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COURT OF APPEAL.

FEBRUARY 10TH, 1913.

*RE HUTCHINSON.

Infant — Custody — Habeas Corpus — Right of Father against Maternal Grandparents—Agreement—Adoption—1 Geo. V. ch. 35, sec. 3—Application to Father of Child—Welfare of Infant—Medical Testimony.

Appeal by Robert Burvill and Adah Burvill, grandparents of the infant Adah May Hutchinson, from the order of a Divisional Court, 26 O.L.R. 601, 3 O.W.N. 1552, reversing the order of BOYD, C., 26 O.L.R. 113, 3 O.W.N. 933, and awarding the custody of the infant to her father, William H. Hutchinson.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

W. A. Sinclair, for the appellants.

W. N. Tilley, for the respondent.

HODGINS, J.A.:—. . . It would, I think, require very clear and explicit words to enable the Court to construe the statute in question (1 Geo. V. ch. 35, sec. 3) as entirely reversing the law flowing from 12 Car. II. ch. 24, secs. 8 and 9, on which this enactment is based—see Leach v. The King, [1912] A.C. 305—and as enabling a father to renounce the rights and duties of a parent during his lifetime and to make an agreement which, prior to this recent statute, was regarded as illegal and contrary to public policy: Roberts v. Hall, 1 O.R. 388, at p. 404.

*To be reported in the Ontario Law Reports.

The agreement in question did not in terms alter the expectations or fortunes of the child; and, even if justified by 1 Geo. V. ch. 35, sec. 3, as to which I express no decided opinion, it was immediately revoked or repudiated.

I do not see how this Court can order or require the grandparents to implement their promise, if promise there was, to make the child their heir. They offer so to do; but it must, I think, be left to the father to say whether he is willing to pay the price they require. If there had been a will or settlement made in pursuance of the agreement, the question of revocation by the father would have occasioned more difficulty, and, I think, must have been the subject of an action.

The agreement is dated the 4th December, 1911, and the writ asking its cancellation was issued on the 28th December, 1911, and this application was begun on or about the 16th February, 1912. It has been contested, and for a year the infant has remained in the grandparents' custody. She is now three and a half years old. The father has filed an affidavit, as directed by the Divisional Court, sworn on the 25th February, 1912, stating that he has rented for six months and furnished a house, and was ready to receive the child, his sister having come to reside with and keep house for him. What the situation is just at present is not apparent. No serious fault has been found with either the father or the grandparents, and the father is entitled primâ facie to the custody of the child. Were it not for the affidavit of Dr. Reid, I should agree with the Divisional Court that the custody should be changed; but, in view of his statement as to the temperament of the child and the effect upon her health, I am unable to come to the conclusion reached by the Divisional Court, and prefer the views expressed by the learned Chancellor, so far as they relate to the welfare of the child. See The Queen v. Gyngall, [1893] 2 Q.B. 232.

I think the proper disposition to make of the matter would be to allow the appeal without costs and restore the judgment of the Chancellor, reserving leave for the father to apply when the child attains the age of six years for her transfer to his care. In the meantime the father should have the right to all reasonable access to the child when he so desires; this right of access to be settled by the Local Master if the parties cannot agree.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that the father should have the custody of the

child upon his satisfying a Judge of the High Court Division that he had procured a suitable house with his sister in charge and that the removal of the child would not be fraught with any real peril to her health.

Appeal allowed; MEREDITH, J.A., *dissenting.*

FEBRUARY 10TH, 1913.

*PEARSON v. ADAMS.

Deed—Conveyance of Land—Building Restriction—Construction—Covenant or Condition—"Detached Dwelling-house"—Apartment House.

Appeal by the defendant from the judgment of a Divisional Court, 27 O.L.R. 87, 3 O.W.N. 1660, reversing the judgment of MIDDLETON, J., 27 O.L.R. 87, 3 O.W.N. 1205.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

J. M. Godfrey, for the defendant.

J. H. Cooke, for the plaintiff.

MEREDITH, J.A.:—If we have regard only to the interpretation of the words of the "condition" in question, this case presents no great difficulty; but, if we unconsciously let our minds be carried away by that which we may feel ought to have been provided against in the "condition," our chances of going astray, too many under any circumstances, are very greatly increased.

The provisions of the deed in question are, that the grant contained in the deed shall be subject to the "further condition that the said land shall be used only as a site for two isolated dwelling-houses . . ."

So that the single and simple question, on the subject of the interpretation of the deed, is, whether the plaintiff has proved that the building in question is not a dwelling-house, or, if a dwelling-house, is not an isolated one: the restriction must, like an exception out of the grant, be well proved, by those asserting it, to have been violated.

*To be reported in the Ontario Law Reports.

That it is a dwelling-house no one can reasonably deny; its one purpose is a settled dwelling-place for human beings; it is to be a house to be used solely as such a dwelling-place. And that it will be isolated is obvious.

It cannot be the less a dwelling-house merely because more than one person, or more than one family, is to dwell in it; the character is the same, and the quantity of that character is greater only.

Structurally it is unquestionably one isolated building, and that building is unquestionably a house; the number of persons living in it cannot, nor can the manner in which they live in it, change these obvious facts. If it were the intention of the parties that they should be more restricted, it should have been so provided; it is as easy to say a dwelling-house for one family only, as to say merely a dwelling-house, which no one can but know has a much wider meaning.

To call one isolated house, within four walls, under one roof, and with outer doors for one house only, several houses, merely because several persons may occupy different parts of that one isolated house, would, I cannot but think, amuse rather than convince the minds of ordinary people.

Does the word "apartment" or the word "apartments," in the language of this Province in general, or of Toronto in particular, ever mean a house? Would one person in ten thousand, seeing such a house as that in question and being asked whether it was one or several houses, say anything but that it was one only, and say it with a strong impression that the questioner was either blind or silly? A compact, but very tall, building, in a prominent place in Toronto, has or is to have tens if not hundreds of separate office rooms and suites of rooms, more separate, and in a measure publicly separate, than any dwelling apartments. Would any one of the tens of thousands of persons who pass that building ever describe it as not one house but tens or hundreds of houses? And how do local notions agree with those of the lexicographers? Taking the first dictionary at hand, and a very good one too, I find the definition of the word "apartment" to be a room in a house, and of the word "apartments," a set of rooms; whilst the next nearest, that mine of legal information nick-named "Cyc.," gives this very much in point definition of the word "apartment"—"one or more rooms in a house, occupied by one or more persons distinct from other occupants of the same house."

It is not an unknown thing for different members of one family residing in one house to occupy different parts of it as

exclusively as the house in question is to be occupied separately; indeed, and not so very infrequently too, in farm-houses in this Province the same thing occurs, sometimes being provided for in the last will of the owner; but no one would ever dream of calling the farm-house more than one house, even though the carpenter were called in and had done such work as had made the exclusion effectually exclusive.

It is very likely that, when the deed in question was made, apartment houses, such as are very common in these days, were unknown to the parties to it; that which was known to every one was the double house—semi-detached—and terraces and rows and blocks of houses, things which were generally considered more or less objectionable to exclusive building schemes, and which, in each case, and in every sense, was more than one house, the one severable from the other, even to demolition, leaving the other substantially intact.

For some special purpose, under some special enactments, such as those affecting the franchise, part of a house is to be deemed a house, but that is quite contrary to the popular meaning of the words: see Thompson v. Ward, L. R. 6 C.P. 327, at p. 341; which popular meaning must prevail in such a case as this.

I am, therefore, clearly of opinion that, assuming the "condition" to be binding, as creating an equitable easement, or otherwise, there would be no breach of it in the erection of the building in question: and so it is unnecessary to say anything upon the other points dealt with by Riddell, J., further than that silence is not to be taken as assent.

But I must add that this is most likely another case of wasted energy, as in all probability the now existing by-law against the placing of apartment houses in certain localities in Toronto prevents the erection of this house at the place in question.

I would allow the appeal and restore the judgment dismissing the action.

GARROW, J.A.:—I agree.

HODGINS, J.A., also agreed, for reasons stated in writing.

MACLAREN and MAGEE, JJ.A., dissented, for reasons stated by MACLAREN, J.A., in writing.

Appeal allowed; MACLAREN *and* MAGEE, JJ.A., *dissenting.*

FEBRUARY 10TH, 1913.

*YOULDEN v. LONDON GUARANTEE AND ACCIDENT CO.

Accident Insurance—Death Claim—Cause of Death—Injury from Lifting Heavy Weight—Evidence—Statement of Deceased—Admissibility—Conditions of Original Policy—Non-compliance with—Renewal Receipt—Fresh Contract—Reference to Original Policy—Sufficiency—Insurance Act, R.S.O. 1897 *ch.* 203, *sec.* 144.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 26 O.L.R. 75, 3 O.W.N. 832.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

J. L. Whiting, K.C., for the plaintiff.

W. N. Tilley and C. Swabey, for the defendants.

MEREDITH, J.A.:—The insurance in question originated in 1902, and was evidenced by the policy No. 65996. That insurance seems to have been renewed from year to year, and was in force when the insured person died in 1909; and his death took place under such circumstances that, admittedly, the plaintiff has no legal claim against the defendants under the policy. How then can she recover? What sort of difficulty does the case present?

The contention is, that the policy must be disregarded, and that the contract of insurance must be taken to be the mere renewal receipt; and, as no conditions are set out in or upon it, none are applicable to the case. But how can any such contention reasonably be made? The "accident renewal receipt" is, upon its face, and was in fact, nothing but a receipt for the premium by which the policy No. 65996, was renewed for another year. Indeed, without the policy, the plaintiff, suing in her own right only, as she does, would have no right of action. The "insurance contract," was the contract which was first made in 1902, and thereafter renewed from year to year, the contract evidenced by the policy No. 65996, and none other; that contract, admittedly, complies with the requirements of the law; and, under it, admittedly, there is no right of action. The premiums might just as well, as a matter of law, have been paid without any re-

*To be reported in the Ontario Law Reports.

ceipt being taken for them; could it in such a case be contended, reasonably, that there was no contract in writing?

It is true that it may be that there was no right of renewal, such as that in question, without the consent of the defendants: but what difference can that make? Whether it was in the power of one of the parties alone, or whether it required the concurrence of each, in either case the contract ended unless and until it was renewed; the renewal in either case is indifferently called a renewal of the policy, and the effect of it is just the same—the old contract is carried on in its entirety for another year. That is, and in this case was, the intention of the parties as well as the effect in fact and in law of every such renewal, unless in it there is some provision to the contrary; and such there was not in this case.

The only difficulty is to make anything like a real difficulty out of the appellant's contention in this respect.

Upon the question of admissibility of evidence the trial Judge, in my opinion, erred.

How can the observation, made some time after the event, that he thought he had hurt himself, be considered admissible evidence, except, if material, against him? It did not relate to his sensations at the time; but was his opinion as to something that had happened before.

However, little or nothing turns upon the statement. If it were meant to convey the opinion that he had ruptured or strained himself, the meaning which the words would ordinarily convey, it was wrong, because nothing of the sort occurred. Whilst, if it were intended to convey the meaning that by overexertion he had exhausted himself, there was no need to say anything; that was as evident to those to whom he spoke as it could be to him. They knew of his condition before his exertion, they saw what he did, and they saw the weakness which it apparently brought on. So that excluding the statement has really no effect upon the case.

Upon the question of fact, it is never questioned that a finding on circumstantial evidence is quite as good as one on direct testimony; discussions of that kind are quite out of the question. The real questions are: when the case was tried by a jury, was there any evidence upon which reasonable men could find as the jury have found? and, when tried by any judicial officer, whether the finding was right; having regard always to the advantages of a Judge who sees and hears the witnesses over any Court that does not.

Having regard to these things, I am not prepared to say that

the trial Judge erred in his finding as to the cause of death; though bound to say that there is no great margin of foundation for the support of that finding in the evidence upon which it is based.

I would dismiss the appeal.

GARROW, J.A., concurred.

HODGINS, J.A., gave reasons in writing for agreeing with the conclusions of MIDDLETON, J.

MACLAREN and MAGEE, JJ.A., agreed with HODGINS, J.A.

Appeal dismissed with costs.

FEBRUARY 13TH, 1913.

*RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO.

Ontario Railway and Municipal Board—Jurisdiction—Right of Appeal—Ruling on Preliminary Question not Appealed against—Leave to Appeal—Work Done in Pursuance of Previous Ruling—Street Railway—Power to Remove Line from one Street to another—Power of Expropriation—Construction of Statutes—Deviation—Costs.

An appeal by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board of the 17th June, 1912, whereby the Board approved the plan, profile, and book of reference filed by the Toronto and York Radial Railway Company on the 30th May, 1912, shewing a certain proposed deviation of the line of railway of the company, from Yonge street, on the southerly end of the Metropolitan division of the railway.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

Irving S. Fairty, for the appellants.

C. A. Moss, for the respondents.

*To be reported in the Ontario Law Reports.

MEREDITH, J.A.:—Questions of much importance are raised by this appeal; and, in the view I take of this case, these two must now be considered: (1) Is this appeal barred by lapse of time? And (2) are the respondents authorised by law to construct their line of railway, as they purpose doing, under any circumstances?

