THE
ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 5TH, 1904.)

VOL. IV. TORONTO, NOVEMBER 10, 1904. NO. 11

ANGLIN, J. NOVEMBER 1ST, 1904.

CHAMBERS.

PERRINS (LIMITED) v. ALGOMA TUBE WORKS (LIMITED).

Discovery—Examination of Officer of Foreign Corporation—Provisional Director—Officer out of the Jurisdiction—Rule 439 (a).

Appeal by defendants from order of Master in Chambers (ante 233) directing that a commission may issue to take the examination for discovery of John J. Freeman, an officer of defendant corporation resident in the city of Philadelphia, U.S.A.

W. E. Middleton, for defendants.

C. A. Moss, for plaintiffs.

ANGLIN, J.—With great respect, I am of opinion that this order cannot be supported. In the first place a commission for the purpose of an examination for discovery is machinery not contemplated by the Rules making provision for such examinations. "These Rules were intended to provide a complete code of procedure applicable to persons resident within the jurisdiction of the Court and to persons residing out of that jurisdiction:" Connolly v. Dowd, 18 P. R. 38, 39. The group of Rules dealing with the examination of residents of this Province expressly extends to the examination of officers of corporations (Rule 1250). The Rule providing for the examination of persons out of the Province is in terms restricted to parties litigant. Whether the omission to provide for the examination for

discovery of non-resident officers of litigating corporations be accidental or designed, I am unable to read into this "code of procedure" something which it certainly does not contain. Its inability to secure obedience to any order such as that which plaintiffs seek, by any sanction which the Court has power to enforce, is a sufficient reason for the belief that this casus omissus is such of deliberate purpose on the part of the framers of our Consolidated Rules. No "practice hitherto always followed" is "a sufficient warrant" for making an order which the Rules do not authorize: Appleby v. Turner, 19 P. R. 175, 177.

Appeal allowed with costs to defendants in any event.

ANGLIN, J. NOVEMBER 1ST, 1904.

WEEKLY COURT.

FRASER v. MUTCHMOR.

Mortgage—House upon Adjoining Lot Projecting upon Mortgaged Land — Reformation — Construction — General Words—Short Forms Act — Description—Plan—Title—Registry Laws—Appeal—Costs.

Appeal by defendant Mansfield from report of local Master at Ottawa.

J. Kidd, Ottawa, for appellant.

H. A. Burbidge, Ottawa, for plaintiff.

T. A. Beament, Ottawa, for defendants A. P. and Ida Mutchmor.

ANGLIN, J.—Plaintiff is mortgagee of lot 4. Defendant Mansfield owns lot 3 adjoining. A building erected upon lot 3 extends over a small triangular piece of land which is part of lot 4. Plaintiff brings the present action for foreclosure, upon his mortgage, joining as defendants the mortgagor, A. P. Mutchmor, his wife Ida, and also Mansfield, whose only remaining interest is in respect of the projecting angle of his house. . . . Defendants the Mutchmors not having appeared, a præcipe judgment was entered against them. Defendant Mansfield defending in respect of the part of lot 4 covered by the north-western angle of his house, the action came down for trial to determine the title to this small triangular piece of property. By consent an order was pronounced referring the action for trial to the local Master at Ottawa. From his report, finding that defendant

Mansfield has no title to the small strip of land in question, the present appeal is taken. . . .

Mansfield claims title to this strip of land by grant, express or implied, or by possession.

Both lots were originally owned by one Alexander Mutchmor. Having first built the house in respect of which the present difficulty arises, he had a plan prepared and registered in June, 1872, covering, amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house built by Mutchmor stood upon lot 3, a small triangular-shaped portion extended over part of lot 4. According to this plan the subsequent sales were made.

In July, 1872, Alexander Mutchmor conveyed lot 3 to one Campbell; in September, 1872, he conveyed lot 4 to one Lawrence. There can be no doubt that all parties in 1872 acted upon the assumption that the building in question was wholly upon lot 3. The Master so finds. . . . The deed to Campbell describes the lands conveyed to him as lot 3 according to the registered plan. The deed to Lawrence describes the lands conveyed to him as lot 4 according to the same plan. These descriptions have been carried down through all the conveyances and mortgages of the respective properties.

The ownership and possession of the two properties remained distinct until June, 1883. From that time until 1896 one Lucy McCuaig owned both, subject to outstanding mortgages. In 1892 she mortgaged lot 3 to defendant Mansfield, who in 1896 foreclosed and obtained possession, up to that time held by Mrs. McCuaig. In 1893 Mrs. McCuaig mortgaged to Alexander Mutchmor lot 4, and, through foreclosure proceedings in respect of that mortgage and a subsequent mortgage to himself by A. P. Mutchmor, plaintiff claims title. The legal estates in these properties appears to have been from the beginning and throughout outstanding in different mortgagees, holding distinct mortgages on the respective lots.

Whatever might have been the rights of the original grantee of lot 3 in an action for the reformation of the Mutchmor deed of 1872, and whether, if such relief were sought, it would be granted, no such claim is made in this action. Any equity to reformation is probably destroyed by the provisions of the Registry Act. Whatever may have been the effect, upon the state of the title, of the possession

and occupation of the house in question by the persons claiming under the Mutchmor conveyance of lot 3 down to June, 1883, when both properties passed into the hands of a common owner, defendant Mansfield cannot establish any title by possession to the strip of land in question. Upon this branch of the appeal I unhesitatingly uphold the conclusion of the Master.

But the question whether this much disputed piece of land passed by the McCuaig mortgage to Mansfield presents greater difficulty. It involves the construction and operation of a mortgage made pursuant to the Short Forms Act, particularly as to the meaning and effect of the "general words" formerly implied in such mortgages, and now by statute imported in every conveyance of land: R. S. O. 1897 ch. 119, sec. 12.

