Recover from Estate of Deceased Husband—Assertion of Gift from Wife to Husband—Evidence—Onus—Corroboration—Undue Influence—Mental and Physical Weakness of Wife.

Action originally brought by Martha Nolan against her husband, P. John Nolan, to recover a sum of money belonging to the plaintiff, deposited in a bank to the credit of the defendant. Both parties died, *pendente lite*, and the action was continued in the name of the present plaintiff, the administratrix of the estate of the deceased Martha Nolan, against the present defendant, as executor of the will of the deceased P. John Nolan.

The action was tried before BRITTON, J., without a jury, at Fort Frances.

G. S. Bowie, for the plaintiff.

A. D. George, for the defendant.

BRITTON, J.:—The plaintiff resides in the city of Winnipeg, and is a school-teacher. She is the daughter of the late Peter McDougall and Martha McDougall, his wife. Her father died in September, 1905, and her mother, Martha McDougall, married P. John Nolan in August, 1907. At the time of his marriage, P. John Nolan was a locomotive engineer, residing at Winnipeg. Shortly after the marriage, Nolan and his wife left Winnipeg and took up their residence in Rainy River, in the Province of Ontario.

In 1910, Mrs. Nolan became sick. She suffered from a growth or tumor in the brain. The disease proved fatal, and she died on or about the 25th November, 1911. P. John Nolan became ill at a later date than the beginning of the sickness of his wife, and he died in July, 1911. No children were born to P. John Nolan and Martha McDougall, but two children were born to Martha and Peter McDougall, and two children were born to P. John Nolan and his former wife.

Martha Nolan became possessed and was the owner of a large sum of money, part received by her from her former husband Peter McDougall, and part from property which became hers and was sold by her.

Of this money, at least \$4,800 was, prior to the 21st January, 1911, on deposit to the credit of Mrs. Nolan in the Canadian Bank of Commerce at Rainy River. Of this money, the sum of \$2,100 was drawn out of that bank upon the cheque of Mrs. Nolan and deposited to the credit of P. John Nolan in the Bank of Nova Scotia at its branch at Rainy River.

The balance of the \$4,800, viz., the sum of \$2,700, was drawn out by the wife, she getting a draft for it upon the Canadian Bank of Commerce at Belleville. This money was also received by the deceased P. John Nolan. Some of it was expended by him in his care for and the search for the restoration of his wife's health; but a very considerable part of it was retained by the husband. It is said that he expended money upon himself, not wisely—his habits having become bad.

This action was commenced during the lifetime of the parties, the present plaintiff suing as next friend of her mother. The action abated by the death of P. John Nolan, and was revived as against the present defendant, as executor of the will of P. John Nolan. Then Martha Nolan died, and the action is now continued by the plaintiff as administratrix of Martha Nolan.

An interim injunction was obtained against P. John Nolan drawing out and expending any more of the money. Of the money which Martha Nolan had, there is the sum of \$3,724.81 and interest in the Bank of Nova Scotia at Toronto, standing to the credit of P. John Nolan. P. John Nolan was the original defendant, and this money is the subject of the present controversy. It is hardly in dispute that the money was the money of Martha Nolan, but P. John Nolan asserted, and his executor now asserts, that it was given to P. John Nolan by his wife Martha.

To establish this gift *inter vivos*, the onus is upon the defendant. In my opinion, that onus has not been satisfied. Upon this first point, which goes to the root of the matter, the plaintiff is entitled to recover.

There is really no corroboration of the statement of P. John Nolan. All the facts in connection with the transfer of the money from Martha—the sick wife—to her husband, are more consistent with there being no gift, than that there was a gift. No gift can be implied from the facts and circumstances as stated by John Nolan.

Martha Nolan was not, at the time of the alleged gift, in a state of mind to appreciate the nature and effect of the acts

which are alleged to constitute the gift. The effect would be to deprive her own children of the money and to enable her husband to give it to his children. Such a gift by her would be an improvident act, and one she would not, if in sound mind, be likely to commit.

Although it so happened that Mrs. Nolan survived her husband, her disease, which later on proved fatal, was such as to render her mentally unfit to make a will or a valid gift such as alleged.

In considering the question of burden of proof, it is important to note the difference between influence to obtain a gift *inter vivos* and influence to obtain a will or legacy.

The case of *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462, was cited by counsel for the plaintiff, and is very much in point. In that case the claim was under a will. There was no evidence to go to the jury on the question of undue influence, and the difference mentioned above is thus emphasised: "Natural influence exerted by one who possesses it, to obtain a benefit for himself, is undue, *inter vivos*, so that gifts and contract *inter vivos* between certain parties will be set aside, unless the party benefited can shew, affirmatively, that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be fully exercised to obtain a will or legacy. The rules, therefore, in Courts of equity, in relation to gifts *inter vivos*, are not applicable to the making of wills."

The many cases cited upon the argument and in the judgment in *Parfitt v. Lawless* are applicable to the case now in hand.

When the money passed from Martha Nolan to her husband, she was of "feeble mental capacity and in a weak state of health." She could easily be induced to allow her husband to have control of the money.

Upon the whole evidence in this case, the plaintiff is entitled to recover.

There will be judgment for the plaintiff against the defendant executor for the sum of \$3,724.81, and the interest allowed by the bank.

There will be a declaration that the money in the Bank of Nova Scotia at Toronto, viz., the \$3,724.81 standing there to the credit of P. John Nolan, is money belonging to the estate of Martha Nolan, and that it may be paid over to the plaintiff as administratrix of the said Martha Nolan. Payment to the plaintiff of this money will be in full satisfaction of this judgment.

The plaintiff asked for a reference to take the accounts against the estate of the late P. John Nolan. In an ordinary case of this sort, the plaintiff would be entitled, at her own risk, to such reference; but in this case it is quite clear that the plaintiff would gain nothing by having an account of how P. John Nolan expended his wife's money.

The judgment will be without costs payable by the defendant. The plaintiff's costs will be payable out of the money belonging to the estate of Martha Nolan.

RE BURRIDGE—LENNOX, J.—JULY 24.

Executors—Power to Sell and Convey Land—Interest of Infants—Approval of Court—Vendors and Purchasers Act.]—Motion by all parties interested for an order approving of a sale of land in which infants were interested. The Court was asked to treat the application as one under the Vendors and Purchasers Act. The counsel making the application represented all interested parties, including the infant and including the proposed purchasers, the Board of Education of the City of London. It appeared by the affidavits of Patrick Walsh and Thomas C. Knott that it would be decidedly beneficial to the estate that the proposed sale should go through. An excellent price was offered for the property, and it was stated that the money was required for payment off of mortgages upon the estate. LENNOX, J., was of opinion that the testator, by the will under which the vendors derived title as executors, clearly intended that his executors should have power to convey in a case of this kind. He, therefore, declared that the surviving executor and executrix had power to convey the property, and that the Board of Education of the City of London were compelled to accept the title made in this way. J. R. Meredith, for all parties.

BANCROFT V. MILLIGAN—FALCONBRIDGE, C.J.K.B.—JULY 26.