On the first question my opinion is, that the right of appeal is not so barred; and that leave to appeal was properly granted. I cannot look upon the ruling of the Board, upon a preliminary question, as a decision or order against which an appeal ought to be taken as if it were final. There was nothing, that I know of, to prevent the Board altering, or disregarding altogether, that ruling before making any more final order such as that in question. It may, no doubt, be very convenient and quite proper to make such a ruling with a view to getting the judgment of this Court upon a vital question which may control largely or indeed altogether further proceedings in the matter; but I cannot think that failure so to appeal ought to be made conclusive against an application subsequently made for leave to appeal, though it might very materially affect the terms upon which leave should be granted.

Nor can I think that work done by reason of no such appeal having been taken should, in a case such as this, preclude altogether an appeal. The question is one of jurisdiction. If there be no jurisdiction, it is better to have it determined now than when more work has been done; and in this Court rather than upon a criminal prosecution or other proceeding in which the jurisdiction of the Board might be called in question indirectly. I cannot think that an unappealed "decision or order" of the Board, in a matter beyond its jurisdiction, is binding as if it were one within its jurisdiction. And so, notwithstanding the view of the appellants that no appeal lay, and notwithstanding all that has happened in the meantime, it seems to me to be in the interests of all parties that the second of the two questions I have set out should be determined now, by this Court—to be followed, if any of the parties desire it, by such further appeal as the law may allow.

Then, upon the main question: I am unable to find, in any of the enactments relied upon, any authority for the respondents' removing their railway from Yonge street, at the place in question.

It is true that, in the early part of the proceedings before the Board, the appellants more than once expressed the desire to have the railway removed from that part of Yonge street; and

it was whilst that state of affairs existed that the ruling in favour of the right of removal was made; but, later on in the proceedings, the appellants appear to have got more light upon the subject; at all events, they more than once objected to the change of situation, and referred to the real cause for the desire to make it.

The case might be very different if the appellants were the owners of the highway, but that is not so; the public have the highest rights in it, the respondents being in the character of conservators of it for the use of the public.

I can, as I have said, find nothing, in any of the enactments to which we have been referred, giving the right to take the railway from Yonge street and place it elsewhere, as the respondents are substantially seeking leave to do. Such a right, if intended, should, and doubtless would, have been given in reasonably plain language. To the contrary, the whole legislation, up to that of the year 1911, seems to me to point to a railway upon Yonge street only, at the place in question. Giving some power to expropriate lands for the purposes of this railway, and indeed of any street railway, is not at all inconsistent with this view of the legislation in question: roads which run solely upon highways must have land elsewhere for car sheds and other purposes, and so a need for power to expropriate.

In regard to the Act of 1911, if the respondents come within its provisions, then the consent of the municipality is required, and has not been obtained; if, on the other hand, because the intention is merely to cross, not to run along, highways, the Act is not applicable, the right to cross is not conferred by it, but must be found elsewhere, and is not.

The Board was of opinion that the enactments in question conferred the right to change now the situation of the railway, apparently in whole or in part; and relied for that opinion upon (1) the Act of 1893. But that Act relates to a railway north of the then northern terminus; and, as I understand it, the place in question was then and is now the southern terminus; and, whether that be so or not, the respondents exercised their right of selection of the place of their line of railway; and I can find nothing in the enactment permitting them to change, when and how they might choose, a line so laid down; it can hardly be possible that any one ever had such an intention. It was also contended for the appellants that the proposed new line would "be constructed upon or along a street or highway," and so, under the plain words of the Act, requires the consent of the municipality; but in that I am unable to agree; I cannot

consider that merely crossing a street is within the words "upon or along" a street.

The Board also relied upon the power of expropriation, as to which I have already said why I cannot consider the giving of that power evidence of the giving of power to build elsewhere than upon a highway.

They also relied upon the Ontario Railway Act of 1906, sec. 55; but, if there is no power to change the location of the line, that enactment cannot be held to confer the power: a deviation may be permitted, but surely only from one place to another in which the line may lawfully be placed. And there can be really no pretence that this case comes within that section, which allows a deviation for these purposes only: (1) lessening a curve; (2) reducing a gradient; (3) or otherwise benefiting such line of railway, or for any other purpose of public advantage. The plain purpose of the proposed change is, I have no doubt, to make perpetual elsewhere a right upon Yonge street which will in a year or so end. If there is a right to renew life in that way under any other enactment, let it be renewed accordingly; but not under the pretence of a deviation to improve the running qualities of the line, or of being for the public advantage.

Section 199 of the same enactment, of 1906, was also relied upon by the Board, but that section is expressly in accord with the view I have already expressed, that there can be no "deviation" to a place upon which the railway company have not already a right to lay their line; they may deviate from the highway "to the right of way owned by the company."

I do not stop to consider whether all these enactments are or are not applicable to the respondents. If they are, they do not, in my opinion, support the ruling of the Board.

Upon the whole case, I am obliged to say that I cannot consider that the Board had the jurisdiction which they exercised in their later order and asserted in their earlier ruling.

If it be right that the change of location of the line should be made lawful, the Legislature alone can give effect to such right.

The appellants should not have their costs; their vacillation should at the very least deprive them of all right they otherwise might have in that respect.

MACLAREN and HODGINS, JJ.A., were of opinion that the appeal should be allowed, for reasons stated by each in writing.

GARROW and MAGEE, JJ.A., concurred.

Appeal allowed without costs.

APPELLATE DIVISION.

FEBRUARY 10TH, 1913.

*GUNDY v. JOHNSTON.

Solicitors—Costs and Charges—Statute Fixing Amount of Costs of Litigation Payable to Client—2 Geo. V. ch. 125, sec. 6—Construction and Effect—Solicitors Act, 2 Geo. V. ch. 28, sec. 34—Delivery of Bill of Costs—Insufficiency of Principal Item—Other Items—Sufficiency—Action for—Recovery—Costs.

Appeal by the plaintiffs from the judgment of LENNOX, J., ante 121.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

M. Wilson, K.C., for the plaintiffs.

M. Houston, for the defendant.

MEREDITH, C.J.O.:—The appellants are a firm of solicitors, who were employed by and acted for the respondent and certain other persons, as their solicitors, in certain proceedings before the Drainage Referee, and for the respondent only before this Court on an appeal from the Referee, which resulted in a by-law passed by the Council of the Township of Tilbury East, under the Drainage Act, being quashed with costs.

After the decision of this Court on the appeal, the corporation of the township applied to the Legislature for an Act confirming the by-law, and the application was opposed by the respondent, who was represented before the Private Bills Committee.

The application resulted in the passing of the Act 2 Geo. V. ch. 125, which confirmed the by-law, and by its 6th section provided that "the township shall pay to the plaintiff, James Johnston, his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and in the Court of Appeal, and such costs are hereby fixed at eighteen hundred dollars."

The action is brought to recover the costs, in respect of the matters mentioned in the section, payable by the respondent to the appellants, and some other small sums claimed for costs in other matters.

*To be reported in the Ontario Law Reports.

The appellants' contention is, that sec. 6 fixes the amount of the costs, not only as between the corporation of the township and the respondent, but also as between him and them; and that, if that contention cannot prevail, having delivered a bill of their costs more than one month before the commencement of the action, they are entitled to recover the amount shewn by the bill to be payable.

The bill which was delivered, so far as it is material to the present inquiry, contains one item, which is as follows: "1912, April 15. Solicitor and client costs in litigation over by-law No. 17 of 1910 of the Township of Tilbury East, concerning the Forbes Drainage Works, both in the High Court and in the Court of Appeal, as settled by agreement between the parties, and fixed by statute of the Province of Ontario, passed on or about April 15, 1912, which costs as setteld and fixed as aforesaid were by the said statute directed to be paid by the Township of Tilbury East to you.....$1,800.00."

The learned trial Judge was of opinion that neither contention was well founded, and in that I agree.

Section 6 of the special Act does not—in terms, at all events—purport to do more than fix the amount of the costs with which it deals as between the township and the respondent, and I see no reason why the direction which it contains should have any different operation from that which a similar direction embodied in a judgment of a Court would have; and it could not be seriously contended that such a direction would fix the amount of the costs as between the person to whom they were to be paid and his solicitor. . . .

[Reference to Jarvis v. Great Western R.W. Co. (1859), 8 C.P. 280; Drew v. Clifford (1825), 2 C. & P. 69.]

There is, as I have said, nothing in sec. 6 to indicate that the Legislature intended to fix the amount of the costs otherwise than as between the township and the respondent; and it contains nothing which would prevent the appellants from recovering from the respondent a sum in excess of $1,800, if their costs between solicitor and client amounted to more.

There remains to be considered the question whether the bill delivered was a bill of the fees, charges, and disbursements, within the meaning of sec. 34 of the Act respecting Solicitors, 2 Geo. V. ch. 28.

That it was not, is shewn by Drew v. Clifford, already referred to, and by Philby v. Hazle (1860), 29 L.J.C.P. 370. . . .

Williams v. Griffith (1840), 6 M. & W. 32, has no application. . . .

The provisions of the Solicitors Act of this Province which are relevant to the present inquiry are practically the same as those of the English Act 6 & 7 Vict. ch. 73, which deal with the same matters; secs. 34 to 37, inclusive, of the Ontario Act being, with some verbal changes, substantially a reproduction of sec. 37 of the English Act, except that under that Act, if the costs as taxed are less by one-sixth than the bill delivered, the costs of the reference are to be paid by the attorney, or if not less by one-sixth by the party chargeable; while, under the Ontario Act, the costs of the reference are in the discretion of the Court or Judge, or of the Taxing Officer, subject to appeal.

It is clear from the provisions of these Acts to which I have referred that it is only when a bill has been delivered in accordance with the Act that the order for reference to taxation can be made, on the application of the solicitor, though where a bill has not been delivered the Court or Judge may order the delivery of a bill, and when the bill is delivered an order may be made to refer it for taxation; and it would indeed be anomalous if a solicitor, who could not maintain an action for his costs because a sufficient bill had not been delivered, should be in a position to obtain an order for the taxation of the insufficient bill with the right to issue execution for the amount found due to him on taxation.

Besides the item of $1,800, there were in the bill delivered items, sufficiently stated, amounting to $84.68, and the appellants are entitled to recover these items, unless the bill delivered, being insufficient as to the main item, is to be treated as not being a bill within the meaning of the Act.

There was in England a conflict of authority on the question whether, where the bill contained items not properly stated and items which were properly stated, the attorney could recover in an action for any part of the bill, the Courts of Queen's Bench and Common Pleas holding that he could, and the Court of Exchequer that he could not: Haigh v. Ousey (1857), 26 L.J.Q.B. 217, where the conflicting decisions are referred to; Pilgrim v. Hirchfelt (1863), 9 L.T.N.S. 288.

I think that we should follow the rule in the Court of Queen's Bench; and that, if the appellants so desire, they should have judgment for the $84.68, but in that case the judgment should be with costs on the Division Court scale, with the right to the respondent to set off the difference betwen his taxable costs on the Division Court scale and his costs on the High Court scale and to recover the excess of the latter over the former, and that the appellants should pay the costs of the appeal to this Court.

If the appellants do not desire to have judgment for the $84.68 on these terms, the appeal should be dismissed with costs.

MAGEE, and HODGINS, JJ.A., concurred, each stating reasons in writing.

MACLAREN, J.A., also concurred.

Judgment accordingly.

FEBRUARY 10TH, 1913.

*DUNLOP v. CANADA FOUNDRY CO.

Master and Servant—Injury to Servant—Workmen's Compensation for Injuries Act, sec. 3(5)—Negligence of Fellow-servant—Person in Control of Machine upon Tramway—Findings of Jury—Judge's Charge—Directions to Jury.

Appeal by the defendants from the judgment of TEETZEL, J., 3 O.W.N. 932, in favour of the plaintiff, James Dunlop, an infant, upon the findings of a jury, in an action for damages for personal injuries sustained by him, while working for the defendants in their foundry, by reason of a steel girder falling on him and crushing and breaking one of his legs, owing, as he alleged, to the negligence of the defendants or their servants.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., and B. H. Ardagh, for the defendants.

I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiff.

The judgment of Court was delivered by HODGINS, J.A.:—The learned trial Judge has held that there is no common law liability established. This seems to be so.

The system and the place where the operations were conducted were usual and modern. While the operation of that system imposed on the foreman and those in charge the duty of guarding against the result of carelessness in its working, neglect of that duty, if the foreman were competent, would not render the appellants liable at common law. It was not argued that the

*To be reported in the Ontario Law Reports.

foreman was incompetent. The appellants' rules or directions as to the use of the hoist were proved, and there was no such general disregard of them as to suggest that breaches were "winked at:" Robertson v. Allan, 77 L.J.K.B. 1072. They were enforced to the best of the appellants' power; and they are not responsible if one of their servants by a breach of them caused damage: Choate v. Ontario Rolling Mills Co., 27 A.R. 155. I cannot find any evidence proper to be submitted to the jury on which could be rested the finding that the appellants did not strictly enforce the rules about the hoist.

No other negligence of a fellow-workman, except that mentioned in questions 5 and 6, was suggested as to which any safeguard was required. The providing of a proper and safe place is denied by answer 7, but answers 8 and 9 attribute this to Gracie, the sub-foreman, whose general competence is not attacked. The findings of the jury numbered 2 and 4 cannot, therefore, be supported as a basis for common law liability.