Counsel were unable to refer me to any authority—and I have found none myself—in which the effect of these words has been considered under circumstances such as we find in this case, where a very small portion of a comparatively large house erected upon the parcel of land particularly described projects into an adjoining parcel of land owned by the mortgagor.

I fully accept Mr. Burbidge's proposition that description by reference to a plan is equivalent to description by metes and bounds: Smith v. Millions, 16 A. R. 140. I also appreciate the cogency of his argument that, inasmuch as we are dealing with land itself, it cannot pass as something appurtenant to that which is particularly described. Yet, but for the provisions of our Registry Act, I should hesitate to dismiss this appeal. . . .

[McNish v. Munro, 25 C. P. 290, and Hill v. Broadbent, 25 A. R. 159, distinguished.]

Though criticized in Hill v. Broadbent, Willis v. Watney, 45 L. T. N. S. 739 . . has not been questioned as an authority for the proposition that general words, similar to those contained in sec. 12 of R. S. O. 1897 ch. 119, are not restricted in their operation to incorporeal hereditaments or rights such as easements, but may, in proper cases, be operative to pass the fee simple in lands which they cover. These "general words" are, according to all the text writers of repute, used by conveyancers "to guard against any accidental omission." The triangular portion of the dwelling and the land it occupies here in question manifestly fall within their purview and intent so regarded. Can this be

predicated of the building which was the subject matter of litigation in Hill v. Broadbent?

If the description in Mansfield's mortgage had been "lot No. 3 and all houses to the land comprised belonging, or with the same held, used, occupied, and enjoyed, or taken or known as part or parcel thereof," upon the authorities it seems reasonably clear that that instrument would have carried to the mortgagee the small part of lot 4 in question. I confess my inability to perceive any distinction in substance between a description in the above terms and one reading, "lot No. 3, including all houses to the land comprised belonging, or with the same held, used, occupied, and enjoyed, or taken or known as part or parcel thereof." This latter is the description which, by virtue of the statute, we have in the conveyance under consideration. These statutory "general words," not restricted in their operation to incorporeal rights, but designed to pass the fee itself in anything which they include that may have been accidentally omitted from the particular description, may well, as against the mortgagor employing them and his privies, be taken to pass such a subject matter as is here in dispute. Were it necessary in order to dispose of this appeal, I should strongly incline so to hold. Such a construction of this mortgage would be amply supported by Winfield v. Fowlie, 14 O. R. 102. . . . How far, in view of the decision of the Court of Appeal in Hill v. Broadbent, 25 A. R. 159, Winfield v. Fowlie can now be relied upon as authority for all that was there held is gravely questionable. For reasons already outlined, I do not regard Hill v. Broadbent as conclusive of the present case in plaintiff's favour.

The scope and operation of the statutory general release clause in the Mansfield mortgage are also worthy of consideration.

In my opinion, however, the provisions of our Registry Act, though not relied upon at Bar, preclude the defendant Mansfield from setting up title to any part of lot No. 4 as laid down upon the registered plan. I have discussed the effect of the mortgage apart from the Registry Act merely to make it clear that I do not adopt plaintiff's contention that the statutory "general words" are wholly inefficacious to pass title to a small corner of the very house believed and intended to be conveyed, and to the land upon which such corner stands, omitted from the particular description obviously and unmistakably as the result of accident or carelessness.

The policy of the registry laws is to secure to the holder of the registered conveyance title as against the grantee under an unregistered deed of prior date. The statute provides for the registration of plans, and makes them binding. All instruments to be registered against lands covered by registered plans must conform thereto. The mortgagee of lot 4, upon search in the registry office, would find nothing registered against that lot. The mortgage to Mansfield is registered against lot 3 only. If read, it would not give rise even to a suspicion that it covered any part of lot 4, to which in its entirety another chain of title stood upon the register. Though registered, inasmuch as it affected lot 3, so far as this mortgage may have affected part of lot 4, if at all, it must, in my opinion, be deemed an unregistered instrument. To permit it to defeat the registered title of the plaintiff to any part of lot No. 4, would, I think, to a great extent render nugatory the salutary provisions of the Registry Act and frustrate the intention of the Legislature.

Nothing short of actual notice of the title under which defendant Mansfield claims—such notice as would make it a fraud on the part of plaintiff to insist on the protection of the Registry Act—is sufficient to preclude him from claiming in a court of equity the legal priority conferred by that statute: Harrington v. Spring Creek Cheese Manufacturing Co., 7 O. L. R. 319, 325; Ross v. Hunter, 7 S. C. R. 289, 323; Rose v. Peterkin, 13 S. C. R. 677, 694-5; Gray v. Bell, 23 Gr. 390, 393.

Therefore, whether or not, as against his mortgagor, Mansfield acquired title to the piece of land in question, upon the ground that the Registry Act protects the registered title of plaintiff to lot 4 in its entirety, the latter is, in my opinion, entitled to the dismissal of this appeal from the Master's finding in his favour.

I have carefully considered Mr. Kidd's argument upon the question of costs. Mansfield was a necessary defendant in respect of the portion of lot 4 which, upon service of the writ, he offered to relinquish. By his defence he distinctly raises the issue as to title, which entailed all the expense of the trial, and which has been determined against him. I find no sufficient ground for interfering with the disposition made of the costs by the Master. Defendant Mansfield must pay plaintiff's costs of this appeal. There will be no order as to the costs of the other defendants.

NOVEMBER 1ST, 1904.

DIVISIONAL COURT.

DINI v. FAUQUIER.

Executors and Administrators—Action under Fatal Injuries Act—Status of Administrator—Person Having no Interest in Estate—Action Begun before Grant of Administration —Fiat—Judicial Act—Fraction of Day.

Action by the administrator of the estate of Augustino Fancelli, deceased, against Fauquier Brothers, to recover damages under Lord Campbell's Act for having negligently caused the death of deceased.