Fraudulent Conveyance—Setting aside—Priority of Mortgage—Will—Election—Counterclaim—Costs.]—Action for a declaration that a conveyance of land by the defendant John C. Milligan to the defendant Maude Milligan was voluntary, fraudulent, and null and void, and that a certain mortgage had

priority thereto, and for other relief. The learned Chief Justice finds that the plaintiff has proved all the material allegations in the statement of claim, and gives judgment for the plaintiff in terms of the prayer of the statement of claim with costs against the defendants John C. and Maude Milligan. He observes that the death of one of the parties since the trial has removed her contentions from the arena; but he would have held, in any event, that she had elected to take under the will. The plaintiff was willing, if she had lived, to pay the deceased party \$100 a year as claimed in paragraph 3 of the counterclaim. No costs for or against the defendants other than John C. and Maud Milligan. G. A. Stiles, for the plaintiff. R. A. Pringle, K.C., for the defendants John C. and Maude Milligan. J. G. Harkness, for the other defendants.

RE MACKENZIE AND HAMILTON—LENNOX, J.—JULY 31.

Vendor and Purchaser—Contract for Sale of Land—Objection to Title—Outstanding Interest—Vendors and Purchasers Act.]—Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title shewn by the vendor, upon a contract for the sale and purchase of land, was invalid, and that the vendor could make a good title. LENNOX, J., considered himself bound by a decision of MIDDLETON, J., in *Re Hamilton and Adair*, on the 18th September, 1911, in respect of another property, but upon the same question, viz., whether Gordon A. Yates took an interest under a declaration in his favour made by the vendor. LENNOX, J., was inclined to think that Yates took an interest in the land; but he did not see that the circumstances of the present application differed from the conditions which MIDDLETON, J., had to consider. Order declaring that the objection made by the purchaser in reference to the interest of Yates was not a valid objection to the title to the land which he was purchasing, and that neither Yates nor his assignee had any interest in the land in question. The purchaser to pay the vendor the costs of the application. J. A. McEvoy, for the vendor. H. L. Macdonell, for the purchaser.

RE MACKAY AND NELSON—LENNOX, J.—JULY 31.

Will—Power of Executors to Sell Land for Payment of Debts—Contract for Sale of Land by Executors—Objection to Title—Application under Vendors and Purchasers Act—Costs.]—Motion by the vendors for an order, under the Vendors and Purchasers Act, declaring that the purchaser's objection to the title of the vendors, upon a contract for the sale and purchase of land, was invalid, and that the vendors could make a good title. The vendors were the executors of a deceased person, and the objection was as to the power of the executors to sell, under the terms of the will. LENNOX, J., said that the will contained a clear charge of debts and a specific devise of all the property of the testatrix to the executors for named purposes—amongst them, the payment of debts. A few months only having elapsed since the death of the testatrix, there was no presumption that the debts had been paid; and the purchaser had no right to be informed as to them. It was admitted on the argument that the Ontario statutory law relating to the matter was the same as the English law; and all the points were covered by *In re Tanqueray*, 20 Ch.D. 465. The executors had power to convey; and it should be so declared. The question of interest did not come before the Court on the application. The letters and attitude of the vendors had been somewhat vacillating; and it was a case in which each party should pay his own costs. J. M. Langstaff, for the vendors. A. B. Armstrong, for the purchaser.

COUNTY OF HURON ASSESSMENT APPEALS.

DOYLE, Co.C.J.

JULY 29TH, 1913.

RE RATTENBURY AND TOWN OF CLINTON.

RE MCCAUGHEY AND TOWN OF CLINTON.

RE PIKE AND REINHARDT AND TOWN OF CLINTON.

Assessment and Taxes—Assessment of Hotel Properties—Effect of Local Option By-law—Reduction in Value—Business Assessment—Inapplicability to Hotel without License—Assessment Act, 4 Edw. VII. ch. 23, sec. 10(h).

Appeals by Joseph Rattenbury, John J. McCaughey, and Thomas G. Pike and Joseph E. Reinhardt, hotel-keepers in the town of Clinton, from decisions of the Court of Revision for the town, affirming the assessments of the appellants.

J. L. Killoran, for the appellants.

The Mayor and Reeve of the town supported the rulings of the Court of Revision.

DOYLE, Co.C.J.:—The appellants in each of the above-mentioned appeals appeal against their assessments, on the grounds of (1) overcharge on land, and (2) that the appellants are not liable for business tax.

The appellants contend that the passage of a local option by-law by the town corporation has reduced the value of the appellants' hotel properties to one-half of their former value.

A standard author, Weir, "Assessment Law of Ontario," p. 130, says: "It is a popular error that the cost of the buildings, less proper allowance for wear and tear, and other deterioration, should be the assessed value. By 'value of the land' and 'actual value,' in this section, is doubtless meant the market-value, or the value as an asset of the owner's estate. Its actual value must, however, be measured in dollars, and is not more than what, within a reasonable time, and with due care, can be realised from the sale of it. . . . Strictly speaking, the value of the land, as of any other commodity, is the price it will bring at the time it is offered for sale: *Squire qui tam v. Wilson*, 15 C.P. 284."

There is no doubt that the passage of the local option by-law in Clinton has most materially reduced the value of all hotel property there, if it has not made it wholly unsaleable.

The appellants contend, and not unreasonably, that the by-law has reduced the value by one-half. It is a serious question whether any of these properties could not be sold, without their contents or fixtures (which are not assessable), for half the sum at which they are now assessed.

Yet, as shewn by the case cited, the value of land is the *price it will bring at the time it is offered* for sale.

Adopting McCaughey's present valuation, for assessment purposes, of his hotel property, including stable and sheds, which I believe to be a reasonable estimate, I order and adjudge that the assessment of the said property be and the same is hereby reduced to \$2,500; the rink property to remain at the sum at which it is assessed. There was evidence shewing that the hotel building is from fifty to sixty years old.

I order and adjudge that the assessment of the hotel property, including the stable and sheds, of the appellant Joseph Rattenbury, be and the same is hereby reduced on the assess-

ment roll to \$3,500. The buildings on this property are new, and the whole property is certainly worth \$1,000 more than the McCaughey hotel property.

And I also order and adjudge that the assessment of the Pike hotel property, including all of the buildings, be and the same is hereby reduced to \$800.

As to the business tax, assessed against these appellants, when they were assessed, those three hotels were "licensed," and properly assessable as "licensed" hotels, for a business tax. But, subsequently, and before appeal, the local option by-law was passed by the respondents, which deprived the appellants of the opportunity to renew their licenses.

The appellants are now all hotel-keepers, but not "licensed;" and, therefore, they are *not* in the class of persons mentioned in the Act as liable to business assessment: see the Assessment Act, 4 Edw. VII. ch. 23, sec. 10 (1) (h).

The only hotel-keeper defined by that Act, as liable to a business tax, is "every person carrying on the business of a . . . hotel in respect of which a *tavern license has been granted.*" No tavern license having been granted to any one of the appellants, they are clearly not within the Act.

In America, "hotel" has been held to be a synonym for "inn": *Cromwell v. Stevens*, 2 Daly 15.

"I agree that the words 'hotel' and 'tavern' are undergoing a change in their meaning, there being temperance hotels and temperance taverns, as well as houses for the sale of excisable liquors:" per Chitty, L.J., in *Webb v. Fagotti*, 79 L.T.R. 684.