But this is a case well within the rule stated by MacMahon, J., in McDonell v. Alexander Fleck Limited (1908), 12 O.W.R. 84: "There is no doubt that for the happening of an accident out of the ordinary course of things, there is cast upon the defendants the onus of explaining and discharging themselves. It is a case of res ipsa loquitur."

Objection was taken to the charge of the learned trial Judge upon the ground that he had misdirected the jury upon three points. These were that he had instructed them as a matter of law: (1) that the hoist used in the appellants' shops was a machine or engine and was operated upon a tramway or railway; (2) that the unknown workman who moved it was entitled to be and was in charge or control of a machine or engine; and (3) that they could consider three acts operating together as negligence resulting in the respondent's injury. A further objection was made that the findings of the jury were inconsistent.

Taking the last objection first, I am unable to see any such inconsistency in the findings as would make them self-destructive. Mere inconsistency would not be fatal unless that inconsistency were such that none of the effective findings could stand. Reading them in the light of the Judge's repeated statement that he was asking several questions which might involve repetition in the answers, I think their purport and bearing can be readily understood. Paraphrasing the answers of the jury, they result in this: the appellants were negligent: (1) in that they did not take proper precaution for safeguarding their employees from the negligence of other workmen; (2) and that they did not

brace the girder; (3) and that they did not strictly enforce the rules about the hoist; (4) and that the respondent's injury was in consequence of the negligence of an unknown workman who had charge of the hoist; (5) which negligence consisted in moving the hoist across the girder without raising the chain and removing the hooks; (6) that the appellants did not supply a proper and safe place for the respondent to work in; (7) because the girder when in place should have been safely braced, and the angle-iron should have been differently placed; (8) and that the failure to provide a proper and safe place in those respects was due to the appellants' sub-foreman, Gracie.

I think the answers of the jury may fairly be taken as consistent and as capable of standing together, and afford cause for finding the appellants liable under the Workmen's Compensation for Injuries Act, unless they are entitled to escape by reason of the other questions raised by them.

The next objection was, that the learned trial Judge told the jury that the three acts above referred to, viz., neglect to brace, allowing angle-irons to be placed too close to the girder, and allowing the hooks upon the hoist to hang down far enough to catch the girder, in combination, if proved to their satisfaction, shewed sufficient negligence to warrant a verdict for the respondent.

Under the Workmen's Compensation for Injuries Act, liability may well attach if acts of negligence form a chain resulting in damage to the injured workman, just as well as if it was due to one specific act. I should take it that, if negligence can be imputed to the appellants as a corporation, by the actions of their servants, it makes no difference whether only one of them does the injurious acts, or whether they are done by several, provided they form co-operating causes of the negligence producing the injury. If the sub-foreman had placed upon a tram-car a bar of steel projecting so far that, if the car moved on the track, the bar must come in contact with a workman, and another workman, whose duty it was to set the car in motion, then did so, the appellants would be liable for the injury, though neither of the separate acts without the other would have caused damage. Here want of bracing is directly attributable to Gracie, the sub-foreman, and the collision with the unbraced girder to a workman whose right it was to move and operate the hoist. The injury was due to his carelessness in moving it without raising the piston and chain or removing the grips, contrary to his duty, established by the directions given to all the workmen for operating the hoist. The case of Thompson v. Ontario Sewer Pipe

Co. (1908), 40 S.C.R. 396, would be in point if none of the three acts was an efficient cause of the injury. I do not think there was much evidence to support the jury's finding as to the placing of the angle-irons; but there was some, and the finding must stand: Ainslie v. McDougall, 42 S.C.R. 420.

The charge of the learned trial Judge upon the other points was undoubtedly in the nature of an instruction to the jury as to the law. The answers to 5 and 6 must be so read; and, unless they can be supported in law, there must be a new trial, for the jury have not found a fact simply, but based their conclusion upon a proposition of law. Leaving aside for the moment the question of whether the hoist was a machine upon a railway or tramway, I think the learned trial Judge was quite right on the question of charge or control. The hoist was movable, and was intended to be moved by the men. It could be run along for 100 feet. The workman using it had to run the chain up or down to take up what material he wanted, and then to propel the hoist to the place to which he desired to transport it. This involved charge of the hoist, and, while he used it, control of it as well. . . .

[Extracts from the testimony at the trial.]

It would seem to me quite proper for the learned Judge to direct the jury that, in law as well as in fact, the workman using the hoist was in charge or control of it.

Applied to something admittedly an engine or machine, the fact that a workman could and did use it, and when using it raised and lowered it, moved it and stopped it, would shew that he controlled it, and the fact that he alone decided whether he wanted to use it, and how he did use it, would amount to control. This was the view taken by Mathew, J., in Cox v. Great Western R.W. Co. (1882), 10 Q.B.D. 106, at p. 109. . . .

If the state of affairs thus set out comes within the legal meaning of the phrase "charge or control," then the direction is unexceptionable. . . .

[Reference to McCord v. Cammell, [1896] A.C. 57, 65; Martin v. Grand Trunk R.W. Co. (1912), 27 O.L.R. 165.]

The next question is, was the hoist an engine or machine upon a railway or tramway?

Descriptions of it are given by men called by the appellants. . . .

It is a machine for lifting and carrying heavy weights, and it runs on rails when it and the object lifted are moved about. It can only run in the direction in which the rails extend. While a car is ordinarily above the rails, this hoist is hung to and de-

pends from wheels which run on the rails, and is, therefore, below them. But its mechanical construction and operation is that of a machine, and it is run on rails which form a tramway or trolley runway. It is built to move and to move on rails, and its utilisation of otherwise waste space above the working floor, as well as its extreme convenience for lifting and transporting heavy weights, cause it to be in almost universal use.

I do not think, therefore, that the learned trial Judge erred in law in his direction. It was his province to construe the statute, and to rule whether, upon the facts as presented, the workman was in charge and control, and whether the hoist was an engine or machine upon a tramway or railway. It is true that what the workman did, and under what circumstances he did it, are questions of fact; but whether what he did and the circumstances under which he did it, gave him charge or control, is a matter of law.

If there are conflicting facts or circumstances, then, upon any question of fact relating to any of these subjects, the trial Judge is bound to ask the assistance of the jury. But, when the facts as to which the trial Judge is in doubt are found by the jury, or where these are clearly established on the evidence to the satisfaction of the trial Judge, the rule is the same. It cannot be left to the jury to construe the statute and to define "charge or control," "engine," "machine," "tramway or railway." The Judge must do so upon the evidence, just as he has to construe the words of any other statute; and none of these words are so ambiguous in the present day as to require expert evidence. If expert evidence is not necessary, then the interposition of a jury is equally unnecessary. . . .

[Reference to Gibbs v. Great Western R.W. Co. (1884), 12 Q.B.D. at p. 212.]

The trial Judge is bound to rule upon the meaning of the statute, and he must determine what "charge or control" means or indicates, and whether the facts bring the case presented within the meaning of that phrase as established by law or by his own view of it; and equally so whether the hoist is an engine or machine meant by the statute, and whether the way on which it runs is a railway or tramway.

"Is not the Judge bound to know the meaning of all words in the English language, or, if they are used technically or scientifically, to inform his own mind by evidence and then to determine the meaning?" Hills v. London Gaslight Co. (1857), 27 L.J. Ex. 60, at p. 63, per Martin, B. See Haddock v. Humphrey, [1900] 1 K.B. 609; Rex v. Hall, 1 B. & C. 136; Elliott v. South

Devon R.W. Co., 2 Ex. 725; Lyle v. Richards, L.R. 1 H.L. 222, 241.

But it is, on this appeal, quite open for the defendants to dispute the correctness of the law as applied.

I cannot see how any other direction could have been given regarding charge or control, nor have I any serious doubt as to the hoist being a machine or engine, and the rails upon which it ran being a tramway. I think that a reference to any ordinary dictionary (vide Standard Dictionary, Century Dictionary and Cyclopædia) and to the decided cases, support this view: McLaughlin v. Ontario Iron and Steel Co., 20 O.L.R. 335. See also Taylor v. Goodwin (1879), 4 Q.B.D. 228.

I think the defendants are liable, and that the appeal should be dismissed.

Appeal dismissed with costs.

FEBRUARY 14TH, 1913.

*GOWER v. GLEN WOOLLEN MILLS LIMITED.

Master and Servant—Injury to Servant—Dangerous Machinery—Negligence—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.

An appeal by the defendants from the judgment (ante 467) of LATCHFORD, J., who tried the action without a jury, awarding the infant plaintiff, suing by his next friend, $2,000 damages against the defendants in an action for injuries caused to the plaintiff by reason of the defendants' negligence, as the plaintiff alleged.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. H. Watson, K.C., and B. H. Ardagh, for the defendants.

T. J. Blain, for the plaintiff.

The judgment of the Court was delivered by SUTHERLAND, J.:

—. . . Damages were claimed at common law and under the Workmen's Compensation for Injuries Act and the Ontario Factories Act.

*To be reported in the Ontario Law Reports.

The plaintiff, who was, at the time of the accident, nineteen years of age, had been in the defendant company's employ about two months, but had had experience in England in operating machines in woollen mills for about five years. He had not, however, there had any experience in putting belts on and taking them off machinery.

The injuries suffered by the plaintiff were severe, resulting in the loss of an arm. The accident occurred while the plaintiff was attempting to place a belt upon a pulley. The course pursued in the factory was to rest a ladder, about twelve feet long, against the end of a revolving shaft, which projected beyond the pulley. The ladder did not have clamps on the top or spikes at the bottom to hold it securely, and was not long enough to go up to the rafters. The floor of the room was greasy. There were three storeys in the factory building, and an elevator was used to take materials up and down. . . .

One Schofield was the overseer of the shafting and belting. The evidence, however, discloses that the oversight of the work of putting on and off this belt and other belts was lax. . . . While Schofield was nominally in charge, it had apparently become the custom for employees, as the elevator was from time to time required to carry materials up and down, to put the belt on the pulley for the purpose of operating it. . . .

On the day the accident occurred . . . a boy named Bierman required, in connection with the work of the defendants, his employers, to bring some yarn down from the upper storey, and at about the same time the plaintiff wanted to have some "spools" taken up. . . . Bierman went to the plaintiff . . . and asked him to come and put the belt on. He accompanied Bierman, and, finding the ladder already placed against the shafting, went up and attempted to put the belt on. It ran over to the other side, so that it hung on the shaft between pulley A., the pulley in question, and the hanger on the other side. He then attempted to reach over and take hold of the belt for the purpose of trying to put it on again; but, in doing so, pushed the ladder off, fell on the shafting, was caught and whirled around and injured, finally falling to the floor below. . . .

The defendants had immediate notice and knowledge of the accident and of the injuries resulting to the plaintiff. . . . It is clear . . . that the question of compensation for the injuries was matter of discussion betwen the plaintiff's parents and the defendants soon after the accident. . . .

The Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, sec. 9, provides that "an action for the recovery under

this Act of compensation for an injury shall not be maintainable against the employer of the workman unless notice that injury has been sustained is given within twelve weeks and an action is commenced within six months from the occurrence of the accident causing the injury."

The accident occurred on the 19th December, 1911, and the action was commenced within the six months, namely, on the 13th May, 1912. No notice . . . was given . . . within the twelve weeks, and the defendants . . . pleaded "that they were not served with any notice of injury or any sufficient notice, as required by the provisions of the said Act." . . .

[Reference to 3 Edw. VII. ch. 7, sec. 46, providing that liability for damages by reason of any violation of the Ontario Factories Act shall be subject to the limitations contained in section 7 of the Workmen's Compensation for Injuries Act, limiting the amount of compensation recoverable; and to 8 Edw. VII. ch. 33, sec. 52, amending sec. 46 by substituting "sections 7 and 9" for "section 7."]

Section 9 of the Workmen's Compensation for Injuries Act is subject to the provisions of secs. 13 and 14 thereof, and sec. 13, sub-sec. 5, is as follows: "The want or insufficiency of the notice required by this section, or by section 9 of this Act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury, if the Court or Judge before whom such action is tried, or, in case of appeal, if the Court hearing the appeal, is of opinion that there is reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence."

It seems to me that, where the defendants had an immediate knowledge of the accident and the injuries to the plaintiff, and were from time to time informing his parents, who were apparently asserting a claim for compensation and negotiating with them for a settlement, that the insurance company had the matter in hand and could do nothing until the plaintiff was dismissed by the medical authorities, this should form a reasonable excuse for any want or insufficiency of a notice such as contemplated by the Act. . . .

[Reference to Giovinazzo v. Canadian Pacific R.W. Co., 19 O.L.R. 325; Armstrong v. Canada Atlantic R.W. Co., 4 O.L.R. 560; O'Connor v. City of Hamilton, 10 O.L.R. 529.]

The effect of the defendants' representations to the plaintiff's parents was to mislead them so that they delayed taking action. The trial Judge thinks this course was taken deliberately

by them. I am, therefore, of opinion that there was reasonable excuse . . . for not serving the notice.

I cannot see how the defendants were in any way prejudiced in their defence by any lack of formal notice. . . .

The plaintiff is entitled to recover at common law, owing to the defective system.

It is also plain from the evidence that, with the shaft projecting as it was and revolving, it was the duty of the defendants, knowing that the belt was in the habit of slipping off the pulley, and had to be replaced from time to time . . . to guard it. It was, in the circumstances, a dangerous part of the machinery, and under the Factories Act should have been guarded. . . .