Defendants, besides denying any negligence, pleaded that plaintiff was not at the time of the commencement of the action the administrator of the deceased.

The damages were claimed in the statement of claim for Egidio and Creusa Fancelli, the father and mother of the deceased, both of whom were alleged to be living near Pisa, in Italy. The action was tried before Idington, J., and a jury.

It appeared at the trial that plaintiff had applied to the Surrogate Court of the district of Algoma, some time before the issue of the writ, for a grant to him of letters of administration, alleging himself to be authorized for the purpose by the father of the deceased, and that on 23rd January, 1903, an order was made by the Judge of that Court for the issue to the plaintiff of letters of administration, but that the letters of administration were not actually issued by the registrar until 26th January, 1903. The writ of summons in the present action was issued on 23rd January, 1903.

The Judge left questions to the jury, which were answered in plaintiff's favour, finding that defendants had been guilty of negligence which caused the accident; that deceased had not been guilty of contributory negligence; and they assessed the damages at $500.

The Judge reserved to himself the disposition of the question as to whether plaintiff was entitled to maintain the action before the actual grant to him of letters of administration. Subsequently, on 16th June, 1904, he gave judgment upon this point in favour of the defendants and ordered the action to be dismissed without costs and without

prejudice to plaintiff bringing a further action if so advised: 3 O. W. R. 786.

Plaintiff appealed to a Divisional Court.

W. M. Boultbee, for plaintiff.

D. C. Ross, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

STREET, J.—Defendants at the argument before us sought to sustain the judgment in their favour upon the facts of the case, and to shew that there was not sufficient evidence upon which to base the findings of the jury, but we are all of opinion and so determined at the conclusion of the argument, that the findings were fully justified by the evidence, and we reserved only the legal question as to the right of plaintiff to maintain the action, under the following circumstances:—

Some time before 23rd January, 1903, plaintiff applied to the proper Surrogate Court for the grant to him of letters of administration, in the ordinary form, to the estate of the deceased, and, having completed his papers, an order was made by the Judge on 23rd January, 1903, for letters of administration to issue to him. On the same day he began the present action, and letters of administration were actually issued to him on 26th January, 1903. My brother Idington, before whom the action was tried, dismissed the action, upon the ground that plaintiff at the time the writ was issued was not the administrator of the deceased, and that the subsequent grant of letters of administration three days after action was not sufficient and did not relate back so as to enable him to maintain it, because he was not personally interested in the subject matter of the action and was not one of the next of kin of the deceased entitled to take out letters of administration. He followed in this respect a judgment of his own in Doyle v. Diamond Flint Glass Co., 3 O. W. R. 510, 7 O. L. R. 747, in which he had adopted dicta to the same effect in Chard v. Rae, 18 O. R. 376. Doyle v. Diamond Flint Glass Co. was reversed, 3 O. W. R. 921, but upon grounds not affecting the present question.

I have gone through all the cases cited upon the argument and many more, and have been unable to find any actual decision supporting the distinction relied on by defendants in the present case between the effect of letters of

administration granted to a person interested in the estate, and those granted to a person not interested. Before the Judicature Act a distinction was well established to the effect that in an action brought by an administrator it was necessary that letters of administration must have been granted before action, but that in an action by an executor it was sufficient if probate were taken out at any time before the trial. The reasons given for the distinction were that the executor's title was under the will, and probate was only necessary for the purpose of proving his title, while an administrator had no title except under the letters of administration; and further that an administrator in an action at law was obliged to make oyer of the letters of administration.

The distinction did not however exist in equity. In the early case of Fell v. Lutwidge, Barnardiston Ch. 320, decided in 1740, upon an objection being taken that a widow, party to the suit and claiming as administratrix of her late husband, had not taken out letters of administration until after suit, Lord Hardwicke said: "It was very true that this would have been an exception in an action at law, but that it was not so to a bill brought in this Court." In the report of the same case in 2 Atk. 120, the reason why the rule is otherwise at law is stated to be because there the defendant may crave oyer of the letters of administration.

In Humphreys v. Humphreys, 3 P. Wms. 349 (1734), where an only daughter had taken out letters of administration, after suit brought, to the estate of her father, Lord Chancellor Talbot, "not without some warmth in respect of the delay," observed "that the mere right to have an account of the personal estate was in the plaintiff, Hellen, the daughter, as she was the next of kin to her father, Colonel Lancashire; and it was sufficient that she had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case where an executor before his proving the will brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be after the filing thereof." This case, it will be observed, was decided six years before Fell v. Lutwidge.

These cases, with many others, are referred to in the judgment of Blake, V.-C., in Edinburgh Life Assce. Co. v. Allen, 19 Gr. 593.

In Trice v. Robinson, 16 O. R. 433, it was held by Boyd, C., that since the Judicature Act the former rule in equity

is to prevail as opposed to the rule at law, that letters of administration, when obtained, relate back to the death, and that it is sufficient if a plaintiff suing as administrator qualifies before trial.

In all the cases to which reference has been made, down to and including Trice v. Robinson, it appears to have been the case that the persons appointed administrators after suit or action were persons interested in the estate, and in many of the cases that circumstance is mentioned, but I do not read any of them as turning upon that point, or as suggesting that a different rule would have prevailed had the administrator not been interested. It is treated as a matter of course that the letters of administration have been granted to the person entitled to them, and that person in ordinary cases is one of the next of kin.

In Chard v. Rae, 18 O. R. 371, the question seems to have been first raised as to whether administration granted after action was sufficient to entitle a plaintiff to maintain an action brought by him as administrator at a time when the person entitled in priority to him as administrator had not renounced. I read the judgment of Boyd, C., in that case as rather suggesting the point now under discussion, and as deciding the case upon the ground that there could at all events be no relation back of the letters of administration to the date of the commencement of the action where the effect would be to prevent the bar of the Statute of Limitations.