"An inn or hotel may be defined to be a house in which travellers, passengers, wayfaring men, and other such like casual guests are accommodated with victuals and lodgings and whatever they reasonably desire for themselves and their horses, at a reasonable price, while on their way:" Stroud's *Judicial Dictionary*, 2nd ed., 978, tit. "Inn," and cases cited. "Neither a boarding-house, restaurant, nor coffee-house, is an inn:" *ib.*

Inn, hotel, tavern, public-house, the keeper of which is now by law responsible for the goods and property of his guests, are treated as synonymous in the English Act, 1863, 26 & 27 Vict. ch. 41.

"Taxing Acts must be construed strictly, and any ambiguity will entitle the subject to be exempt from the tax:" Weir's *Assessment Law*, p. 49, and cases cited.

I order and adjudge that the "business tax" assessed against

each of the appellants be and the same is hereby disallowed, and I order that it be struck out of the assessment roll.

And I order the said assessment roll to be amended according to all of the foregoing adjudications.

The appellants, being all clearly entitled to succeed, I allow them their costs.

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 —It is important not only that the fountain of justice should be preserved from all impurity, but also that it should be protected against any semblance of impurity. *Eckersley v. Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667, 671, followed.—Where a County Court Judge had appealed unsuccessfully to the Court of Revision of the city in which he lived, from the assessment of his salary as income, and had launched a further appeal to the County Court Judge, which he proposed to request some other County Court Judge to hear (9 Edw. VII. ch. 29, sec. 15):—*Held*, upon a motion for prohibition and in the alternative for an order under 10 Edw. VII. ch. 26, sec. 16, that an order should be made under that enactment appointing a disinterested person to hear the appeal. The County Court Judge being disqualified by reason of interest, the jurisdiction of a Judge of the High Court to appoint another person immediately arises. *Re Chisholm and City of Berlin*, 4 O.W.N. 431.—MIDDLETON, J. (Chrs.)

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- ch. 34, sec. 94, was dismissed; it being *held*, (1) that the plaintiff, who became entitled to a part of the men's wages for boarding them, under an arrangement with the company, was not an assignee of the wages under an assignment or equitable assignment; and (2) that the judgment against the company was not a judgment for wages. *Lee v. Friedman*, 20 O.L.R. 49, distinguished. *Olson v. Machin*, 4 O.W.N. 287.—D.C.
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2. *Shares Purchased for Defendant without Authority—Contract—Evidence—Correspondence—Assumption of Liability—Ratification—Costs.*]—The plaintiffs sued for a balance of the price of certain company-shares said to have been bought by them for the defendant. The plaintiffs' instructions were received from one M., purporting to act on behalf of the defendant, and they received payment for a part from M.; but he had in reality no authority to use the defendant's name. M. died before the action was brought. The plaintiffs relied on a certain letter of the defendant to them as establishing ratification or estoppel:—*Held*, that, as at the time the letter was written the loss had been sustained, and the plaintiffs knew that M. had no authority, and the letter in fact refused to admit liability, while expressing doubt about the legal position, it did not warrant a finding of assumption of liability or of an estoppel. *Dominion Bank v. Ewing*, 7 O.L.R. 90, *Ewing v. Dominion Bank*, 35 S.C.R. 133, [1904] A.C. 807, distinguished.—The action was dismissed without costs, as it had been provoked by the defendant's letter. *Wiggin and Elwell v. Browning*, 4 O.W.N. 155.—MIDDLETON, J.

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 2. Foreign Commission—Application by Defendant—Delay of Trial—Reasonable Facilities for Making out Defence—Refusal to Impose Terms. *Antiseptic Bedding Co. v. Gurofsky*, 4 O.W.N. 1309, 1552.—MASTER IN CHAMBERS.—MIDDLETON, J. (Chrs.)
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2. Seizure of Goods—Claim under Bill of Sale—Interpleader Issue—Evidence—Credibility—Onus — Possession — Title. *Reinhardt Brewery Limited v. Nipissing Coca Cola Bottling Works*, 3 O.W.N. 366.—C.A.
3. Seizure of Goods—Claim under Prior Sale—Bills of Sale and Chattel Mortgage Act—Change of Possession—Interpleader. *Dominion Bank v. Salmon*, 4 O.W.N. 460.—KELLY, J.

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2. *Action Brought in Name of Infant by Next Friend on Behalf of Parents of Deceased—Power of Attorney—Status of Plaintiff—Letters of Administration not Granted—Amendment—Time-limit for Bringing Action—Unfounded and Vexatious Action—Summary Dismissal—Con. Rule 261.*—The plaintiff, an infant suing by his next friend, alleged that he sued on behalf of his father and mother for damages for the death of his brother, a labourer employed by the defendants, who was killed by an explosion of dynamite, owing, as the plaintiff alleged, to the defendants' negligence and an improper and defective system in their works. The father and mother, by an instrument under seal, constituted the plaintiff their attorney to sue to recover the damages:—*Held*, that the person in whom the cause of action is vested, and not his attorney or agent, must be the plaintiff.—It was said that the plaintiff would, if the trial of the action were delayed until he should be of age, apply for letters of administration to the estate of his deceased brother, and that his title as administrator would relate back to the death; but it was *held*, that a plaintiff, suing in his own right, cannot succeed upon a cause of action vested in the administrator of another, merely because he produces at the hearing letters of administration constituting him the administrator of that other. *Dini v. Fauquier*, 8 O.L.R. 712, and *Chard v. Rae*, 18 O.R. 371, distinguished.—An action brought in the name of an infant by a next friend is authorised only with respect to an action where the right is vested in the infant personally.—No amendment could be made in the plaintiff's favour which would deprive the defendants of the protection of the statutory limitation.—The action was summarily dismissed: Con. Rule 261. *Luciani v. Toronto Construction Co.*, 4 O.W.N. 1073.—MIDDLETON, J.—See also S.C., 4 O.W.N. 1025.