I am also of opinion that . . . there was a defect in the machinery of the defendants' shaft, in the way it was hung, which caused the belt to slip off the pulley. It was this defect which, at the time of the accident, when the plaintiff took hold of the belt and attempted to put it on the pulley, caused it to run over on the other side. It was in the attempt to reach over and take hold of it to try and put it on again that the accident occurred.

I am of opinion, therefore, that under the Workmen's Compensation for Injuries Act, also, the plaintiff is entitled to succeed.

I think the appeal must be dismissed with costs.

14TH FEBRUARY, 1913.

*TOWN OF WATERLOO v. CITY OF BERLIN.

Municipal Corporations—Agreement between two Municipalities Account—Action—Jurisdiction of Court—Exclusive Powers—Street Railway Operated in both—Division of Profits—of Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, secs. 16, 17, 51, 53, 64—Ontario Railway Act, 1906.

Appeal by the plaintiff corporation from the judgment of BOYD, C., ante 256.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

M. K. Cowan, K.C., for the plaintiff corporation.

*To be reported in the Ontario Law Reports.

E. E. A. DuVernet, K.C., and H. J. Sims, for the defendant corporation.

RIDDELL, J.:—The defendant corporation became the owner of an electric railway between and within the two towns. By an order of the 18th January, 1911, the net profits of the railway were to be divided, one-fourth to Waterloo, three-fourths to Berlin. Both towns taxed that part of the railway within their borders. Berlin, which owns and operates the railway, deducted the amount of taxes levied by itself from the gross profits of the road. Waterloo complains that this should not be done, and brings an action accordingly. The Chancellor decided that the Court has no jurisdiction, and Waterloo appeals. . . .

It seems to be proper to determine, first, precisely what it is the plaintiff corporation can complain of.

What Berlin may do in the way of assessing, so long as it is not upon Waterloo's property, Waterloo cannot complain of—the assessing does no harm. That the management of the railway pays to Berlin any sum of money is not material, so long as sufficient remains to pay Waterloo the fourth. Whatever the form may be, the railway is the property of Berlin, and the management Berlin's statutory or other agent: McDougall v. Windsor Water Commissioners (1900), 27 A.R. 566; S.C. (1901), 31 S.C.R. 326; Ridgeway v. City of Toronto (1876), 28 C.P. 574; and what was done when the form was gone through (if it was gone through at all) was that the agent paid to the principal some of the principal's own money. There was no payment out by Berlin to any third person of any of the profits of the railway—no harm could thereby be done to the plaintiff corporation, and so far Waterloo could not complain of any injury.

The damage began when the owner of the road attempted to charge the amount mentioned in this banking transaction—a purely domestic transaction as it was—against the profits, and thereby to diminish the net profits. In other words, the real cause of complaint by Waterloo is the proposed allowance of a certain sum against the profits—that sum never having been in law paid out.

Such a question would be determined by the Master in the taking of partnership accounts—and, under the very wide jurisdiction given to the Ontario Railway and Municipal Board by the Act of 1906, I cannot see that the Board could not pass on such a matter. That the Board would have to determine a question of law is no objection. The Board is doing that every day; and, if its decision should be wrong, an appeal is provided for.

I am of opinion that the appeal should be dismissed with costs, without prejudice to an application to the Board.

MULOCK, C.J., and SUTHERLAND, J., reached the same conclusion, for reasons given in writing by each.

LEITCH, J., concurred.

Appeal dismissed.

FEBRUARY 14TH, 1913.

SMITH v. BOOTHMAN.

Appeal—Appellate Division—Division Court Appeal—Evidence Taken at Trial—Duty of Judge—Memorandum of Facts—Insufficiency—New Trial—Division Courts Act, 10 *Edw. VII. ch.* 32, *secs.* 106, 127, 128.

Appeal by the defendant from the judgment of the Junior Judge of the County Court of the County of Wentworth upon a Division Court plaint to recover $176.70, made up of the amount of a promissory note signed by the defendant, $175, and $1.70 for interest thereon.

The learned Judge in the Division Court gave judgment for the plaintiff for the amount claimed with costs.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

L. E. Awrey, for the defendant.

H. S. White, for the plaintiff.

The judgment of the Court was delivered by MULOCK, C.J.:—On the appeal first coming before us for argument, it was found that the appeal case was incomplete, the evidence not having been certified to this Court. Accordingly, it was impossible to hear the appeal, which stood over in order, as provided by sub-sec. 2 of sec. 128 of the Division Courts Act, to enable the clerk of the Division Court to amend the appeal case by certifying the evidence. On the appeal again coming on for argument, the Registrar of this Court produced a letter from the Judge who tried the case, wherein it was stated that "the Division Courts here are not supplied with a stenographer, and, therefore, the

evidence was reduced to writing only on a memorandum which, probably, no one but myself would understand;" and the letter then proceeded to add the facts which, the learned trial Judge says, were proved at the trial.

The Division Courts Act, 10 Edw. VII. ch. 32, sec. 106, declares that in all actions in which the sum sought to be recovered exceeds $100, unless the parties agree not to appeal, "the Judge shall . . . take down the evidence in writing and leave the same with the clerk;" and, in the event of an appeal, sec. 127 of the Act enacts that, at the request of the appellant, the clerk shall "certify to the clerk of the central office at Osgoode Hall, Toronto, the summons with all notices endorsed thereon; the claim and any notice of defence; the evidence and all objections and exceptions thereto," etc.

Thus it was the defendant's right, under the statute, to have the evidence at the trial taken down in writing by the trial Judge, and certified to this Court. This has not been done; and, in the absence of the evidence, we are unable to have any opinion as to the correctness or otherwise of the judgment appealed from. Without questioning the view of the learned trial Judge as to what facts were, in his opinion, proved at the trial, we think that the statement embraced in his letter as to what was proved is not admissible as evidence on this appeal—nothing less than the complete evidence itself meeting the requirements of the statute.

The defendant cannot be held responsible for the evidence not being forthcoming; and, the Court being unable, in its absence, to determine the rights of the parties in connection with the issue involved in the case, the only way out of the impasse is to direct a new trial, which we accordingly order. The costs of the former trial and of this appeal to be costs in the cause.

FEBRUARY 14TH, 1913.

McMENEMY v. GRANT.

Trespass—Dispute as to Boundary between Lots—Plans and Surveys—Evidence—Claim of Right—Damages.

Appeal by the plaintiff from the judgment of WINCHESTER, Senior Judge of the County Court of the County of York, in favour of the defendants, in an action brought in that Court to establish a boundary line between the properties of the plaintiff and defendant, and for damages for trespass.

The appeal was heard by MULOCK, C.J. EX., RIDDELL, SUTHERLAND, and LEITCH, JJ.

Shirley Denison, K.C., for the plaintiff.

F. W. Carey, for the defendant.

The judgment of the Court was delivered by RIDDELL, J.:—In 1876, Adam Wilson laid out part of lots 1 and 2 in the 1st and broken front concessions of the township of York, and filed a plan, No. 406. . . . On the plan, the course of Pine avenue is given definitely as N. 74° E., while that of Beech avenue is given as N. 16° W., in quotation marks thus, "N. 16° W.," indicating, it is said, that the line of Beech avenue has not been in fact run, but taken for granted. But there is no dispute or question that the line of Beech avenue is the well known N. 16° W. It follows that, on the plan, Pine and Beech avenues run at right angles. There is no dispute as to the correct position of the north-west corner of Beech and Pine avenues or of the south-east corner of lot 99—these points are all fixed and agreed upon.

The plaintiff bought a part of the south-west portion of lot 99 from her brother Frankland Terry in 1909, having had an agreement for purchase from the spring or summer of 1905, her husband having built a pair of houses on the western portion of the lot, one for a neighbour who owned the land north of hers, and one for Terry on his land.

The land had been theretofore vacant, but a fence of posts and wires ran along what was taken for the south line of lot 99—an old fence which, the plaintiff says, ran from a stake on Balsam avenue through to Beech avenue. Edward Heffernan says that in 1902, a surveyor, Mr. Browne, planted a stake on Balsam avenue, and that he (Heffernan) built the post and wire fence in 1904 to this stake and one (undisputed) on Beech avenue, which indicated the north line of lot 98.

In 1910, Heffernan, who owned that part of lot 98 now the property of the defendant, and the plaintiff, agreed to put up a board fence as the boundary of their lots; and they did so on practically the line of the former post and wire fence.

The defendant bought the north part of lot 98 from Heffernan in 1911. The owner to the south of him "moved him up" about four feet; and he then claimed four feet from the plaintiff. She refused to give this up; he tore down the fence; and she brought this action. . . .

The whole case of the defendant is based upon two assumptions: (1) the north line of Pine avenue is not at right angles to Beech avenue; and (2) the boundary line between 98 and 99 is necessarily parallel to this north line.

I am not at all satisfied that Pine avenue, as originally laid out, was not run on the course laid down definitely, and not with quotation marks—that is, N. 74° E. Much assumption must be made before that can be accepted.

But, supposing that Pine avenue was not made at right angles to Beech, it by no means follows that the other lines are not at right angles to Beech. The course that would be followed if a blunder had been made at the junction of the two avenues, is to measure along the course N. 16° W. the proper number of feet, and then, turning the instrument through 90° from this course, run the course to the westerly—then, giving another distance, pursue the same course.

No original stakes have been found on Balsam avenue, and there is absolutely nothing to indicate that this course was not followed in the original laying out. We have no radii for the curves on Balsam avenue, and the scale 100 feet to an inch makes it impossible to determine accurately a small distance like four feet (which would take up only 1-25 of an inch on the plan).

If Pine avenue were at right angles to Beech, the assumption of the surveyors that all the lot-lines were parallel to Pine avenue would be sound; but only so because they, as well as Pine avenue, were at right angles to Beech avenue.

Quite irrespective of the evidence of Heffernan that the board fence ran from surveyor's stake to surveyor's stake, I think the defendant has wholly failed to prove that his land goes beyond the fence.

He went on land of which the plaintiff was in quiet possession, and which he has not proved to be his: he was a trespasser, and he should pay damages. The "cash amount" of such damages is about $16. I think, as he acted under claim of right, though with a high hand, the damages should be moderate. The plaintiff should have a verdict for $25 damages, an injunction, and costs on the County Court scale, here and below.

FEBRUARY 14TH, 1913.

*WOOD v. CITY OF HAMILTON.

Negligence—Occupant of Market Stall—Injury to Health from Unsanitary Condition—Notice to Corporation—Lessee or Licensee—Contributory Negligence — Voluntary Assumption of Risk.

Appeal by the defendants from the judgment of CLUTE, J., ante 427, awarding the plaintiff $550 damages for injury to her health owing to the negligence of the defendants as found.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

W. M. McClemont, for the plaintiff.

SUTHERLAND, J.:—The facts are fully set out in the judgment of Clute, J. I agree with him in his opinion that the rights of the plaintiff were those not of a lessee but of a licensee. The character and scope of the possession which the person is entitled to is of prime importance in considering the question.

In Woodfall on Landlord and Tenant, 19th ed. (1912), p. 146, there is a full discussion.

By-law 2 of the defendants . . . "to regulate the central market," etc., seems to me plainly to indicate that the possession of the stand assigned to the plaintiff . . . was not an exclusive one. I refer particularly to secs. 24 and 27, sub-secs. 1, 2, 4.

Under her weekly license, the plaintiff had a right to the use of her stand only during certain hours of the day and for a specified length of time: Taylor v. Caldwell (1863), 3 B. & S. 826; Marshall v. Industrial Exhibition Association of Toronto (1901), 1 O.L.R. 319, per Street, J., at p. 328 (affirmed 2 O.L.R. 62); Glenwood Lumber Co. Limited v. Phillips, [1904] A.C. 405; Flynn v. Toronto Industrial Exhibition Association (1905), 9 O.L.R. 582, per Osler, J.A., at p. 585, and per Garrow, J.A., at p. 587

If she were a mere licensee, she could, of course, not recover, as the trial Judge pointed out. I agree also with him in the view that she was more than a mere licensee: Holmes v. North Eastern R.W. Co., L.R. 4 Ex. 258. . . .

*To be reported in the Ontario Law Reports.

[Quotation from the judgment of Clute, J., ante at p. 429, referring to Lax v. Corporation of Darlington, 5 Ex. D. 28, and quotation from the judgment at p. 431.]

I am unable to agree with this view, upon the facts in question in the action. Before the 30th November, 1911, complaints had been made by the licensee to the defendants about the water coming into the huckster's stand which she was occupying from time to time. The defendants made certain repairs on the 30th November, which, the plaintiff says, were ineffectual for the purpose of keeping out the water.

According to the terms of the by-law under which the market was being operated, it was not possible for a stand such as the one in question to be assigned to any person "for longer periods than one week at a time."

Notwithstanding that, from week to week during the whole of the time from November to March, the plaintiff was the only person assigned to the particular stand in question, we must treat the matter as though each week she were applying for that particular stand, and was having it assigned to her each week, she paying the stipulated weekly market fee for it.

It seems to me that, on her own evidence, she was each week voluntarily assuming the risk of injury to her health from an alleged negligence of the defendants of which she was aware. . . .

[Reference to Lax v. Corporation of Darlington, 5 Ex. D. 28, per Brett, L.J., at p. 33.]