The next case seems to be Doyle v. Diamond Flint Glass Co., 3 O. W. R. 510, in which Idington, J., seems to have treated the distinction as an established one, and he has adopted the same view in his judgment in the present case.

In my opinion, the unqualified language of Lord Hardwicke in Fell v. Lutwidge expresses the rule which should be followed, viz., that letters of administration taken out after action and before the trial, when the plaintiff brings his action as administrator, are sufficient to support the action. It is contrary to authority to divide administrators into two classes, those who have rightly obtained administration and those who have not, because the grant of letters of administration by the proper Court is conclusive while unrevoked upon the question of the right to them, and no other Court can permit it to be gainsaid: Attorney-General v. Pontingdon, 3 H. & C. 193, at 204; Re Ivory, 10 Ch. D. 372; Eades v. Maxwell, 17 U. C. R. 173, 180; Book v. Book, 15 O. R. 119.

A plaintiff, therefore, suing as administrator, and producing letters of administration at the trial, is justified in refusing to submit to any inquiry as to his right to appear in the character, and must, in my opinion, be treated as being the person who was entitled to obtain them at the time the action was begun.

In the present case there is, however, the further circumstance that the Judge of the proper Surrogate Court had on the day the writ was issued ordered that letters of administration should be issued to the plaintiff.

This was a judicial act and is to be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act: Converse v. Michie, 16 C. P. 167; Clark v. Bradlaugh, 8 Q. B. D. 62.

It was contended by plaintiff, upon the authority of Eldon v. Keddell, 8 East 187, Edwards v. Reg., 9 Ex. 631, and Ramsbottom v. Buckhurst, 2 M. & S. 567, that the grant of letters of administration should be held to date from the order of the Judge, and that the order, being a judicial act, must be taken to have been made before the writ issued. I think a difficulty exists to our so holding because of the fact that, by Surrogate Court Rule No. 25, a caveat entered after the order, and before the actual issue of the letters of administration, would prevent their being issued. I think, however, that the existence of an order for their issue before the commencement of the action was at all events such a declaration of his right to obtain them as would make them when issued relate back to the date of the order.

I am of opinion, for these reasons, that the judgment dismissing the action should be set aside with costs of the present motion, and that judgment should be entered for the plaintiff with the costs of the action.

MACLAREN, J.A. NOVEMBER 1ST, 1904.

C.A.—CHAMBERS.

HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

Appeal to Supreme Court of Canada—Leave to Appeal after Time Expired—Special Circumstances.

Motion by defendants, under sec. 42 of the Supreme and Exchequer Courts Act, for allowance of an appeal to the Supreme Court of Canada from the judgment of this Court

(3 O. W. R. 851), notwithstanding that the appeal was not brought within the 60 days prescribed by sec. 40 of the Act.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiffs.

MACLAREN, J.A.—The judgment of this Court was given on 29th June last, and dismissed defendants' appeal from the decision of the trial Judge in favour of plaintiff. Notice of appeal was given only on 16th September. In an affidavit filed on behalf of defendants the delay is accounted for: (1) by an impression that the time for appealing did not run in vacation; (2) by the absence of the solicitor who usually acted for defendants; and (3) by negotiations which finally proved to be abortive.

Section 42 of the Act says that an appeal may be allowed after the expiration of 60 days "under special circumstances," but does not indicate what such circumstances may be. In Smith v. Hunt, 5 O. L. R. 97, the Chief Justice of this Court, on an application in several respects not unlike the present, said: "Upon an application of this nature it lies upon the applicant to shew, among other things, a bona fide intention to appeal, held while the right of appeal existed, and a suspension of further proceedings by reason of some special circumstances."

In this case the 60 days expired on 28th August. Defendants' solicitors here only received instructions to appeal on 8th September, and it does not appear that defendants intended to appeal before the letter received that day was written at the head office in New York.

Only one of several issues, namely, the validity of a release granted by the insured to defendants, was before the Courts on the trial and appeal which have already been had. This was done at the instance of defendants, and if the result had been in their favour, it would have terminated the litigation. The result, however, having been adverse to the company, the other issues remain to be tried, if defendants do not obtain leave to proceed further.

On the whole I do not see that there is sufficient in the present case to distinguish it from the case of Smith v. Hunt . . . and I do not consider that justice requires that leave to appeal further on this issue should be granted. See the remarks of the Master of the Rolls in In re Manchester Economic Building Society, 23 Ch. D. at p. 497.

Motion dismissed with costs.

ANGLIN, J. NOVEMBER 2ND, 1904.

CHAMBERS.

ARMSTRONG v. ARMSTRONG.

Costs — Discontinuance of Action — Depriving Defendant of Costs—Discretion—Good Cause—Rule 430 (4)—Appeal.

Appeal by defendant from order of Master in Chambers (ante 223) allowing plaintiff to discontinue the action without costs.

Shirley Denison, for defendant.

J. H. Spence, for plaintiff.

ANGLIN, J.—. . . I have carefully considered all the English authorities upon which counsel for defendant relied, and my view is . . that the English Rule No. 290 (Order xxvi., r. 1) confers on the Court or a Judge full power and discretion to deal with the costs of an action upon permitting it to be discontinued, as the learned Master has done in this case.

The Master in his written opinion obviously assumes the wording of the English Rule to be identical with our present Con. Rule 430 (4) as to discontinuance by leave, and the argument before me proceeded upon the same assumption. A difference which if designed would be of the greatest significance seems to have escaped attention. The English Rule reads: "Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may before, or at, or after the hearing, upon such terms as to costs, and as to any other action and otherwise (as may be just), order the action to be discontinued or any part of the alleged cause of complaint to be withdrawn."