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 2. Contracts Induced by Fraud—Action for Rescission—Affirmance by Disposing of Property Acquired—Dismissal of Action without Prejudice to Action for Deceit. *Tucker v. Titus*, 4 O.W.N. 1402.—LATCHFORD, J.
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3. Lease—Action to Set aside—Fraud and Misrepresentation—Collateral Agreement—Alleged Breach of—Tenant in Possession—Counterclaim—Costs. *Ruff v. McFee*, 4 O.W.N. 501.—D.C.
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8. Lease of or License to Use Premises—Covenant not to Sublet—Power to Relieve from Consequences of Breach—Importance of Personality of Occupiers—“Interest in or Use of any Part of the Property”—Construction of Agreement between Licensees and Stranger—Power of Assignee of Reversion to Evict—Landlord and Tenant Act, 1 Geo. V. ch. 37, secs. 4, 5—Other Breaches of Provisions in Lease—Evidence—Judgment for Possession. *Curry v. Pennock*, 4 O.W.N. 712, 1065.—MEREDITH, C.J.C.P.—APP. DIV.
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12. Seizure for Rent—Illegal Distress—Acceleration Clause—Valuation of Goods Seized—Special Damages for Injury to Tenant's Business—Credibility of Witness not Subjected to Cross-examination. *Jarvis v. Hall*, 4 O.W.N. 232.—D.C.
13. *Summary Proceeding to Eject Overholding Tenant—Dispute as to Tenancy—Evidence—Inference of Assent from Silence—Credibility of Witness—Rejection of Testimony—New Trial—Costs—Powers of County Court Judge—Reasons for Judgment.*]—Upon a summary proceeding by a landlord against an overholding tenant, it is competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it, and the Judge may do this on conflicting evidence. *Re Fee and Adams*, 1 O.W.N. 812, and *Moore v. Gillies*, 28 O.R. 358, followed.—Upon appeal by the tenant from the order for possession made by the County Court Judge, the Court ordered a new trial, the facts as to the tenancy not having been fully developed.—County Court Judges should give reasons for the conclusions they arrive at.—Costs of appeal, of the new trial, and of the former proceedings, were left to be disposed of by the County Court Judge. *Re St. David's Mountain Spring Water Co. and Lahey*, 4 O.W.N. 32.—D.C.
14. *Summary Proceeding to Eject Overholding Tenant—Landlord and Tenant Act, 1 Geo. V. ch. 37, Part III.—Order of County Court Judge "Dismissing Application"—Refusal of Writ of Possession—Appeal under sec. 78(1)—Termination of Tenancy—Conflicting Evidence—Powers of Divisional Court—Discharging Order of Judge—Landlord Left to Bring Action—Costs.* *Re Dickson Co. of Peterborough and Graham*, 4 O.W.N. 100, 27 O.L.R. 239.—D.C.

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1. Security for Costs—Insolvent Plaintiff—Alleged Libel Involving Criminal Charge—Report of Proceeding before Magistrate—Animus—Implication. *McVeity v. Ottawa Citizen Co.*, 4 O.W.N. 37.—MASTER IN CHAMBERS.
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1. Mortgage—Foreclosure—Recovery of Land—Period of Limitation—Covenant for Payment—Default in Payment of In-

*terest—Effect of Acceleration Clause—Costs.]—A mortgagee sued for foreclosure and to recover money on the covenant for payment:—Held, that, so far as foreclosure was asked, the action was for the recovery of land, and, to avoid the bar of the Limitations Act, must be brought within ten years after the right of action first accrued. *Heath v. Pugh*, 6 Q.B.D. 364, followed.—2. So far as the recovery of money due on the covenant to pay was concerned, the action must also be within ten years after the cause of action arose: 10 Edw. VII. ch. 34, sec. 49(k). In mortgages made before 1894, the period of limitation was longer; but the mortgage sued upon was made in 1901.—3. The statutory form of mortgage was used, and it provided that, in default of payment of interest, the principal should become payable:—Held, that the cause of action in respect of the whole sum arose on default in payment of interest, and that the statute began to run upon the first default. *McFadden v. Brandon*, 6 O.L.R. 247, 8 O.L.R. 610, and *Hemp v. Garland*, 4 Q.B. 519, followed.—4. The inaction of the plaintiff for more than ten years since the first default had deprived him of all remedy on the mortgage.—Special order as to costs. *Cameron v. Smith*, 4 O.W.N. 1459.—BOYD, C.*

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3. Possession of Land—Enclosure—Cultivating and Cropping—Acts of Possession—Abandonment—Person Acquiring Title by Possession not Living on Land during Winter Months—Entry of Owner—Insufficiency—Establishment of Title by Possession—Time of Accrual of Right of Action—Real Property Limitation Act, R.S.O. 1897 ch. 133, secs. 4, 5(1), 8, 15. *Piper v. Stevenson*, 4 O.W.N. 961, 28 O.L.R. 379.—APP. DIV.
4. Possession of Land—Successive Intruders—Break in Occupation—Absence of Writing to Shew Transfer of Claim—Ejectment—Proof of Plaintiff’s Title—Possession by Predecessor. *Robinson v. Osborne*, 4 O.W.N. 120, 27 O.L.R. 248.—D.C.
5. Recovery of Land—Possession—Evidence of Tenancy—Limitation Act—Registered Discharge of Mortgage—Legal

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1. Amending Act, 2 Geo. V. ch. 55, sec. 13—Person Found Drunk in Municipality where Local Option in Force—“Street”—“Public Place”—Hotel—Ejusdem Generis—Conviction—Information. *Rex v. Cook*, 4 O.W.N. 383, 27 O.L.R. 406.—KELLY, J. (Chrs.)
2. Construction of sec. 54—“Sale or Other Disposal” of Intoxicating Liquor—Sale Completed on Saturday—Possession Given on Sunday—Scope of Prohibition. *Rex v. Clark*, 4 O.W.N. 529, 27 O.L.R. 525.—D.C.
3. Selling Intoxicating Liquors without License—Magistrate’s Conviction—Evidence—Acting as Messenger. *Rex v. Davis*, 4 O.W.N. 358.—KELLY, J. (Chrs.)
4. Selling Intoxicating Liquors without License—Magistrate’s Conviction—Evidence—Bottle Seized Bearing Label “Salvador”—Refusal to Admit—Request for Analysis—Estoppel—Fair Trial. *Rex v. Stephenson*, 4 O.W.N. 272.—KELLY, J. (Chrs.)
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6. Unlawful Sale—Evidence—Existence of Bar—Sec. 111, as Amended by 2 Geo. V. ch. 55, sec. 9—Plea of Guilty—Return of Magistrate. *Rex v. Dorr*, 4 O.W.N. 419.—MIDDLETON, J. (Chrs.)

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1. Certificate of—Motion to Vacate Registration—Abuse of Process of Court—Endorsement on Writ of Summons—Cause of Action—Right of Appeal. *Salter v. McCaffrey*, 4 O.W.N. 478.—MASTER IN CHAMBERS.
 2. Certificate of—Motion to Vacate Registration—Speedy Trial of Action—Terms. *Kennedy v. Kennedy*, 4 O.W.N. 1336, 1370.—MASTER IN CHAMBERS.—BRITTON, J. (Chrs.)
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2. Proof of Favourable Termination of Prosecution—Dismissal of Charge—Right to Go behind Record and Shew Abandonment of Prosecution as Result of Compromise—Abuse of Criminal Process of Court—Issue of Warrant in Lieu of Summons—Cause of Action. *Cockburn v. Kettle*, 4 O.W.N. 1161, 28 O.L.R. 407.—APP. DIV.
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4. 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. *Truesdell v. Holden*, *Truesdell v. Holden*, *Holden v. Collingwood Shipbuilding Co.*, 4 O.W.N. 1138.—MIDDLETON, J.