Each week it was open to the plaintiff to avoid the risk and danger she was running from the alleged unsanitary condition of the stand. She saw fit, . . . with knowledge thereof, to continue to apply for her license and to occupy the stand. I think she must be taken to have assumed the risk and danger, and that the injury to her health was, therefore, the result of her own conduct. I think this would be so whether she was a licensee or lessee.

I am of opinion that the appeal should be allowed with costs and the action dismissed with costs.

MULOCK, C.J., was also of opinion that the appeal should be allowed and the action dismissed, for reasons stated by him in writing. He referred to Lax v. Corporation of Darlington, 5 Ex. D. 28; Gordon v. City of Belleville, 15 O.R. 20; Wright v. Midland R.W. Co., 51 L.T.R. 539; and concluded by saying that he was of opinion that the plaintiff's illness was caused by her own negligence, which disentitled her to maintain the action.

RIDDELL, J., agreed, for reasons stated in writing. He stated that, in his view of the case, it was immaterial whether the plaintiff was licensee or tenant; he inclined to the opinion that she was tenant. But in either case the result was the same; her injury was of her own doing. He referred to Lax v. Corporation of Darlington, 5 Ex. D. 28; Humphrey v. Wait (1873), 22 C.P. 580, at p. 586, per Galt, J.; Tennant v. Hall (1888), 27 N.B.R. 499; Opdyke v. Prouty (1875), 6 Hun 242.

LEITCH, J., also agreed.

Appeal allowed.

FEBRUARY 15TH, 1913.

*PATTISON v. TOWNSHIP OF EMO.

Assessment and Taxes—Distress for Taxes on Located Crown Lot—Free Grants and Homesteads Act, R.S.O. 1897 *ch.* 29, *sec.* 9 — *Forfeiture of Location — Relocation — Seizure of Goods of Locatee for Back Taxes—"Owner"—Assessment Act,* 4 *Edw. VII. ch.* 23, *sec.* 103.

An appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Rainy River, dismissing an action to restrain the defendants from selling the plaintiff's goods after seizure for taxes, and for damages for illegal seizure.

The appeal was heard by MULOCK, C.J. EX., RIDDELL, SUTHERLAND, and LEITCH, JJ.

A. E. Knox, for the plaintiff.

No one appeared for the defendants.

RIDDELL, J.:—In 1904, one Duval became locatee of a certain lot in the township of Emo; he failed to perform what the statute requires of a locatee, and in 1909 his location was forfeited, under the Free Grants and Homesteads Act, R.S.O. 1897 ch. 29, sec. 9. He had not paid the taxes, and the township corporation had not seized nor made any effort to realise them.

*To be reported in the Ontario Law Reports.

In August, 1909, the plaintiff made application for the lot, and was there located. He paid his taxes, but not the back taxes; and on the 3rd October, 1912, the township corporation seized for these back taxes. The plaintiff brought an action to restrain the sale. His application for an interim injunction was turned into a motion for judgment, and the District Court Judge dismissed the motion and the action.

The plaintiff now appeals.

I think the appeal must succeed, and on this short ground. There can be no doubt that the Legislature can validly enact that the goods of one man may be sold to pay the debt of another. But, before such a result is declared by the Court to be the effect of a statute, the language of the statute must be scrutinised with care.

By the Assessment Act, 4 Edw. VII. ch. 23, sec. 103, back taxes may be levied "upon the goods and chattels of the owner of the land found thereon. . . ." There is no definition of the word "owner" in the statute, and I know of nothing to compel us to hold that the plaintiff is the owner of the land.

The appeal should be allowed with costs, and the injunction granted with costs.

Other relief is claimed by the writ, i.e., damages for seizure. The damages should be referred to the District Judge to be assessed by him, and he will dispose of the costs of such reference.

SUTHERLAND and LEITCH, JJ., concurred.

MULOCK, C.J., was also of opinion that the appeal should be allowed, for reasons stated by him in writing.

Appeal allowed.

HIGH COURT DIVISION.

LATCHFORD, J. FEBRUARY 10TH, 1913.

ST. CLAIR v. STAIR.

Contempt of Court—Publisher and Editor of Newspaper—Injurious Publications Pending Action—Breach of Undertakings—Motions for Committal and Sequestration—Finding Defendants in Contempt—Punishment—Costs.

Motions by the plaintiff to commit the defendant Rogers and for the issue of a writ of sequestration against the defendants

the "Jack Canuck" Publishing Company for contempt of Court in publishing in a newspaper called "Jack Canuck," pending this action, articles containing injurious references to the matters in question in this action, in breach of undertakings contained in former orders.

The motions were heard by LATCHFORD, J., in the Weekly Court.

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

A. R. Hassard, for the defendant company.

The defendant Rogers in person.

LATCHFORD, J.:—The defendants Rogers and the publishing company formally undertook by their counsel, as is stated in the orders of the 19th December, that until the trial of this action nothing would be published in their newspaper "in any way defamatory of the plaintiff or tending to prejudice the minds of the public against him."

The undertaking was given with the knowledge of Rogers, and may, therefore, be enforced against him by process of contempt, and against the publishing company by sequestration; the remedies invoked upon this motion: Cozens-Hardy, J., in D. v. A. & Co., [1900] 1 Ch. 484; Milburn v. Newton Colliery (1898), 52 Sol. J. 317.

The statements made by counsel for the accused at the trial of the case of Rex v. Stair, as published in the newspaper of the defendants, now before me, are grossly defamatory of the plaintiff. I express no opinion as to whether the counsel who made such statements are or are not protected by the rule expressed in Munster v. Lamb (1883), 11 Q.B.D. 588. What is material is, that the defendants published the language used by counsel, with other defamatory statements regarding the plaintiff, and at least one reference to the present action, which could not but tend to his prejudice at the trial.

In The King v. Parke, [1903] 2 K.B. 432, Mr. Justice Wills, in delivering the judgment of the Court, says: "The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency, and sometimes their object, is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which is to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

There can be no doubt upon the facts, unquestioned before me, that the defendants have acted in breach of their undertaking and in contempt of Court. Mr. Rogers is liable to committal, and the publishing company to a writ or order of sequestration.

On behalf of the defendants, affidavits are filed disclaiming any intentions of acting in contempt of Court or in breach of the orders of the 19th December. I should be the more readily disposed to credit these asseverations but for the conduct of Mr. Rogers in giving out for publication, after the hearing of these motions on the 8th instant, a summary of that part of his argument before me devoted to the denunciation of the plaintiff and his counsel.

As Mr. Rogers was a layman, I allowed him the widest latitude in opposing the motion, and did not interfere with him when his language exceeded the bounds of propriety, as it frequently did. Had I imagined that he would, upon leaving my Chambers, have published any part of his intemperate argument, I should have restricted him closely to the issue, and not have afforded him any opportunity, under cover of a report of the proceedings, to repeat with addenda the defamatory statements he had published in his newspaper.

He has, however, expressed once more his regret, and apologised for what he considers his inadvertence.

I am a little sceptical as to his good faith; but, giving him and the defendant company credit for their professions, I do not at present make any order further than that the defendants Rogers and the publishing company pay forthwith to the plaintiff the costs of and incidental to these motions.

It is perhaps needless to express the hope that no occasion will be given for a renewal of the present applications.

BRITTON, J., IN CHAMBERS. FEBRUARY 11TH, 1913.

RE GRAND TRUNK R.W. CO. AND ASH.

RE GRAND TRUNK R.W. CO. AND ANDERSON.

Railway — Expropriation of Land — Compensation — Offer of Money and Right of Way over other Lands—Arbitration and Award—Jurisdiction—Costs.

Applications by the railway company for orders directing the taxation and payment of their costs of arbitration proceed-

ings to ascertain the compensation to be paid to two land-owners for lands taken for the purposes of the railway, under the Dominion Railway Act.

M. L. Gordon, for the railway company.
Grayson Smith, for the land-owners.

BRITTON, J.:—The offer of the railway company, pursuant to which the arbitration was held, was not a mere declaration of willingness to pay a certain sum of money as compensation for the land which the company wanted, but it was an offer to pay $40 in cash to Ash and $20 to Anderson together with something else in each case. The notice is set out in the award, as follows: "The railway company offered to pay the owner of said land the sum of $ and to dedicate to and permit the use of by the land-owners owning lands abutting upon the lane shewn upon plan No. 135, the use of and right of way over those parts of 10 and 11 coloured green, as shewn upon a plan of said lands prepared by J. W. Fitzgerald, O.L.S., dated the 22nd March, 1912 . . . in addition to the use of and the right of way over said lane on plan 135 by the adjacent land-owners, and in addition to all other rights enjoyed by them, the said adjacent land-owners, in respect to the said lane, and for all purposes for which and to the same extent as the said lane may be used by the said adjacent land-owners from time to time, as full compensation for all damages," etc.

This notice was accompanied by the certificate of J. W. Fitzgerald, O.L.S., that the said sum of $ and the aforesaid dedication of the land coloured green was a fair compensation, etc.

The offer was, in substance, the same, except the amount, in each case, and was refused by each land-owner. Apart from agreeing to give crossings under or over railway lands, or to make culverts and work of that kind, I know of no authority to permit a railway company or its surveyor or engineer to compel or bind a land-owner to accept some other land, or the use of some other land, by way of compensation for land taken for or injured by the railway.

Arbitration followed, and an award was made by two of the arbitrators—one dissenting and declining to sign.

The award recites that the railway company have agreed, and by their counsel undertaken, to dedicate the said lands coloured green on the plan of the 22nd March, 1912, and to register the said plan, and, if necessary, further sufficiently to assure to the

owners of the land abutting on the lane shewn on the said registered plan No. 135, and their assigns, the use of the said land coloured green as a lane or right of way for the intents and purposes and to the full extent and in the manner set forth in their partly-recited offer of compensation.

Then in the award itself the arbitrators say in part as follows: "And the said railway company having agreed and undertaken with regard to the lands coloured green as is hereinbefore more fully set out, we have in making our award fully considered and given weight to such undertaking and agreement." Then the award concludes that the sum of ($40 and $20), under the circumstances set forth in the notice of offer, is sufficient compensation.

I am of opinion that the present application must be refused, upon two grounds.

(1) The first ground is, that the offer itself is not such an offer as contemplated by the statute. It embraces things which the land-owner may not want, and which may or may not reduce the compensation which the owner of the land is entitled to. Such an offer introduces into an arbitration things in the future which may never be carried out. Section 198 of the Railway Act, R.S.C. 1906 ch. 37, compels the arbitrators to "take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway . . . or by reason of the construction of the railway, and shall set off such increased value . . ." See Fisher v. Great Western R.W. Co., [1910] 2 K.B. 252.

(2) Then, I think, the agreement of counsel to do something not in the original offer—which agrement the arbitrators specially considered and on which they relied—brings this case within the authority of Ontario and Quebec R.W. Co. v. Philbrick, 5 O.R. 674, affirmed by the Supreme Court of Canada, 12 S.C.R. 288.

The arbitrators assumed to deal with the costs—that was in excess of their jurisdiction.

I am of opinion that the fact that the land-owners have not appealed or moved to set aside the award does not preclude them from objecting to the payment of the company's costs of arbitration.

The motion will be dismissed, but without costs.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 11TH, 1913.

*BANK OF HAMILTON v. BALDWIN.

Writ of Summons—Issue in Name of Former Sovereign—Mistake —Irregularity—Power of Court to Cure—Con. Rules 310, 312—*Amendment—Costs—Statute of Limitations.*

Appeal by the defendant from an order of the Master in Chambers, ante 729, refusing to set aside the writ of summons and permitting an amendment thereof.

S. H. Bradford, K.C., for the defendant.
M. L. Gordon, for the plaintiffs.

MIDDLETON, J.:—The action is upon a promissory note. The writ was issued just before the note would have become barred by the Statute of Limitations. The motion is important, as, if it is successful, the note is now outlawed. By a mistake of the plaintiff's solicitor, not noticed by the officer issuing the writ, an old form of writ was used, printed during the reign of His Majesty King Edward VII., and no change was made in it; so that the command in the writ is in the name of the deceased and not the reigning sovereign. It is said that this is fatal, as an action can only be commenced by writ, and that the writ is a command by the Sovereign.

Cases can be found in the old reports shewing that at one time such an irregularity could not be cured: see, for example, Drury v. Davenport (1837), 3 M. & W. 45, where the writ commencing "William IV.," etc., instead of "Victoria," etc., issued after the beginning of her reign, was set aside by the full Court.

There is no doubt that the writ is irregular. The real question is as to the effect of Con. Rules 310 and 312. These provide that non-compliance with the Rules "shall not render the writ . . . void," but the same may bet set aside as irregular or be "otherwise dealt with" as may be deemed just; and it is made the duty of a Judge to "amend any defect or error in any proceedings . . . necessary for the advancement of justice, determining the real matter in dispute," etc.

The distinction between mere irregularity which is amendable and such a defect as to render the proceedings incurable and void, is not easily to be drawn. Very many years ago Twisden, J., in Malever v. Redshaw (1669), 1 Mod. 35, said:

*To be reported in the Ontario Law Reports.

"The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father; makes void only that part where the fault is, and preserves the rest."