Rule 430 (4), though otherwise substantially the same, omits the words "as may be just." Construing this Rule as if this omission were intended, I would, in view of the retention of the word "such," read it as enabling the Court to order discontinuance only upon the terms as to costs mentioned in clause 1 of Rule 430, which would absolutely entitle defendant to his costs. I do not think Rule 1130 applicable, in view of the express provisions as to costs in Rule 430, which forms a complete code of procedure governing discontinuance.

But, upon examining the history of the Rule, I cannot believe that the omission of words similar to "as may seem just," was designed. Rule 641 of the Rules of 1888 contained the words "as may seem fit" immediately after the word "otherwise." Rule 431 of the present consolidation, dealing with withdrawal of defence or counterclaim, contains the words "upon such terms as may seem just." The corresponding Rule (No. 642) of the consolidation of 1888 contained the words "upon such terms as may be imposed." In Rule 430 (4), as now framed, no meaning whatever can be given to the words "and otherwise," if the word "such" is to be read as relating to the foregoing parts of the Rule. I cannot but think that if it were intended to omit the words "as may seem fit," the word "such" would also have been eliminated; and I therefore would read our Rule either omitting the word "such" or as if it contained the words "as may seem fit" or "as may seem just" immediately after the word "otherwise." So read, it, in my opinion, gives to the Master ample power for good cause to deprive a defendant of his costs where an action is discontinued by order made under that provision: Musman v. Boret, 66 L. T. R. 171.

If this order be appealable—as to which I determine nothing—I am unable to say that the cause for which the Master, in the exercise of his discretion, refused costs to defendant, was not adequate.

Appeal dismissed with costs.

ANGLIN, J. NOVEMBER 2ND, 1904.

WEEKLY COURT.

RE SOLICITORS.

Solicitor — Costs — Taxation of Solicitor and Client Bill— Re-taxation—Special Circumstances—Quantum of Counsel Fees and other Charges.

Appeal by the Grimsby Public School Board from the taxation of the solicitors' bills of costs by the local officer at Hamilton.

C. A. Moss, for appellants.

A. O'Heir, Hamilton, for solicitors.

ANGLIN, J.—At my request the senior taxing officer at Toronto has considered the items particularly objected to

by the clients who appeal, and has certified to me the amounts which, if taxing these bills, he would have allowed in respect of these items. He has not reported in regard to the general objection taken in the notice of appeal, "that the bills were taxed on an exorbitant scale throughout." Rule 773 makes applicable to these appeals the procedure governing appeals from the report of a Master; Rule 771 requires that upon such appeals the notice of appeal shall set out the grounds of appeal.

Section 48 of the Act respecting Solicitors, R. S. O. 1897 ch. 174, forbids re-taxation, unless, under special circumstances, the Court thinks fit to direct it; and, to establish such a case of special circumstances, improper charges should be specified and proved: Eastman v. Eastman, 2 Ch. Ch. 325. Upon appeal the Court cannot itself, upon a mere general charge of exorbitancy in the allowances made upon taxation, be expected to review and re-tax the entire bill. To ask an officer to do so, as delegate of the Court, would be in effect to direct a re-taxation within the purview of sec. 48. Neither upon the argument before me, nor by what the senior taxing officer reports, am I satisfied that such special circumstances exist as would justify me in directing a re-taxation of these bills.

As to the particular items in respect of which the senior taxing officer reports that, if taxing under an order of reference to himself in the first instance, he would have allowed smaller sums than have been taxed by the local officer, in all to the extent of $44, I do not think I should allow the clients' appeal. Three of these items are counsel fees. It is only with the quantum of these that the appellants quarrel, and, upon the matter of such quantum, the decision of the local taxing officer is conclusive: Denison v. Woods, 18 P. R. 328. The remaining $14, which the senior taxing officer would have disallowed, under the circumstances stated in his report, represent what he deems excessive allowances in respect of certain instructions and consultations. Again, the quarrel is merely with the quantum of the local officer's allowance. No question of principle is involved. The amount is comparatively trifling. To encourage an appeal upon such a matter alone would, in effect, so hamper and fetter the discretion of the taxing officer as to utterly destroy it.

Upon the whole, I think the appeal should be dismissed, but, in view of the report made by the senior taxing officer, I shall, in the exercise of my discretion, make no order as to costs.

STREET, J. NOVEMBER 2ND, 1904.

TRIAL.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Railway—Bridge—Contribution to Cost and Maintenance—Liability of Railway Company — Construction of Agreements with City Corporation—Exemption or Indemnity.

Action by the corporation of the city of Toronto against the Grand Trunk R. W. Co. and the Canadian Pacific R. W. Co. to have it declared that the Grand Trunk Co. were liable under an agreement between them and the other parties to the action, dated 26th July, 1892, to contribute to the cost of an iron overhead bridge on York street, Toronto, spanning the tracks of defendants; and that the Grand Trunk Co. were not exempt or entitled to be indemnified by plaintiffs from liability to contribute to the cost of the bridge in question. Defendants the Canadian Pacific Co. were in the same interest as plaintiffs.

Defendants the Grand Trunk Co., by their statement of defence, denied any liability under the agreement or otherwise, and they asserted that under certain agreements with plaintiffs they were exempt, as between themselves and plaintiffs, from, and entitled to be indemnified by plaintiffs against, any liability to contribute to the building of the bridge.

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

S. H. Blake, K.C., W. Cassels, K.C., and W. A. H. Kerr, for defendants the Grand Trunk Co.

E. D. Armour, K.C., and Angus MacMurchy, for defendants the Canadian Pacific Co.

STREET, J.—The facts bearing on the case are not in dispute, and the whole question seems to turn upon the construction to be given to the agreement of July, 1892, and to the various Acts of Parliament and the numerous previous agreements between plaintiffs and the Grand Trunk Co.