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3. Dismissal of Servant—Action for Wrongful Dismissal—Justification—Acquiescence—Costs. *Wilson v. Sanderson-Harold Co.*, 4 O.W.N. 1403.—FALCONBRIDGE, C.J.K.B.
4. Employment of Works Manager by Incorporated Company—Action for Salary—Suspension—Dismissal—Resolution—Notice—Sufficiency—Justification—Incapacity—Misconduct—Counterclaim—Improper Expenditure by Manager—Costs. *Bashforth v. Provincial Steel Co.*, 4 O.W.N. 1019.—MIDDLETON, J.
5. Injury to Servant—Building Trades Protection Act, 1 Geo. V. ch. 71, sec. 6(O.)—Breach of Employer's Duty—"Scaffolding"—Findings of Jury—Liability of Employer. *Hunt v. Webb*, 4 O.W.N. 1225, 28 O.L.R. 589.—APP. DIV.
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7. Injury to Servant—Negligence—Dangerous Machinery in Factory—Common Law Liability—Defective System—Factories Act—Absence of Guard—Workmen's Compensation for Injuries Act—Notice of Injury—Failure to Give in

- Time—Reasonable Excuse—Absence of Prejudice. *Gower v. Glen Woollen Mills Limited*, 4 O.W.N. 467, 796, 28 O.L.R. 193.—LATCHFORD, J.—APP. DIV.
8. Injury to Servant—Negligence—Dangerous Machinery in Foundry—Unusual Accident to Workman—Burden of Proof—Liability at Common Law—Evidence—Findings of Jury—Consistency—Liability under Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Judge's Charge—Directions to Jury—Combination of Negligent Acts of Different Fellow-workmen—Workman Operating Hoist—"Charge or Control"—"Engine or Machine upon Railway or Tramway"—Questions of Law and Fact—Respective Functions of Judge and Jury—Construction of Statute. *Dunlop v. Canada Foundry Co.*, 4 O.W.N. 791, 28 O.L.R. 140.—APP. DIV.
 9. Injury to Servant—Negligence—Dangerous Work—Absence of Instructions and Warning—Contributory Negligence—Common Law Liability—Workmen's Compensation for Injuries Act—Damages. *Sturgeon v. Canada Iron Corporation*, 4 O.W.N. 1386.—LENNOX, J.
 10. Injury to Servant—Negligence—Kick of Horse—Evidence to Submit to Jury—Voluntary Incurring of Risk—Knowledge of Danger—Imperfect Information as to Nature and Extent—Nonsuit Set aside and New Trial Ordered—Pleading—Amendment—Addition of Alternative Claim under Workmen's Compensation for Injuries Act. *Valci v. Small*, 4 O.W.N. 1238.—APP. DIV.
 11. Injury to Servant—Negligence—Use of Explosives—Un-guarded Receptacle—Cause of Injury—Negligence of Servant—Findings of Fact of Trial Judge—Appeal. *Davidson v. Peters Coal Co.*, 4 O.W.N. 36.—D.C.
 12. Injury to Servant—Negligence—Violation of Factories Act, R.S.O. 1897 ch. 256, sec. 20(1)—Dangerous Machinery—Absence of Guard—Contributory Negligence—Evidence for Jury—Findings—Breach of Statutory Duty—Voluntary Assumption of Risk. *McClemont v. Kilgour Manufacturing Co.*, 4 O.W.N. 313, 27 O.L.R. 305.—C.A.
 13. Injury to Servant—Negligence—Findings of Jury—Absence of Evidence to Support—Nonsuit. *Wyers v. Winlow & Irving Co.*, 4 O.W.N. 1080.—MIDDLETON, J.

14. Injury to Servant—Negligence of Fellow-servant—Engineer in Charge of Engine Operating Steam-shovel—Person in Charge or Control of Engine or Machine upon Railway—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Findings of Jury. *Dicarlo v. McLean*, 4 O.W.N. 1444.—APP. DIV.
15. Injury to Servant—Negligence of Fellow-servant—Liability of Master—Railway—Engine-driver—Signals—Backing Movement—Workmen's Compensation for Injuries Act—"Charge or Control" of Engine. *Allan v. Grand Trunk R.W. Co.*, 4 O.W.N. 325.—C.A.
16. Injury to Servant—Negligence of Fellow-servant in Lower Grade of Employment—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Railway—"Person in Charge or Control of Engine"—Evidence—Findings of Jury. *Martin v. Grand Trunk R.W. Co.*, 4 O.W.N. 51, 27 O.L.R. 165.—C.A.
17. Injury to Servant—Negligence of Fellow-servant in same Grade of Employment—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Railway—"Person in Charge or Control of Engine"—Evidence—Findings of Jury—Inference. *Simmerson v. Grand Trunk R.W. Co.*, 4 O.W.N. 1082, 1529.—MIDDLETON, J.—APP. DIV.
18. Injury to Servant—Negligence of Foreman—Person Intrusted with Superintendence—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 2, 3—Damages—Money Paid for Relief of Workman—Deduction. *Nigro v. Donati*, 4 O.W.N. 2, 453.—LENNOX, J.—D.C.
19. *Injury to Servant—Negligence of Master at Common Law not Shewn—Negligence of Fellow-servant—Person to whose Orders Plaintiff Bound to Conform—Injury by Reason of Conforming—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 1, 2—Contributory Negligence—Finding against—Damages—Costs—Liability of University Board of Governors for Injury to Workman at University Press—Position of Governors—Corporate Body—Crown.]—By statute "The Governors of the University of Toronto" are made a legal entity, a corporate body, with capacity to sue and be sued; and, it being admitted that the work (University Press) in which the plaintiff in this action was*

injured was their work and under their control, and that the persons engaged in it were their servants, the action was properly brought against them in their corporate capacity, instead of against the University.—The Governors are not Crown officers, and the rule that the King can do no wrong does not apply to them.—The fiat of the Attorney-General for the Province, giving leave to bring the action, does not confer any right of action; it merely removes the legislative bar to the commencement of any action without such leave.—In this case there was no liability at common law—no failure on the part of the defendants to supply proper machinery, or to take any other reasonable precaution to insure the safety from injury, in their employment, of their servants.—But E. was a person, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform; the plaintiff was ordered by E. to oil the tympan of the press, and, while conforming to that order, and by reason of conforming to it, was injured through the negligence of E. in setting the machine in motion without first giving the plaintiff warning; and both sub-secs. 1 and 2 of sec. 3 of the Workmen's Compensation for Injuries Act applied to the case.—And, upon the whole evidence, the defendants had not proved contributory negligence.—The damages were assessed at \$600, the injury being the loss of three fingers of the left hand. *Scott v. Governors of University of Toronto*, 4 O.W.N. 994.—MEREDITH, C.J.C.P.