This view, thus quaintly expressed, affords a working rule, reconciling most if not all of the authorities. Where the defect is in respect of a matter which by some statutory or other provision is made a condition precedent, then its non-observance is fatal. The tyrranical statute has made void the thing done. In other cases, the Consolidated Rule, a nurse yet more gentle and sympathetic than the common law, enables the defect to be cured. . . .

[Reference to Anlaby v. Prætorius, 20 Q.B.D. 764; Appleby v. Turner, 19 P.R. 145; Hoffman v. Crerar, 18 P.R. 473, 19 P.R. 15; Hamp-Adams v. Hall, [1911] 2 K.B. 942.]

The general principle underlying all the cases is, that the Court should amend where the opposite party has not been misled or substantially injured by the error. . . .

[Reference to Dickson v. Law, [1895] 2 Ch. 62.]

Many of the cases—e.g. Fry v. Moore, 23 Q.B.D. 395—suggest as the test the question whether the defect is one that could be waived. Manifestly, the defect in this case could be waived, as the defendant could appear; and, appearance once entered, the form of the writ becomes immaterial.

I have no doubt that this is the kind of defect or irregularity in the proceedings which the Court is empowered to amend. The duty cast upon the Court by Con. Rule 312 is to make all amendments necessary for the determining of the real matter in dispute. The real matter in dispute here is the existence of the debt. When the plaintiffs issued the writ, they had, within the time limited by the law, resorted to the Courts for the enforcement of their claim. The defect in the writ arose from the default of the solicitor, an officer of the Court, in using the wrong form. This defect was not discovered because of the default of another officer of the Court, the Local Registrar; and the defendant was in no wise misled. When the writ was served the defendant knew that he was called upon to defend himself in the Court. He knew the place where he was to enter his appearance; and the fact that there was a mistake in the name of the Sovereign was abundantly plain.

Then it is said that I ought not to amend because amending will defeat the right of the defendant to set up the Statute of Limitations. I quite concede that, after the Statute of Limitations has run, the Court ought not to introduce a new cause of action into a pending action so as to defeat the statute; nor

should one who has not been sued be added as a party as of the date of the original writ, so as to deprive him of his statutory defence. The case relied upon by Mr. Bradford of Challinor v. Roder, 1 Times L.R. 527, falls within this category. So also does Hudson v. Fernyhough, 61 L.T.R. 722; for what was there sought was really the addition of a plaintiff in whom the cause of action was vested.

I think the appeal fails, and should be dismissed with costs to the plaintiffs in any event.

MIDDLETON, J. FEBRUARY 11TH, 1913.

RE UPTON.

Will—Construction—Charitable Gift—Failure to Designate Particular Object with Accuracy—General Charitable Intention—Method of Carrying out.

Motion by the executors of the will of Johanna Upton, deceased, for an order, under Con. Rule 938, determining a question arising upon the construction of the will.

J. Cowan, K.C., for the executors.
T. L. Monahan, for the Roman Catholic Church.
Frank McCarthy, for the next of kin and heirs at law.

MIDDLETON, J.:—Johanna Upton, in her lifetime a member of the Roman Catholic Church, by her last will, after some specific legacies, gave all the residue of her estate, real and personal, "unto and for the use and benefit of foreign missions in connection with the Roman Catholic Church in Canada," and further directed her executors "to use and apply all such rest and residue of my estate in and towards the support of such foreign missioners as aforesaid."

The Roman Catholic Church is a world-wide body, and has no separate organisation for Canada. The Church in Canada is part of the parent body, having its headquarters at Rome. There are not at the present time any foreign missions carried on by that portion of the Roman Catholic Church which is in Canada. Contributions for the purpose of foreign missions are remitted to the principal officers of the Church; and the missions in all countries are carried on, as the Church in Canada itself is carried on, under the directions of the authorities at Rome.

From this it is clear that the devise in question is not aptly expressed. I think, however, that there is a sufficiently clear expression of the general charitable intention to prevent the failure of the gift.

Upon the argument, both counsel seemed to assume that it was necessary that there should be foreign missions at present in existence. I do not at all agree with this. It may well be sufficient if such missions are hereafter established in connection with the Roman Catholic Church in Canada. Counsel for the Roman Catholic Church intimated a readiness to do everything necessary to carry the intention of the testatrix into effect, but desired that the money should be paid to the Catholic Church Extension Society of Canada, incorporated by 8 & 9 Edw. VII. ch. 70(D.)

I do not see my way clear to assent to this. As I read the will, the desire of the testatrix was, that the money should be spent on foreign missions, that is to say, missions presumably to heathen lands; certainly outside of Canada; and the Church Extension Society is incorporated for the purpose of supporting Christian missions and missionary schools throughout Canada.

I see no reason why the executors should not pay the moneys over to the proper authorities of the Roman Catholic Church—the Church undertaking on its part to apply the moneys in and towards the support of foreign missions in connection with that branch of the Roman Catholic Church which is in Canada.

It may have been the desire of the testatrix to induce the Church to connect some particular mission with the membership in Canada, and so encourage and quicken missionary zeal. No doubt, that end can be brought about by the action of the Church authorities, which their counsel has said they are ready to take.

Costs of all parties may come out of the fund.

FALCONBRIDGE, C.J.K.B. FEBRUARY 11TH, 1913.

HOODLESS v. SMITH.

Covenant — Building Restriction — Covenant not Running with the Land—Privity—Merits—Injury to Building.

Action for a mandatory injunction requiring the defendants to convert a building containing a shop and flats into a dwelling-house, or to pull down the building, and for damages and other relief.

M. Malone, for the plaintiffs.
M. J. O'Reilly, K.C., and A. H. Gibson, for the defendants.

FALCONBRIDGE, C.J.:—At the hearing I dismissed that part of the plaintiffs' claim which alleged that their building or property had been injured by reason of the defendants' excavation for their cellar.

As to the claim for breach of an alleged covenant running with the land in erecting a shop and flats, I fail to see how the defendants' position is at all improved by Mrs. Markle procuring the conveyance to her of the 25th April, 1912, from the Cumberland Land Company, which had no longer any interest in the lands in question.

But I also am unable to find that there is here any covenant running with the land in favour of the plaintiffs. They are not purchasers from the Cumberland Land Company, to whom the covenant was given, but they and the defendants are purchasers from Mrs. Markle, who gave the covenant.

No case cited seems to me to have any application to the point. Pearson v. Adams, 27 O.L.R. 87, cited by the plaintiffs, has just been reversed by the Court of Appeal.

The merits are with the defendants. The district is not residential, and they bought without knowledge of the alleged covenant.

Action dismissed with costs.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 12TH, 1913.

PLAYFAIR v. CORMACK AND STEELE.

Discovery—Examination of Defendant—Scope of Inquiry—Dealings in Company-shares — Restriction to Pleadings—Relevancy of Interrogation.

Appeal by the defendant Steele from an order of the Master in Chambers, ante 647, requiring the appellant to attend and be further examined for discovery.

W. D. McPherson, K.C., for the appellant.
Harcourt Ferguson, for the plaintiff.

MIDDLETON, J.:—It is a cardinal rule that discovery is limited by the pleadings. Discovery must be relevant to the issues as

they appear on the record. The party examining has no right to go beyond the case as pleaded and to interrogate for the purpose "of finding out something of which he knows nothing now which might enable him to make a case of which he has no knowledge at present:" Hennessy v. Wright, 24 Q.B.D. 445. Much less is it the function of discovery to extract from the opponent admissions concerning a case which he has not attempted to make by his pleadings.

Upon the record here the issues are simple. The plaintiffs say they sold to the defendants Cormack and Steele certain stocks, and that there is a balance of the purchase-price due to them. Cormack sets up as a defence that the purchase of stock, if made at all, was made by him upon the faith of some promise made by the plaintiffs by which they agreed to carry the stock for him without any liability on his part, and that the stock purchased was sold by the plaintiffs without authority.

Steele confines his defence within narrow limits. He was not the purchaser, and was a mere go-between, carrying certain communications from the plaintiffs to Cormack and from Cormack to the plaintiffs. In this he was agent for his co-defendant, and known to the plaintiffs as agent only; and credit was given to Cormack alone. He further alleges that the suit was originally brought against Cormack alone, and that in that suit the plaintiffs, on a motion for judgment, swore that the indebtedness was the indebtedness of Cormack. He further says that he had some transactions with the plaintiffs other than those giving rise to this action, and that for these he settled and received a full discharge.

Upon the examination it appears that Steele was an officer of the mining company whose shares form the subject-matter of the action. Counsel seeks to interrogate him as to his agreements with the mining company and his transactions with stock in that company. This, I think, is irrelevant.

The appeal should be allowed, with costs to the appellant in any event.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 12TH, 1913.

YOLLES v. COHEN.

Attachment—Absconding Debtor—9 Edw. VII. ch. 49, sec. 4—Corroborative Affidavits—Condition Precedent—Motion to Set aside Order—Notice of Motion—Failure to Point out Irregularities—Con. Rule 362—Costs.

Motion by the defendant to set aside an attachment order issued on the 5th February, 1913, by the Master in Chambers.

A. Cohen, for the defendant.
J. P. MacGregor, for the plaintiff.

MIDDLETON, J.:—Upon the argument of this motion it clearly appeared that the plaintiff's proceedings were very faulty. The defendant is not in a position to avail himself of the defects appearing, as his own practice is not above reproach. His notice of motion does not comply with Con. Rule 362, in that it does not point out or mention any of the irregularities complained of.

I deal with the motion upon one ground only. The Absconding Debtors Act, 9 Edw. VII. ch. 49, sec. 4, provides that the order may be made upon an affidavit by the plaintiff and upon the further affidavit of two other persons that they are well acquainted with the defendant and have good reason to believe, and do believe, that he has departed from Ontario with intent to defraud, etc.

The application was here granted by the Master upon the plaintiff's own affidavit, without the necessary corroborative affidavits. These are, I think, made by the statute a condition precedent to the making of the order. The plaintiff now files affidavits, but I do not think this can help him.

As the applicant is himself irregular, and has made no affidavit of merits, I think this affords justification for setting aside the order, as I do, without costs. This will be without prejudice to any application that the plaintiff may make for a similar order; but, as counsel for the defendant stated that his client was returning to the city to-day, the order should not be made upon stale material.

KELLY, J. FEBRUARY 12TH, 1913.

NILES v. GRAND TRUNK R.W. CO.

Water and Watercourses—Railway—Flooding Lands Adjoining Works—Ditches—Surface Water—Powers of Railway Company — Remedy by Action — Remedy against Municipality under Municipal Drainage Act—Damages—Injunction—Stay of Operation.

Action for damages for flooding the plaintiff's lands in the township of Thurlow.

E. G. Porter, K.C., and W. Carnew, for the plaintiff.
D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

KELLY, J., after reviewing the evidence, said that the flooding had seriously interfered with the use of the plaintiff's lands as a market garden and orchard; that many fruit trees had been killed or injured; and water had found its way into the cellar of the plaintiff's dwelling-house. The condition of which the plaintiff complained and the damage were continuing; and he was not debarred by lapse of time, as contended by the defendants, from bringing action. The law as to liability for interfering with the natural flow of surface water and causing it to overflow on other lands is to be found in Angell on Watercourses, 7th ed., p. 133; Gould on Waters, 3rd ed., pp. 539, 540, 545, 551; Addison on Torts, 5th Eng. ed., p. 247.

The defendants contended that, not only as to the surface water which was directed towards the ditch in the plaintiff's land, but also as to the water which they brought on their own premises and then discharged in the same direction, they were not liable; that, by the terms of their Act of incorporation and by the provisions of the Railway Act, they were within their rights in disposing of the water as they did in carrying on the operations of their business.

The learned Judge said that he was unable to accept the broad proposition that, because the defendants had been given certain powers in furtherance of the objects for which they were incorporated, they had the right so to carry on these operations as, in such circumstances as appeared in this case, to cause damage to others.

The learned Judge was of opinion that the law as laid down in Rylands v. Fletcher, 3 H.L.C. 330, applied to this case; and

he referred also to Baird v. Williamson, 13 C.B.N.S. 317, and Whalley v. Lancashire and Yorkshire R.W. Co., 13 Q.B.D. 131; saying that the circumstances in the present case were much the same as those in Rylands v. Fletcher, with the added fact that the defendants not only brought upon their premises this large quantity of water, and discharged it therefrom, to the injury of the plaintiff, but, by widening and deepening the ditch on Herkimer avenue, they turned it more directly and in larger quantities on the plaintiff's lands.

The learned Judge did not agree with the defendant's further contention that the plaintiff's remedy was against the municipality, and that his proceedings should be under the Municipal Drainage Act.

Then, as to the damages. The plaintiff said that the value of his property had decreased in value from $12,000 to $2,000; but that was an extravagant estimate. The main elements of damage were the injury to and destruction of his fruit trees, the almost total loss of his vegetable crop in 1912, as well as a loss in 1911, and the loss of some of his hay crop. Taking all the facts into consideration, the learned Judge estimated the damages sustained by the plaintiff at $1,525.

Judgment for the plaintiff for $1,525 and for an injunction restraining the defendants from permitting the water, other than surface water by natural flow, from their premises and works, to come upon and overflow the plaintiff's lands, with costs of the action. The injunction part of the judgment not to be operative for four months, so as to give the defendants ample time to make provision for properly taking care of the water and removing the cause of the trouble; this to be without prejudice to any proceedings by the plaintiff for the recovery of any damage that he may in the meantime suffer.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 13TH, 1913.