The agreement of July, 1892, contains a large number of clauses relating to the tracks of the two railway companies and the conduct of their freight and passenger business in the city of Toronto, manifestly intended for the mutual convenience and benefit of the three parties to it. . . .

Paragraph 7 provides that an overhead traffic bridge, with ramps and approaches for vehicles and passengers, is to be constructed by the Canadian Pacific Co., along York street, according to plans and specifications to be approved by the three parties to the agreement, and, in case of disagreement, by the Railway Committee of the Privy Council, the bridge to be carried from the south side of Front street to a point shewn on a plan attached to the agreement.

Paragraph 8 declares that nothing contained in the agreement is to affect the rights, if any, which the Grand Trunk Co. have under any existing agreements with the city, that the city shall not require the Grand Trunk Co. to build, find, or procure any bridges, ramps, crossings, or other approaches, over, along, or under the Grand Trunk Co.'s tracks on the Esplanade, but that the city shall provide all such, if any, when required, at their own expense, and that, by said agreements, the city guaranteed, etc.

The bridge was built by the Canadian Pacific Co., and the cost of it was paid by the city and that company in equal shares. . . . The portion of York street for which the bridge has been substituted is crossed by some 25 tracks of the railways of the defendant companies, and the bridge was necessary in order that the large amount of travel along the street might not be obstructed, and might be safely continued.

I think it is not unfair to any of the parties to set out with the assumption that the bridge was a necessity both to the railways and to the inhabitants of Toronto doing business in that part of the city, and, being for their mutual convenience, that, apart from any question of exemption by contract, they might be expected mutually to contribute in proper proportions to the cost of building it. I think a perusal of paragraph 8 shews that the Grand Trunk Co., as well as the other two parties to the agreement, recognized this position as the prima facie one. The Grand Trunk Co. begin the paragraph by an express stipulation that nothing contained in the agreement is to affect the rights which they claim by agreements, as against the city, that they shall not be required to build any bridge, and that the city shall indemnify them against any demands made upon them by reason of their railway being placed on the tracks mentioned in the agreements, and that they have the right and privilege to cross streets in the city on the level for the purpose of access to their stations, etc. Provision is next made in the paragraph for a special case to determine whether the rights

so claimed by them do exist; and it is agreed that if the decision is in favour of the right of exemption and indemnity so claimed, then the cost of the bridge is to be borne by the city and the Canadian Pacific Co. alone; but, if the decision is against the right so claimed, then the Grand Trunk Co. are to pay a share of the cost of the bridge, the proportion which it is to bear being fixed by arbitration.

So far the paragraph is only what one might expect to find under the circumstances, and I cannot find any reason for doubting that there is an express agreement by the Grand Trunk Co. to bear their proper share of the cost of the bridge in the event of their failure to establish, to the satisfaction of the Court, their right to exemption and indemnity.

But one of the concluding sentences of the paragraph was relied on as doing away with any such agreement . . . "Nothing herein contained shall be construed as an admission on the part of the Grand Trunk Co. of any liability to contribute to the cost of the said bridge by reason of the amalgamation of the company with the Great Western or Northern Railway Co., or for any other reason, which liability the said Grand Trunk Co. expressly deny."

It is contended by the Grand Trunk Co. that here is to be found an express general denial of any liability whatever to contribute to the cost of the bridge, which must override any liability which might be deduced from the preceding portions of the paragraph. It is not difficult, however, to reconcile the two portions of the paragraph. If they are read together, they plainly mean this:—The Grand Trunk Co. deny any liability to contribute to the cost of the bridge, and nothing in this agreement is to be construed as an admission of liability; but, if the Court holds that they are not exempt under their agreements with the city, and are not entitled to indemnity, they will pay their share. . . .

The next question to be considered, therefore, is, whether the Grand Trunk Co. are entitled to be exempt from contribution to the expense of building this bridge, or entitled to be indemnified by the city against any such expense under any of the agreements with the city into which they had from time to time entered before the agreement in question. . . .

[Reference to the agreement for the building of the Esplanade, 4th January, 1854; the statute 18 Vict. ch. 175; the agreements between the city and the Grand Trunk Co. of 21st January, 1856, and 30th August, 1856; the statute C. S. C. ch. 66; the agreement between the city and the Grand Trunk Co. of 23rd December, 1862; the statute 28

Vict. ch. 34; the agreement between the city and the Grand Trunk Co. of 15th May, 1866.]

It appears then, upon a general review of the agreements to which the city has been a party, that it has granted to the Grand Trunk Co., or to the companies to whose rights the Grand Trunk Co. have succeeded, the following as the only rights which come in question here:—

1st. A right of way 40 feet wide along the whole south front of the Esplanade for railway purposes, but without any guarantee beyond that of title.

2nd. A right of way 12 feet 6 inches wide for railway purposes along the southerly limit of Esplanade street, east of York street.

3rd. The right, west of the east side of York street, to carry as many tracks as might be necessary for themselves or any other company using the Union Station upon, along, or across Esplanade street.

The evidence and the plans shew a number of tracks used by the Grand Trunk crossing York street under the present bridge, which are not upon any part of the Esplanade, and are therefore not specifically, nor, so far as I can discover, generally, authorized by any of the agreements with the city.

The claims of the Grand Trunk Co., as set out in the 8th paragraph of the agreement of 26th July, 1892, and relied on as a defence in the present action, are as follows:—

1st. That the city has agreed not to require the Grand Trunk Co. to build any bridges over their tracks on the Esplanade, but, on the contrary, has agreed to provide all such, when required, at its own expense.

This claim is apparently founded upon the agreement to that effect contained in the 17th paragraph of the agreement of 21st January, 1856, but, . . . that agreement referred to a proposed forty foot track at the top of the bank, and was expressly cancelled by the agreement of 30th August, 1856, which contained no such stipulation.