20. Injury to Servant—Negligence of Superintendent—Liability—Tort Committed in Province of Quebec—Quebec Law—Workmen's Compensation Act—Damages—Jury. *Story v. Stratford Mill Building Co.*, 4 O.W.N. 1212.—KELLY, J.
21. Injury to Servant—Workmen's Compensation for Injuries Act—Defect in the Arrangement of Ways, Works, etc.—Negligence—Contributory Negligence—Findings of Jury. *Portlance v. Milne*, 4 O.W.N. 589.—D.C.
22. Injury to Servant—Workmen's Compensation for Injuries Act—Negligence—Defective Ways—Unguarded Circular Saw—Conflict of Evidence. *Maitland v. Mills*, 4 O.W.N. 557.—FALCONBRIDGE, C.J.K.B.
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24. Injury to Servant—Notice of Injury—Failure to Give within Proper Time—Reasonable Excuse—Mistake as to Name of Master—Absence of Prejudice—Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, secs. 9, 13, 14. *Quist v. Serpent River Logging Co.*, 4 O.W.N. 159.—BRITTON, J.
25. Injury to and Death of Servant—Action by Widow for Damages—Negligence—Statutory Duty—Breach—Contributory Negligence—Finding of Jury—Absence of Evidence to Support—Rejection of Finding by Trial Judge. *Pressick v. Cordova Mines Limited*, 4 O.W.N. 1334.—LATCHFORD, J.
26. Injury to and Death of Servant—Dangerous Machinery—Negligence—Defect in Condition of Premises—Common Law Liability—Negligence of Superintendent—Workman Bound to Conform to Orders and Conforming—Liability under Workmen's Compensation for Injuries Act—Damages—Apportionment. *Hicks v. Smith's Falls Electric Power Co.*, 4 O.W.N. 1215.—LATCHFORD, J.
27. Injury to and Death of Servant—Dangerous Work—Scope of Employment—Acting under General Instructions of Foreman—Negligence of Fellow-servant—Person Having Superintendence of Work but not over Deceased—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 2—Defective System of Signalling—Evidence—Findings of jury. *Darke v. Canadian General Electric Co.*, 4 O.W.N. 851, 28 O.L.R. 240.—C.A.
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3. *Power of Sale—Exercise of, by Mortgagee—Position and Conduct of Mortgagee—Sale en Bloc instead of in Parcels—Bona Fides—Absence of Fraud—Action for Damages—Dismissal.*—A mortgagee exercising the power of sale in a mortgage is not acting as a trustee, but only in pursuance of the powers conferred by the mortgage, and he may consult his own interest before that of the mortgagor, especially where the security may be difficult of realisation. The test

of the prudent man dealing with his own property is not to be applied; a lesser degree of responsibility is involved. Where the sale is attacked, the inquiry should be: has the mortgagee been culpable to the extent of wilful default in exercising the power? If a mortgagee takes pains to comply with the provisions of the power and acts in good faith, his conduct as to the sale cannot be impeached. *British Columbia Land and Investment Agency v. Ishitaka*, 45 S.C.R. 302, 317, *National Bank of Australasia v. United Hand in Hand*, 4 App. Cas. at pp. 392, 411, *Haddington Island Quarry Co. v. Huson*, [1911] A.C. at p. 729, and *Kennedy v. De Trafford*, [1897] A.C. 180, followed.—And in a case where the land was advertised and sold by the mortgagee *en bloc*, and the evidence shewed that a better price might have been obtained if it had been sold in parcels, but the good faith of the mortgagee was not impugned, and there was no fraud nor wilful nor reckless conduct, an action for damages was dismissed. *Wilson v. Taylor*, 4 O.W.N. 253.—Boyd, C.—Affirmed, 4 O.W.N. 1376.—APP. DIV.

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2. Commissioner of Water—Office of—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. *Rex ex rel. Martin v. Jacques*, 4 O.W.N. 1112.—MIDDLETON, J. (Chrs.)
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- swers — Effect of — Consistency — New Trial Ordered by Divisional Court — Appeal to Court of Appeal—Restoration of Judgment of Trial Judge Dismissing Action. *Herron v. Toronto R.W. Co.*, 4 O.W.N. 12, 691, 28 O.L.R. 59.—D.C.—C.A.
12. Street Railway—Injury to Passenger—Electric Explosion in Car—Evidence—Onus—Rebuilt and Defective Controller—Negligence of Motorman—Failure to Apply Brake—Lack of Proper Inspection—Expert Evidence — Onus — Nonsuit—Judgment on Former Appeal. *Fleming v. Toronto R.W. Co.*, 4 O.W.N. 323, 27 O.L.R. 332.—C.A.
13. *Telephone Company—Death of Employee 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.]—R.*, an employee of the defendant telephone company, was engaged in stringing a messenger wire along a city street, when he came in contact with another messenger wire and received from it an electric shock which caused his death. This latter was in contact with a primary electric wire of the defendant electric company, carrying 2,200 volts:—*Held*, upon the evidence, that the defendant electric company, in the erection of their poles, did not take adequate precautions, by guying or otherwise, to prevent the increase of the sag in their wire, and did not inspect the wire, or they would have discovered the contact, which had existed for some months before the fatality.—*Held*, however, that the defendant electric company owed no duty to the defendant telephone company or their employees to protect the wire improperly placed by the telephone company in a dangerous position; and, the accident being in truth caused by the negligence of the telephone company in placing their wires in undue proximity to the electric wires, neither the telephone company nor the plaintiff, the personal representative of R., was entitled to recover.—*Held*, also, that it was not a case in which liability existed apart from negligence, because the electric current was a dangerous substance; for the erection of poles on the highway was authorised by the legislature, and the authority relieved from liability unless negligence was shewn.

National Telephone Co. v. Baker, [1893] 2 Ch. 186, and *Eastern and South African Telegraph Co. v. Capetown Tramways Co.*, [1902] A.C. 381, followed.—*Held*, also, that the injury sustained by R. was 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. *Urquhart v. Farrant*, [1897] 1 Q.B. 241, referred to.—The action, as against the electric company, was dismissed. *Roberts v. Bell Telephone Co. and Western Counties Electric Co.*, 4 O.W.N. 1099.—MIDDLETON, J.

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3. Statement of Claim—Cheques—Refusal to Account—Discovery—Production of Books—Banks. *Spitzer Bros. v. Union Bank of Canada*, 4 O.W.N. 594.—MASTER IN CHAMBERS.
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 7. Statement of Claim—Misrepresentations—Contract—Rescission—Demand—Costs. *Murray v. Thames Valley Garden Land Co.*, 4 O.W.N. 773.—HOLMSTEAD, SENIOR REGISTRAR (Chrs.)
 8. Statement of Claim—Motion after Delivery of Defence, but before Examination for Discovery — Plaintiffs Resident Abroad—Default in Payment of Interlocutory Costs. *Rickart v. Britton Manufacturing Co.*, 4 O.W.N. 112.—MASTER IN CHAMBERS.
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2. *Action in Name of Firm after Dissolution—Objection by one Partner—Motion by Defendants to Stay Proceedings—Security for Costs—Parties—Objecting Partner Made Defendant—Amendment—Service out of the Jurisdiction.*—A partner may sue in the name of his firm; but, if his co-partner objects, the partner suing may be ordered to give the objecting co-partner security against the costs of the action. *Seal & Edgelow v. Kingston*, [1908] 2 K.B. 579, followed.—In this case the objecting co-partner was out of the jurisdiction, and notified the defendants that he was not a party to the litigation; and, fearing to attorn in any way to the jurisdiction, he declined to make the motion necessary for protection; whereupon the defendants moved

to stay proceedings:—*Held*, reversing the order of the Master in Chambers, 4 O.W.N. 1338, that the name of the objecting co-partner should be eliminated from the style of cause, and he should be added as a party defendant, with leave to serve him out of the jurisdiction and to make all appropriate amendments. *In re Mathews*, [1905] 2 Ch. 460, followed. *Widell Co. & Johnson v. Foley Bros.*, 4 O.W.N. 1419.—MIDDLETON, J. (Chrs.)