PALLANDT v. FLYNN.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers—Interpleader—Issue—Parties—Claimants—Security—Practice.

Motion by the Canadian Bank of Commerce, claimants, for leave to appeal to the Appellate Division of the Supreme Court of Ontario from the order of BRITTON, J., ante 681.

R. C. H. Cassels, for the applicants.
J. Jennings, for the execution creditor.
R. J. Maclennan, for the Sheriff.

MIDDLETON, J.:—The execution creditor caused a seizure to be made of some 3,000 shares in a mining company, standing in the books of the company in the name of the execution debtor. Before the stock was brought to a sale, the bank served notice upon the Sheriff, claiming that the stock had been transferred to the bank as security for advances, and that there was some $2,000 due thereon.

Subsequently, one Albert Freeman claimed the stock, on the ground that it had been assigned to him as security for advances to the extent of over $8,000.

Upon an application being made for interpleader, the Master in Chambers made an order directing the trial of an issue, in which the Canadian Bank of Commerce are to be plaintiffs and the execution creditor defendant; reserving directions with reference to any claim between the defendant Freeman and the execution creditor until after the trial of this issue.

The execution creditor does not admit either the making of the transfer of the stock to the bank or that there is anything due to the bank; and, moreover, contends that the assignment, even if executed, was inoperative, because the stock was transferable only upon the books of the company, and the alleged transaction was by an endorsement upon a stock certificate, not recorded: the contention being that until recorded the title does not pass.

The merits of this contention are not ripe for discussion upon the present motion. The bank contend, first, that an interpleader issue ought not to have been directed, because the Sheriff is not in possession. I agree with the learned Judge that this objection is not well taken, and that, a claim having been made to property which has been seized in a manner authorised by statute, the Sheriff is entitled to interpleader.

A more substantial question will arise upon the trial of the issue, as to which I express no opinion. It may be that the only matter which will be open upon the trial of the issue will be the existence of the assignment and the ascertaining of the amount due the bank. See O'Donohoe v. Hull, 24 S.C.R. 683, and Keenan v. Osborne, 7 O.L.R. 134.

The second complaint by the bank is, that the bank are made plaintiffs in the issue. As pointed out in Kinnee v. Bryce, 14 P.R. 509, if the bank have a transfer of stock as alleged, on prov-

ing the document and the date, the onus will be shifted; so this point is not of importance.

The third point urged is this: by the order it is provided that the bank do within 14 days pay into Court $8,000, or give security in the sum of $15,000, for the payment of $8,000 according to any direction that may hereafter be made; and, upon such payment or security, the Sheriff do withdraw his seizure; but, in default of such payment or security, the Sheriff do sell the stock. This, the bank contend, compels them to purchase this stock at $8,000, a sum which is said to be ascertained from a newspaper report of the market quotations, or to submit to the stock being sold by the Sheriff.

This provision appears to me to be entirely unauthorised and unfair. I can see no reason why the bank should be compelled to submit to a sale of the stock at the present time. It would seem more reasonable to require the execution creditor to put up enough to answer the bank's claim, if any, and take the stock if he desires to sell it, or to provide that the stock should not be sold for less than enough to pay the bank in full if they succeed.

The bank are ready to submit to either of these alternatives, but the execution creditor refuses his assent. Of course, if the stock can be sold for any such sum as $8,000, the bank are not concerned; but the bank fear that the placing of as much stock as this upon the market, for a sale without any reserve, may result in the stock bringing much less than the amount necessary to satisfy the bank's claim.

The principle which, it seems to me, ought to guide is that laid down in England with respect to the sale of property under an execution where there is a mortgage. The sale of an equity of redemption is not provided for there, as here. The property must be sold free from the charge, and the execution creditor is required to give security to the mortgagee against any loss.

As I think the order ought to be reviewed with respect to this matter, and as the matter is obviously one of importance, I give leave to appeal; and, as the matter is to be reviewed, I think it better not to handicap the parties by restricting the leave in any way. The appellants may confine their appeal as advised.

There is another matter, not argued, but outstanding on the face of the papers. The course pursued by the Master with reference to the claim of Freeman seems to me inexplicable. If the assignment to Freeman is good, then the execution creditor has no right to the stock. No matter what the form of issue, the real test is, whether this stock shall be taken to satisfy the execution. In Merchants Bank v. Herson, 10 P.R. 117, Sir

Adam Wilson thought that there should be one issue, in which all the execution creditors should be on one side and all the claimants on the other.

The proceedings are for the guidance of the Sheriff, and not for the adjustment of the rights of the claimants as between themselves. If the appellants desire to argue this question also, leave is granted to introduce it.

Proceedings may be stayed meantime.

KELLY, J. FEBRUARY 13TH, 1913.

RE CORR.

Distribution of Estate of Intestate—Ascertainment of Next of Kin—Identity of Deceased with Father of Claimant—Evidence—Finding of Master—Appeal.

Appeal by Mary Elizabeth Donnelly from the report of the Master in Ordinary.

G. S. Hodgson, for the appellant.

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

J. P. Crawford, for the National Trust Company, administrators of the estate of Felix Corr, deceased.

KELLY, J.:—In this matter an order was made referring it to the Master in Ordinary to ascertain and report what parties, if any, are entitled as next of kin to share in the distribution of the estate of Felix Corr, who died, intestate, in Toronto, on the 3rd May, 1910.

Several persons put forward claims to be such next of kin; and the Master has found that none of these persons has substantiated his or her claim. One of these claimants, Mary Elizabeth Donnelly, brings this appeal from the Master's report.

After a careful perusal and consideration of the evidence, I have come to the conclusion that the Master's finding is correct, in so far as it applies to the appellant. The evidence on which she particularly relies is that of a number of persons residing in Ireland, which is intended to prove the identity of the deceased with the father of the appellant, from an examination of a portrait sketched by Mr. Smith, who knew him for about fifteen years prior to his death.

These witnesses had not seen the Felix Corr who is said to be the father of the appellant since 1867. Some of them had not seen him since an earlier date. There were in that part of Ireland several persons named Corr, more than one of whom bore the name "Felix."

Another circumstance upon which the appellant relies is the similarity of the occupation of her father to that followed by the deceased in Toronto. The former is said to have been a wheelwright, before his disappearance from his home in Ireland; the deceased was a waggon-maker.

Then, too, it is said by some of these witnesses that the Felix Corr whom they knew was somewhat of the same height and size as the deceased. They also say that the man of whom they speak had one brother and one sister; that he was married in Ireland in January, 1866; that, before the end of that year, a son was born of that marriage; that he left his home in Ireland in April, 1867; and that a daughter was born of the marriage in October, 1867. The appellant claims that she is this daughter.

As against this, there is the evidence of the persons who knew the deceased in Toronto, one from the year 1866 and others from later dates, from which it appears that the deceased came to and took up his residence in Toronto not later than 1866; that he spoke at times of his family, consisting of one brother and two sisters, but whose names, as he mentioned them, do not at all correspond with the names of the brother and sister of the Felix Corr of whom these other witnesses speak.

The witness Margaret Hodgkinson, who knew him in Toronto in 1866, tells of a visit made to Toronto about that time by her cousin, who knew the deceased in Ireland, and whose conversation with him corroborated his account of the number and names of the members of his family; but no mention was made in any such conversations of his having been married.

Another witness says that the deceased stated to him that he had been married. This, even if accepted, does not, as against the other evidence, help the appellant.

I have referred to some only of the facts brought out in the evidence; in other parts also there is not a little conflict.

Whatever may be the real facts concerning the parentage of the appellant, the evidence, taken as a whole, does not establish the identity of the deceased with the person she claims was her father; and I think the Master was right in finding as he did; and that, on the evidence, the appellant has not established her claim to be the next of kin of the deceased.

The appeal is, therefore, dismissed, and with costs, if demanded.

BRITTON, J. FEBRUARY 13TH, 1913.

LECKIE v. MARSHALL.

Judicial Sale—Realisation of Vendor's Lien on Mining Properties—Sale without Reserve—Date of Sale—"Forthwith"—Direction of Master—Appeal.

Motion by the plaintiffs by way of appeal from the interim certificate of the Master in Ordinary, dated the 14th January, 1913, of his ruling that the mining properties in question in this action should be a second time offered for sale by public auction, on the 16th June, 1913, and that such sale should be subject to a reserved bid, to be fixed by him, and for an order directing the Master to proceed to sell the properties forthwith, pursuant to the judgment of the Court of Appeal dated the 28th June, 1912 (3 O.W.N. 1527), and without reserve.

James Bicknell, K.C., for the plaintiff.

George Bell, K.C., for the defendants William Marshall and Gray's Siding Development Limited.

BRITTON, J.:—The formal judgment of the Court of Appeal, in so far as material to the matters now under consideration, is as follows: "2 (a). And this Court doth further order and adjudge that, in default of payment into Court on or before the 12th October, 1912, by the said defendants William Marshall and Gray's Siding Development Limited, or either of them, of the moneys aforesaid, the mining properties in question in this action be forthwith sold, with the approbation of the Master in Ordinary of this Court, to answer the lien of the plaintiffs as unpaid vendors for purchase-money."

These mining properties were offered for sale on the 23rd December last. That attempted sale, although held only a little over two months from the date on which the money was to be paid into Court, was not abortive by reason of an entire absence of bidders, but because the bidding did not reach the reserved bid. The properties must again be offered, but when, and whether subject to another or any reserved bid, are the questions.

The sale is to be with the approbation of the Master, and must, therefore, be conducted as a judicial sale; and, so far as reasonably possible, the sale must be conducted in such a way as to protect the interests of all parties—but all this is sub-

ject to the fact that the sale is necessary to enable the plaintiffs to get the money to which they are entitled, and which the defendants did not pay into Court—money for the plaintiffs' properties—which properties are in a way being held up by the defendants. To enable the plaintiffs to get their money, they are entitled to a sale of the properties forthwith, which at least means without unnecessary or unreasonable delay.

The reserved bid on the 23rd December has already prevented the plaintiffs for a considerable time from getting their money. That reserved bid is not now complained of.

The learned Master, in my opinion, wisely exercised the wide discretion vested in him by then fixing a reserved bid—but, considering what took place at the attempted sale, and upon all the facts, there is no reason why there should be any further reserve.

Another may block the way again; and, if a second reserved bid is named, why not a third? Further reserved bids are not consistent with a sale to be made forthwith to realise a vendor's lien—a sale that the plaintiffs are, ex debito justitiæ, entitled to have carried out.

I have not been able to find any cases upon the question of repeated reserved bids. It must be dealt with upon the facts of each case. In this case, the terms and limitations of the judgment are important. It is also important that the bidding on the 23rd December last was only $25,000 less than the original purchase-price of $250,000. That seems to me not a large deficiency on mining properties, not being worked at the time of the attempted sale. The defendants were and are unwilling to take the properties at the purchase-price. A fair inference from the facts is, that there are persons possessed of or who command large means, who have an eye on the properties, and who may bid if they know there will be a sale to the highest bidder. All the parties are allowed to bid. Again, as this is a judicial sale, the Master will report, and the report must be confirmed. If there is any fraud or collusion or improper practice on the part of the purchaser, the sale will not be confirmed.

For these reasons, I am, with great respect, of opinion that the sale should be without reserve.

It is suggested by the plaintiffs that thirty days will be sufficient to give intending purchasers time to make necessary inquiries. I do not agree; but, on the other hand, the delay should not be so long as the 16th June. In fixing the time, the judgment must be looked at, and the fact of the former offering should be considered. Men likely to buy—or bid—are those who will get information from persons already more or less

acquainted with the properties. If, however, personal inspection is required, it can be made in two months. The time of sale should be Monday the 5th May, 1913. If there is any objection to that day, the Master should name a day not later than the 12th May nor earlier than the 30th April next.

Appeal allowed as above and order accordingly. Costs of the plaintiffs of this appeal to be added to the plaintiffs' claim.

KELLY, J. FEBRUARY 14TH, 1913.

RE KETCHUM AND CITY OF OTTAWA.

Appeal—Award—Municipal Arbitrations Act, R.S.O. 1897 *ch.* 227, *sec.* 7 — *Time for Appealing — Notice of Taking up Award—Order Quashing Appeal as too Late.*

Motion by Ketchum et al., claimants, for an order quashing the appeal of the Municipal Corporation of the City of Ottawa from an award made by the Official Arbitrator for that city, under the Municipal Arbitrations Act, R.S.O. 1897 ch. 227, upon the ground that the appeal was not, as required by sec. 7 of the Act, launched within one month after the taking up of the award.

T. A. Beament, for the applicants.
Taylor McVeity, for the city corporation.

KELLY, J.:—On the 21st December, 1912, the solicitor for the city corporation received from the claimants' solicitors a written communication asking for payment of the amount found due by the arbitrator and their costs of the arbitration. It has been suggested by the city corporation that notice of the taking up of the award should have been served on them, and that the time allowed for the appeal should run only from the giving of such notice. Section 7 says that "the award of the Official Arbitrator . . . shall be binding and conclusive upon all parties thereto unless appealed from within one month after the taking up of the same."