2nd. That, by certain existing agreements, the city guaranteed and indemnified the Grand Trunk Co. against all claims and demands whatsoever for or by reason of the railway of the Grand Trunk Co. being placed on the tracks in the said agreement mentioned.

The only guarantee to this effect is found also in the agreement of 21st January, 1856, in the concluding part of the 17th paragraph, introduced for the purpose of declaring the intention of the previous part of the paragraph more fully. It, therefore, must fall with the preceding portion of the paragraph, under the terms of the agreement of 30th August, 1856. The only guarantee in the latter agreement is found in the 7th paragraph, and . . . that is a guarantee of another character.

3rd. That, under certain existing agreements, the Grand Trunk Co. have the right and privilege to cross streets of the city on the level for the purpose of access to their stations and freight sheds in the city, in such way and as often as their business requires.

I can find no such general right in any agreement with the city.

Their rights under the agreements prior to the agreement of 26th July, 1892, seem to be confined, at York street, to those of running along and crossing the Esplanade and Esplanade street, including the right of crossing York street at its junction with the Esplanade and Esplanade street; but I can find nowhere in the agreements made before 26th July, 1892, now in force, a right given them to cross York street at any point not included within the limits of the Esplanade and Esplanade street, either at the level of the street or otherwise.

My conclusion, therefore, is, that the Grand Trunk Co. are not entitled, under any of their agreements with the city or otherwise, to exemption from liability to contribute to the cost of the construction and maintenance of the York street bridge, or to indemnity from the city against any such liability.

There should, therefore, in my opinion, be judgment containing a declaration to that effect, and declaring the liability of defendants the Grand Trunk Co. to be assessed for their proportion of the cost and maintenance of the bridge, such proportion to be ascertained in the manner provided by the agreement of 26th July, 1892; and defendants the Grand Trunk Co. should pay the costs, including those of a former trial, of plaintiffs and the Canadian Pacific Co.

CARTWRIGHT, MASTER. NOVEMBER 3RD, 1904.

CHAMBERS.

COLEMAN v. HOOD.

Judgment Debtor—Transfer of Shares in Company—Injunction to Restrain Further Transfer — Examination of Transferee—Aid of Execution—Affidavit.

Motion by plaintiff for an order requiring defendant McIndoe to attend at his own expense for re-examination and to answer certain questions which he refused to answer upon an examination for evidence on a pending motion.

W. E. Middleton, for plaintiff.

W. J. Boland, for defendant McIndoe.

THE MASTER.—An interim injunction was granted in this case restraining defendants from dealing with certain stock alleged to be the property of defendant Hood, plaintiff having on 2nd September, 1904, recovered judgment for about $3,600 against Hood. Plaintiff moved to continue the interim injunction, and for the purpose of that motion examined defendant McIndoe on 28th October. McIndoe admitted that he had been the holder of 200 shares of the stock in question. He said he thought they belonged to the wife of his co-defendant Hood, but could not give any very good reason for this opinion. He had already stated that he had transferred these shares about 6 months ago, but declined to say to whom or to produce a copy of the instrument of transfer.

From an affidavit of plaintiff made on 31st October it appears that no such transfer of the shares has ever been registered, and that the shares still stand in the books of the company in the name of McIndoe. From the same affidavit it further appears that the stock was originally issued to Hood, and the transfer to McIndoe was made at his request.

This affidavit was objected to, but I think it should be admitted, on the ground that this whole proceeding is really part of the procedure under the O. J. Act in aid of execution, and for the same reason I think that defendant should attend and answer the questions asked. Otherwise a judgment debtor might in many cases set his creditor at defiance. The whole of this procedure is remedial, as was said in

Gowans v. Barnet, 12 P. R. 335, and should therefore be construed so as to advance the remedy.

McIndoe must attend at his own expense, and the costs of this motion will be to plaintiff in any event.

CARTWRIGHT, MASTER. NOVEMBER 3RD, 1904.

CHAMBERS.

READ v. CITY OF TORONTO.

Jury Notice—Striking out—Action against Municipal Corporation—Non-repair of Streets — Obstruction — Amendment.

Motion by defendants to strike out jury notice given by plaintiff as irregular, because plaintiff's action is for injuries caused by non-repair of highway.

F. R. MacKelcan (T. Caswell), for defendants.

Walter Read, for plaintiff.

THE MASTER.—The statement of claim, as first drawn, relied solely on non-repair. There was nothing said of what constituted the alleged non-repair. The statement of defence denied this allegation, and also set up want of notice. The statement of claim was then amended by alleging "obstruction of the highway caused by defendants negligently leaving piles of earth, stone, and gravel thereon." The following paragraphs, as in the original statement of claim, alleged non-repair as the cause of plaintiff's injury.

Counsel for plaintiff admitted that, as the pleadings now appear, the motion must succeed. He asked leave to amend further so as to rely on "obstruction" only and obtain the benefit of the decision in Clemens v. Town of Berlin, 7 O. L. R. 33, 3 O. W. R. 73. There was no allegation in that case of non-repair.

I do not think such leave should now be given. It must be assumed that the alleged obstructions were placed there by defendants. Then the case comes within the judgment . . . in Barber v. Toronto R. W. Co., 17 P. R. 293 . . . Howarth v. McGugan, 23 O. R. 396.

The jury notice should be struck out with costs to defendants in any event.

See order of Street, J., in Breakey v. City of Toronto, 13th November, 1899 (not reported) in a similar case.

CARTWRIGHT, MASTER. NOVEMBER 3RD, 1904.

CHAMBERS.

LEE v. BRITTON.

Parties — Joinder of Defendants — Principal and Agent — Contract for Sale of Land—Specific Performance—Damages.

Motion by defendants for order requiring plaintiff to elect against which of two defendants the action should proceed.