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- 9 Statement of Claim—Breach of Promise of Marriage—Particulars of Promise and Breach—Claim for Seduction and Birth of Child—Maintenance of Child—R.S.O. 1897 ch. 169, secs. 1, 2, 3—Amendment—Aggravation of Damages. *Morris v. Churchward*, 4 O.W.N. 1008.—MASTER IN CHAMBERS.
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- 17 Statement of Claim—Leave to Amend—Charging Acts in Furtherance of Conspiracy—Materiality. *St. Clair v. Stair*, 4 O.W.N. 1486, 1562.—MASTER IN CHAMBERS.—FALCONBRIDGE, C.J.K.B. (Chrs.)
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20. Statement of Claim—Misrepresentations—Particulars. *Morgan v. Thames Valley Garden Land Co.*, 4 O.W.N. 887.—MASTER IN CHAMBERS.
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is by application for indulgence in the original action.—A motion by the plaintiff to continue until the trial an *ex parte* injunction restraining the defendants from enforcing a judgment recovered by the defendants against the plaintiff in the High Court of Justice for Ontario, was dismissed; and, the motion being turned into a motion for judgment, the action, which was brought for the purpose of rescinding the plaintiff's subscription for the stock judgment for the price of which was obtained against him in the original action, was also dismissed. *Boeckh v. Gowganda-Queen Mines Limited*, 4 O.W.N. 27.—MIDDLETON, J.

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- 1 Geo. V. ch. 28 (O.) (Land Titles Act)—See LAND TITLES ACT.
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- 1 Geo. V. ch. 41, secs. 3, 25 (O.) (Land Surveyors Act)—See WATER AND WATERCOURSES, 5.
- 1 Geo. V. ch. 42, sec. 44 (6) (O.) (Surveys Act)—See HIGHWAY, 4.
- 1 Geo. V. ch. 49, sec. 3 (4), (5) (O.) (Innkeepers' Act)—See LIEN.
- 1 Geo. V. ch. 49, sec. 3 (6) (O.)—See ANIMALS, 2.
- 1 Geo. V. ch. 54 (O.) (Amending Ontario Railway and Municipal Board Amendment Act)—See STREET RAILWAYS, 1.
- 1 Geo. V. ch. 64, sec. 23 (O.) (Amending Municipal Act)—See MUNICIPAL CORPORATIONS, 15.

- 1 Geo. V. ch. 71, sec. 6 (O.) (Building Trades Protection Act)—
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- 1 Geo. V. ch. 134, secs. 1, 6 (O.) (Toronto and York Radial Rail-
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- 2 Geo. V. ch. 17, sec. 19 (O.) (Amending Summary Convic-
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- 2 Geo. V. ch. 17, sec. 34 (O.) (Amending Municipal Act)—See
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- 2 Geo. V. ch. 28, sec. 34 (O.) (Solicitors Act)—See SOLICITOR,
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- 2 Geo. V. ch. 33, secs. 170, 171, 247 (O.)—See WILL, 35.
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- 2 Geo. V. ch. 56 (O.) (Betting)—See WAGER.
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 2. *Non-payment of Interlocutory Costs—Vexatious Proceedings in Action—Contempt of Court.*]—An action, not in itself vexatious, was stayed because the plaintiffs had made certain vexatious interlocutory motions which were dismissed with costs, and the costs whereof had not been paid. *In re Wickham* (1887), 35 Ch. D. 272, *Graham v. Sutton*, [1897] 2 Ch. 367, *Stewart v. Sullivan* (1886), 11 P.R. 529, and *Wright v. Wright* (1887), 12 P.R. 42, followed. *Rickert v. Britton*, 4 O.W.N. 258.—RIDDELL, J.—Affirmed by a Divisional Court, 4 O.W.N. 499, upon the ground that there was jurisdiction to stay proceedings, and the discretion of the Judge should not be interfered with. *Rickert v. Britton*, 4 O.W.N. 499.—D.C.
 3. Prior Judgment against Incorporated Company without Assets—Res Judicata—Estoppel—Negligence. *Campbell v. Verral, Gibson v. Verrals*, 4 O.W.N. 300, 355.—RIDDELL, J. (Chrs.)—SUTHERLAND, J. (Chrs.)
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1. Agreement between Company and Municipality—Construction—Ontario Railway and Municipal Board—Jurisdiction—Order Requiring Street Railway Company to Repair Tracks and Substructures and Pave Part of Roadway Used for Railway—Covenant of Company—Construction—Contractual Obligation—Powers of Board—Railway and Municipal Board Amendment Act, 10 Edw. VII. ch. 83, sec. 3—“Tracks”—1 Geo. V. ch. 54 (O.)—Terms of Order of Board—Omission to Prescribe Kind of Pavement to be Laid—Remitter to Board. *Re City of Toronto and Toronto and Suburban R.W. Co.*, 4 O.W.N. 1379, 29 O.L.R. 105.—APP. Div.
2. Agreement between Company and Municipality—Construction—Restriction as to Switches—Right to Carry Freight—Powers of Ontario Railway and Municipal Board. *Re Waddington and Toronto and York Radial R.W. Co.*, 4 O.W.N. 617.—C.A.
3. Injury to and Death of Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury—Evidence—Cause of Injury—Recklessness of Deceased. *Long v. Toronto R.W. Co.*, 4 O.W.N. 741.—APP. Div.
4. 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. *Myers v. Toronto R.W. Co.*, 4 O.W.N. 1120.—MIDDLETON, J.
5. Injury to Persons Crossing Track—Negligence—Contributory Negligence—Answers of Jury—Reasonable Care—Indefinite and Inconclusive Answers—“To a Certain Extent”—“By Lack of Judgment”—Ultimate Negligence. *Dart v. Toronto R.W. Co.*, 4 O.W.N. 315.—C.A.
6. Injury to Person Crossing Track after Alighting from Car—Negligence—Excessive Speed—Contributory Negligence—Findings of Jury—Evidence to Support—Duty of Railway

Company.]—The plaintiff, an elderly woman, alighted from a street car of the defendants, and, in attempting to cross the street behind the car, was struck by another car travelling in the opposite direction, and, as she alleged, at an excessive speed. In an action for damages for her injuries the jury found in her favour, and upon appeal the defendants contended that there should have been a nonsuit.—*Held*, that there was reasonable evidence upon which the jury might find, as it did, in the plaintiff's favour, that the defendants were guilty of negligence in excessive speed and that the plaintiff was not guilty of negligence or contributory negligence in crossing behind the car.—In all cases in which there is no reasonable evidence upon which the jury could find in the plaintiff's favour, the case must be withdrawn from the jury and the action dismissed. If there be no legal evidence on one side, no matter which, there is nothing upon which a jury can pass, and so the case should be withdrawn from the jury.—A moving car approaching a car which has stopped to let down passengers ought to approach and pass it with more care than would be needed if both were moving, in order to avoid especially just such accidents as that which was the subject-matter of this action.—When companies use the public highways as discharging and receiving stations for their passengers, they, as well as the passengers, should have some care that the alighting and discharge and boarding are made with some reasonable regard to saving the passengers from the danger to those on foot in a horse road traversed by a railway as well as ordinary traffic. *Cooper v. London Street R.W. Co.*, 4 O.W.N. 623.—C.A.