Notice of the filing of the award was given to the appellants' solicitor on the 29th November. On the argument it was admitted by counsel that the award was taken up not later than the 4th

December; and the appellants' solicitor states in his affidavit that the letter which he received on the 21st December was the first notice or intimation which he received that the award had been taken up; so that, even if notice of the taking up were necessary —and that is not expressly required by the Act—he had such notice on the 21st December; and the appeal, therefore, was not taken within the time required.

The application is granted with costs.

WILEY v. TRUSTS AND GUARANTEE CO.—DIVISIONAL COURT—FEB. 8.

Judgment—Form of—Contract—Trustees—Registration of Conveyances—Cancellation.]—A motion was made by the defendants to vary and settle the minutes of the judgment of the Divisional Court of the 24th June, 1912: see 3 O.W.N. 1494. In settling the judgment, the Registrar provided for cancelling the registration of the conveyances. RIDDELL, J., on the 7th November, 1912, delivering the judgment of the Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) upon the motion, said that that was proper; but it was obvious that, if the registration were to be annulled with nothing further, the vendor might effectively dispose of the land, leaving the trustees without any but a personal remedy. The only reason for cancelling the registration was the agreement on the part of the trustees to hold the transfers unregistered; but the trustees were not to be put in further peril through their ill-advised act. The transfers must be handed to the trustees. The form of judgment submitted by the defendants was the correct one. No costs.—Upon the solicitors going again before the Registrar to settle the minutes, a difficulty arose, and the plaintiffs applied to the Court for a direction. RIDDELL, J., for the Court (8th February, 1912), said that there would be no change in the direction previously given. The form of judgment submitted by the defendants was the correct one. Costs of this motion to the defendants. W. J. Elliott, for the plaintiffs. M. L. Gordon, for the defendants.

PARKS v. SIMPSON—SIMPSON v. PARKS—DIVISIONAL COURT—FEB. 8.

Judgment—Motion to Vary Minutes—County Court Appeal.]—Motion by Simpson to vary the minutes of the judgment of a

Divisional Court of the 29th November, 1912. See ante 422. FALCONBRIDGE, C.J.K.B., delivering the judgment of himself and BRITTON and SUTHERLAND, JJ., said that, having regard to all the circumstances and the fact that there was no appeal by Simpson from the judgment of the County Court, it was not a matter in which the Divisional Court should now interfere. No costs of the application. Eric N. Armour, for Simpson. H. E. Rose, K.C., for Parks.

FERGUSON v. ANDERSON—MASTER IN CHAMBERS—FEB. 10.

Venue—Change—County Court Action—Con. Rule 529(*b*) *—Convenience—Costs of Motion.*]—Motion by the defendants to transfer the action from the County Court of the County of Carleton to the County Court of the United Counties of Stormont, Dundas, and Glengarry. The Master said that the action was clearly within Con. Rule 529(*b*), and should, therefore, have been brought in the County Court of the United Counties of Stormont, Dundas, and Glengarry: Corneil v. Irwin, 2 O.W.R. 466. There was some inconvenience in going from Maxville, where all the parties lived, either to Ottawa or Cornwall. The distance to Ottawa by rail is 41 miles. To reach Cornwall by rail is 70 miles. An easy solution of the matter was to grant the motion. Then the parties could drive to Cornwall, which is only 25 miles away. No doubt, the Judge would accede to an application, under 10 Edw. VII. ch. 30, sec. 18, to fix the trial at some time when the roads were in good condition. Order made as asked. Costs to the defendants in any event, for reasons given in Murphy v. Township of Oxford, not reported, but cited in Brown v. Hazell, 2 O.W.R. 785. Grayson Smith, for the defendants. J. F. Boland, for the plaintiff.

YOUELL v. TORONTO R.W. CO.—MASTER IN CHAMBERS—FEB. 11.

Pleading — Statement of Claim — Late Delivery — Irregularity — Validation — Con. Rules 312, 353 — *Costs.*]—On the 27th December, 1911, the plaintiff was struck and seriously injured by a car of the defendants. On the 25th January, 1912, this action was brought to recover damages for his injury; service of the writ of summons upon the defendants was made on the same day. The defendants appeared in due course;

but no statement of claim was delivered until the 22nd January, 1913. This the defendants moved to set aside, as irregular. The motion was supported on the ground that the plaintiff had been apparently able to go about and visit his friends, and should, therefore, be considered competent to give any necessary facts to his solicitors. It was further said that, at the time of the accident, the defendants had a note of a number of witnesses of the accident, which occurred at 6.40 p.m., on the corner of Grace and Harbord streets, in the city of Toronto; but that, owing to the long delay in proceeding with the action, "some of the said witnesses who are necessary and material for the proper conduct of the defence to this action have been lost track of." The delay was explained by the affidavit of a member of the firm of the plaintiff's solicitors, who said that the plaintiff was in such "a highly nervous condition that it is still improper to discuss the action with him to any extent." The Master said that the principle of Con. Rule 312, in conjunction with Con. Rule 353, made it proper to validate the statement of claim, even at this stage, giving the costs of the motion to the defendants in any event. If the defendants were unable to find the witnesses referred to, and if (as was stated) the conductor and motorman of the car which struck the plaintiff were no longer in the defendants' service or could not be found, the plaintiff might have to consent to a postponement of the trial until the September sittings. D. L. McCarthy, K.C., for the defendants. A. J. Thomson, for the plaintiff.

HAY v. COSTE—MASTER IN CHAMBERS—FEB. 13.

Discovery—Production of Documents—Motion for Better Affidavit—Grounds for.]—Motion by the plaintiff for a further affidavit on production from the defendant, who had filed an affidavit sufficient according to the Rules. The defendant had not been examined for discovery; and the motion was supported only by an affidavit of the plaintiff's solicitor, which, the Master said, was clearly insufficient in its contents, even if allowable at all. It gave no grounds for supposing that the affidavit of documents was defective, nor did any ground appear in the pleadings or in the documents produced. The Master referred to Ramsay v. Toronto R.W. Co., ante 420. He suggested that the motion might perhaps be successful at a later stage, e.g.,

after examination for discovery of the defendant, referring to MacMahon v. Railway Passengers Assurance Co., 3 O.W.N. 1239, 1301, 26 O.L.R. 430. Motion dismissed with costs to the defendant in any event. M. L. Gordon, for the plaintiff. C. A. Masten, K.C., for the defendant.

SATURDAY NIGHT LIMITED v. HORAN—LATCHFORD, J.—FEB. 13.

Fraudulent Conveyances—Chattel Mortgages—Mortgage of Land—Conveyance of Land—Action to Set aside—Evidence—Insolvency—Knowledge — Actual Advances — Good Faith.]—Action by unsatisfied judgment creditors of the defendant James Horan for a declaration that a mortgage of land, a deed of land, and two chattel mortgages, made by him to his co-defendants respectively, should be declared fraudulent and void as against the plaintiffs and all his other creditors. One of the chattel mortgages, that dated the 5th September, 1911, was in force when this action was begun, but was not renewed, and lapsed as against the plaintiffs. The other chattel mortgage, dated the 27th October, 1910, had been duly renewed. This was made to James Horan's brother, the defendant Eugene Horan, for $325, which was actually advanced. The land mortgage, dated the 31st October, 1910, was a second mortgage, and was made to James Horan's mother, the defendant Elizabeth Horan, to secure a previous advance of $1,200, for which he had promised to give her a second mortgage. On the 27th September, 1911, James Horan conveyed his equity of redemption in the land to his other brother, the defendant William Horan, in consideration of $140.80, which was not in fact paid. LATCHFORD, J., found, upon the evidence, that the chattel mortgage to the defendant Eugene Horan and the land mortgage to the defendant Elizabeth Horan were executed in good faith, when James Horan was solvent, and to secure actual advances, and had not been successfully impeached. Otherwise, however, as regarded the conveyance to the defendant William Horan, who knew that his brother was insolvent on the 27th September, 1911, and procured the execution of the deed of that date in fraud of his brother's creditors. Judgment directing that this deed be set aside and the registration thereof vacated. Action dismissed as against the defendants Eugene Horan and Elizabeth Horan without costs. The plaintiffs to have one-third of the general costs of the action against the defendants James Horan and William Horan. J. J. Maclennan, for the plaintiffs. J. Fraser, for the defendants.

DENISON v. E. W. GILLETT CO. LIMITED—LENNOX, J.—FEB. 14.

Contract—Promise to Pay for Services of Clerk of Works—Evidence—Architect—Finding of Fact.]—Action by architects to recover from the defendants $1,100 alleged to have been paid by the plaintiffs at the defendants' request for the services of a clerk of works or superintendent of the building of a new factory erected by the defendants. The learned Judge finds, upon conflicting evidence, that the defendants' manager instructed the plaintiff Denison to engage a clerk of works for the defendants and agreed that the defendants would bear the expense; and holds that the defendants are liable. Judgment for the plaintiffs for $1,100 with interest from the 22nd November, 1912, and the costs of the action. Gordon Waldron, for the plaintiffs. G. M. Clark, for the defendants.

ROSE v. TORONTO R.W. CO.—BRITTON, J.—FEB. 14.

Negligence—Street Railways—Collision—Injury to Passenger—Evidence of Injury—Conduct of Injured Person—Finding of Fact—Damages.]—Action by a dental surgeon to recover damages for injuries alleged to have been received while he was a passenger in a car of the defendants by reason of a collision with another car, at the corner of Carlton and Parliament streets, in the city of Toronto. The action was first tried before BOYD, C., and a jury. At that trial, there was a verdict for the plaintiff for $750. That verdict was set aside by a Divisional Court, and a new trial without a jury was ordered. The second trial was before BRITTON, J., without a jury. The defendants admitted negligence, but said that the plaintiff was not really injured in the collision; or, if he was injured, the real cause of his injury was in doubt; and, at any rate, he was not injured in the collision to the extent alleged. The collision was on the 28th May, 1911. On the 21st June, 1911, the plaintiff was injured by being thrown from a bicycle, and for this injury he received indemnity under an accident insurance policy. For his alleged injury in the collision he did not seek indemnity under the insurance policy; and he made no claim against the defendants until after the bicycle accident. This action was begun on the 30th April, 1912. Notwithstanding the plaintiff's conduct, the learned Judge finds that he was in fact injured by the collision of the 28th May, 1911, and that he is entitled to

recover. The principal injury was at or in the region of the hip-joint. The usefulness of that joint was impaired. The plaintiff suffered considerable pain, and he had not yet fully recovered; but he had not suffered any permanent injury. The injury from the bicycle accident was quite distinct. In that accident his left hand was injured and he was considerably shaken. Apart from any injury which the plaintiff sustained by the bicycle accident, he should recover from the defendants for the damage and loss occasioned by the collision the sum of $650. Judgment for the plaintiff for that amount with costs of the action and both trials, but not of the appeal to the Divisional Court. No costs to either party of that appeal. J. W. McCullough, for the plaintiff. T. Herbert Lennox, K.C., for the defendants.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. DE SHERBININ—MASTER IN CHAMBERS—FEB. 15.

Summary Judgment—Con. Rule 603—Action on Promissory Note—Defence—Counterclaim—Unconditional Leave to Defend.] —In an action on a promissory note, the making of which was not denied, the plaintiffs moved for summary judgment under Con. Rule 603, after cross-examination of one of the defendants on an affidavit filed in answer. The defendants were engaged as agents of the plaintiffs in selling their machines, and were successful to a certain extent. Afterwards, as it appeared from the affidavit of the defendant above-mentioned, the machine was not satisfactory, and the defendants alleged that they were misled by the plaintiffs; and they said that they intended to counterclaim for damages or to set up the plaintiffs' deceit, whereby they were induced to give the note and incur expense and loss of time, as a defence to the action. The Master said that this was a sufficient answer to the motion; and referred to Neck v. Taylor, [1893] 1 Q.B. 560, at p. 562, per Lord Esher, M.R.; and as to the scope and application of Con. Rule 603, to Smyth v. Bandel, ante 425, 498, affirmed on the 20th December, 1912. W. J. Elliott, for the plaintiffs. J. T. White, for the defendants.

CARTER v. FOLEY-O'BRIEN CO.—MASTER IN CHAMBERS—FEB. 15.

Evidence—Foreign Commission—Examination of a Defendant on Behalf of Plaintiffs—Security for Costs of Commission.] —Motion by the plaintiffs in the above action and two other actions against the same defendants for a commission to examine, as a witness on their behalf, the defendant Geddes at Reno, Nevada, or elsewhere as he might be found. The Master said that he had read the examination of the defendant Geddes for discovery, and, in the light of the statement of claim, his evidence was material. He had agreed to come to the trial, and the plaintiffs were willing "to pay his expenses and a reasonable fee for his time"—the best possible proof of their good faith and desire to save delay and expense. After the trial had been fixed for the 20th January, he notified his solicitor that he would not come. In this state of affairs, it seemed proper to make the order asked for, unless his examination for discovery should be allowed to be taken as his evidence at the trial. The Master had some doubt at the argument as to whether he should accede to the defendants' request for security. Further reflection, however, had satisfied him that this should not be granted, as the plaintiffs did everything in their power to procure the defendant Geddes's presence at the trial, which he would naturally be expected to attend at his own expense. Usual order granted. H. S. Murton, for the plaintiffs. H. Macdonald (Day, Ferguson, & O'Sullivan), for the defendant Foley. R. W. Hart, for the other defendants.