7. Operation in two Municipalities of Railway Owned by one—Agreement between Corporations—Division of Profits—Approval of Ontario Railway and Municipal Board—Action for Account of Profits—Jurisdiction of Court—Exclusive Jurisdiction of Board—Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, secs. 16, 17, 51, 53, 64—Ontario Railway Act, 1906. *Town of Waterloo v. City of Berlin*, 4 O.W.N. 256, 709, 28 O.L.R. 206.—BOYD, C.—APP. Div.

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2. Boundaries—Dispute as to, between Lots—Plans and Surveys—Evidence—Claim of Right—Damages. *McMenemy v. Grant*, 4 O.W.N. 802.—APP. DIV.
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4. 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. *Ireson v. Holt Timber Co.*, 4 O.W.N. 1106.—KELLY, J.

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2. Dismissal of Action of Crim. Con.—Proceedings at Trial—Motion to Postpone—Refusal—Plaintiff Failing to Give Evidence in Support of Claim — Witness Confined in Asylum for Insane—Evidence as to Chances of Recovery—Particulars of Statement of Claim—Confinement to Charges Specified in Compliance with Order—Practice. *Haines v. MacKay*, 4 O.W.N. 651.—APP. DIV.
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10. Postponement—Delay in Prosecution of Action—Evidence—Foreign Commission. *Grocock v. Edgar Allen & Co. Limited*, 4 O.W.N. 1406.—MASTER IN CHAMBERS.
11. Postponement—Grounds—Terms — Powers of Master in Chambers—Pleading — Amendment. *Armstrong v. Armstrong*, 4 O.W.N. 1340.—MASTER IN CHAMBERS.
12. Postponement—Motion for—Affidavit—Con. Rule 518—Absence of Material Witness—Failure to Shew Nature of Expected Testimony — Refusal of Motion — Undertaking—Terms. *Cinnamon v. Woodmen of the World*, 4 O.W.N. 1042, 1094.—MASTER IN CHAMBERS.—MIDDLETON, J. (Chrs.)
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2. Contract for Sale of Land—Absence of Written Memorandum—Part Performance—Subsequent Conveyance by Vendor to Another—Specific Performance—Purchaser Deprived of Remedy by Act of Vendor—Judicature Act, secs. 41, 58 (10)—Damages in Lieu of Specific Performance. *McIntyre v. Stockdale*, 4 O.W.N. 482, 27 O.L.R. 460.—CLUTE, J.
3. Contract for Sale of Land—Action by Assignee of Purchaser for Specific Performance—Omission of Term in Written Agreement—Fraud—Refusal to Decree Specific Performance—Finding of Trial Judge—Discretion—Appeal—Dismissal of Action—Repayment of Deposit Paid by Purchaser to Agent of Vendor. *Sheardown v. Good*, 4 O.W.N. 1344, 1444.—APP. DIV.
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5. Contract for Sale of Land—Action by Purchasers for Specific Performance—Conduct of Plaintiffs—Acts of Agent—Fraudulent Misrepresentation Inducing Defendant to Enter into Contract—Refusal to Carry out Contract before

- Discovery of Fraud—False Signature to Offer—Ratification after Acceptance—Damages — Pleading — Amendment—Costs. *Beckman v. Wallace*, 4 O.W.N. 949, 1356, 29 O.L.R. 96.—FALCONBRIDGE, C.J.K.B.—APP. DIV.
6. Contract for Sale of Land—Assignment—Default—Notice of Cancellation. *Prudhomme v. Labelle*, 4 O.W.N. 388.—SUTHERLAND, J.
7. Contract for Sale of Land—Building Restrictions—Written Consent to Relaxation of Restrictions Obtained upon Condition as to Position of Building—Refusal of Purchaser to Fulfil Condition—Action for Specific Performance—Costs. *Ellis v. Zilliox*, 4 O.W.N. 744.—APP. DIV.
8. Contract for Sale of Land—Condition—Representations—Failure to Prove Truth of—Rescission—Evidence—Exclusion. *Walker v. Maxwell*, 4 O.W.N. 95.—LENNOX, J.
9. Contract for Sale of Land—Default—Rescission—Forfeiture of Sums Paid—Judgment—Costs. *Young v. Plotymeki*, 4 O.W.N. 94.—RIDDELL, J.
10. Contract for Sale of Land—Default in Payment of Installments of Purchase-money—Stipulation that Time of Essence and for Cancellation on Default—Relief from Forfeiture—Compensation by Payment of Purchase-money and Interest—Specific Performance — Laches — Special Circumstances—Costs. *Boyd v. Richards*, 4 O.W.N. 1415, 29 O.L.R. 119.—MIDDLETON, J.
11. Contract for Sale of Land—Default of Purchaser—Time of Essence—Waiver—Recognition of Contract as Subsisting—Necessity for Notice before Terminating Contract—Default of Vendor—Specific Performance—Ascertainment of Amount Due. *Dahl v. St. Pierre*, 4 O.W.N. 1413.—LENNOX, J.
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13. Contract for Sale of Land—Description—Encroachment—Possession. *Re Butler and Henderson*, 4 O.W.N. 498.—SUTHERLAND, J.

14. Contract for Sale of Land—Formation of—Execution of Deed—Reading Several Documents together—Statute of Frauds—Signature by Agent's Clerk—Objection to Title—Outstanding Mortgage—Parties—Specific Performance. *Dixon v. Dunmore*, 4 O.W.N. 1501.—APP. DIV.
15. Contract for Sale of Land—Formation of—Husband of Vendor—Authority—Statute of Frauds—Specific Performance. *Boland v. Philp*, 4 O.W.N. 166.—D.C.
16. *Contract for Sale of Land—Formation of — Statute of Frauds—Incomplete Agreement—Description of Land—Knowledge of Purchaser—Extrinsic Parol Evidence—Terms of Mortgage to be Given by Purchaser—Manner and Time of Payment of Principal.*]—Held, affirming the judgment of TEETZEL, J., 3 O.W.N. 983, dismissing an action for specific performance of an alleged contract for the sale and purchase of land, that there never was any concluded agreement between the parties as to the time for payment of a balance of the purchase-money to be secured by mortgage; and that the law would not supply the missing part of the agreement. The question was one of contract or no contract in fact, and of adding by parol to a written formal document, as well as of a violation of the provisions of the Statute of Frauds.—Held, also, that the land described in the agreement was not that which was really sold. *Reynolds v. Foster*, 4 O.W.N. 694.—C.A.
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of Court.]—Where one person is entitled to a right of way over the land of another, the precise location not having been determined, it is the grantor who has the right and duty to select the precise location, to “define” the way; and, once the way is defined, it cannot be changed by the grantor.—In an agreement (under seal) for the sale of land by the defendant to the plaintiffs, the defendant agreed to give the plaintiffs a right of way across another lot, and agreed “to make a grant of such right of way when and as soon as the same is surveyed:”—*Held*, that it was the duty of the defendant to have the survey made; and, when he refused, an action lay; and, a survey being a prerequisite to a conveyance, the refusal to make a survey was a waiver of the conveyance, if it was the duty of the plaintiffs to prepare and tender one.—*Held*, also, that the plaintiffs were entitled to costs.—*Held*, also, that it is not beneath the dignity of the Court to consider on its merits any question properly before it—contracting parties should not be allowed wilfully to break their contracts because the damage is small. *Burney v. Moore*, 4 O.W.N. 173.—D.C.

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