T. D. Delamere, K.C., for defendants.

H. Cassels, K.C., for plaintiff.

THE MASTER.—The statement of claim alleges a breach of a contract for sale of land made by defendant Macdonald as agent for his co-defendant. The relief asked is: (1) Specific performance of such contract; and (2) special damages for delay as against defendant Britton, and in the alternative damages against defendant Macdonald for wrongfully holding himself out as agent of his co-defendant, if such agency is not established.

The cases cited on the argument were those to be found in Evans v. Jaffray, 1 O. L. R. 614, and Quigley v. Waterloo Manufacturing Co., ib. 606.

The matter is fully discussed by the Chancellor in the latter case. At p. 614 he uses language which seems decisive of the present motion: "The cases have at present defined the limits as being where the transactions involve dealings with principal and agent and landlord and tenant, even though the cause of action may be in form different, if there is substantially one legal transaction having different aspects, in which the defendants are implicated." To the same effect is the language of Meredith, C.J., at p. 608. . . .

Motion dismissed with costs to plaintiff in any event.

STREET, J. NOVEMBER 3RD, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street Railways—Contract with Municipal Corporation—Sale of Workmen's Limited Tickets — Specific Performance—Mandatory Injunction—Parties—Attorney-General.

Action for a mandamus or mandatory injunction commanding defendants to continue to sell on their cars tickets

called "workmen's tickets" good for the payment of fares at certain hours of the day.

Defendants denied any binding obligation on their part to sell these tickets at all on the cars or to receive them from persons other than working men; and they alleged that the action in any event was not maintainable without the presence on the record of the Attorney-General; and that it was not such a contract as entitled plaintiffs to a judgment in the nature of specific performance.

The decision of MAGEE, J., upon a motion for an interim injunction is reported ante 207.

F. MacKelcan, K.C., and W. R. Riddell, K.C., for plaintiffs.

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

STREET, J.—At the conclusion of the argument I gave judgment upon some of the questions involved, holding that, upon the proper construction of the contract and by-law and defendants' Acts of incorporation, they were bound to sell the tickets called "workmen's tickets" upon their cars to the public, and to receive them in payment of fares, at the hours mentioned in the by-law, not from working men only, but from the public generally, without regard to the occupation or absence of occupation of any person tendering them. I further held that the objection that the stipulation was ultra vires of plaintiffs was untenable.

I reserved only the questions: (1) as to the right of plaintiffs to maintain this action without adding the Attorney-General as a party representing the public; and (2) as to whether the remedy by mandamus or mandatory injunction could be granted.

I have not been referred to any authority in support of the contention that the Attorney-General is a necessary party to this action, and I have not been able to discover any. Plaintiffs were vested by law, if not with the ownership, certainly with full powers of management of the streets in Hamilton. One of the powers given them by statute was that of entering into an arrangement with defendants for the running by them of their cars through the streets, upon such terms as plaintiffs might see fit to require. The by-law No. 664, and the agreement by which defendants as well as plaintiffs agreed to be bound, were passed and entered into in pursuance of the legislative authority to that effect. Defendants have broken their agreement, as I have held, in

refusing to sell workmen's tickets on the cars, and in refusing to sell them to any persons but working men. The provision which defendants have broken was part of the consideration promised by them in return for the leave given them to use the streets of the city. It was an express contract entered into between plaintiffs and defendants, authorized by statute, and I see no ground for holding that an action to enforce it cannot be maintained by one of the parties to it without the aid of the Attorney-General . . . Wilson v. Furness R. W. Co., L. R. 9 Eq. 28, at p. 34, last paragraph.

The remaining ground relates to the power of the Court to grant relief and the nature of the relief to be granted. Defendants have obtained from plaintiffs permission to lay their tracks in the public streets of the city, and to run their cars upon them, upon the faith of their promise to sell tickets on their cars at certain definite rates. After living up to this stipulation for 11 years, they have sought to alter the rates and to refuse to sell certain classes of tickets at all upon the cars, or to accept them from persons from whom, in my opinion, they were bound to accept them in payment of fares. In other words, they have endeavoured to charge higher fares than those which they agreed to charge in certain cases. Defendants had an undoubted right to submit their interpretation of the contract to the Courts for adjudication; but they have in the present action gone much further and contended that even if their interpretation should be held to be the wrong one, and that of plaintiffs the right one, plaintiffs, though having the right to enforce the agreement, were powerless, because of a supposed inability on the part of the Courts to compel defendants to perform it. They are endeavouring by this contention to retain the benefits of the agreement without performing the provisions upon which they obtained them. In City of Kingston v. Kingston Electric R. W. Co., 28 O. R. 399, 25 A. R. 462, a similar contention was successfully raised, but in that case it was found that no relief could be given which did not involve a minute supervision over the working of defendants' line of railway.

In the present case what defendants have done is to run cars upon which they do not keep for sale to persons desiring the same the limited tickets called "workmen's tickets," contrary to sec. 19 (p.) of the by-law No. 664, embodied in the contract between plaintiffs and defendants.

If they are restrained from running cars upon which these tickets are not kept for sale, and this restriction is coupled with a declaration that they are bound to sell them

on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in sec. 19 (c), I think the object of the present action will be attained without any violation of established principles, and I therefore so order and declare.

I refer to Wilson v. Furness R. W. Co., L. R. 9 Eq. 28; Greene v. West Chester R. W. Co., L. R. 13 Eq. 44.

Defendants must pay the costs of the action and injunction motion.

BOYD, C., TEETZEL, J. NOVEMBER 3RD, 1904.

ELECTION COURT.

RE NORTH NORFOLK PROVINCIAL ELECTION.

SNIDER v. LITTLE.

Parliamentary Elections — Controverted Election Petition — Costs of Charges not Investigated at Trial—Excessive Particulars— Witness Fees.

The petition and cross-petition came on for trial before BOYD, C., and TEETZEL, J., at Simcoe. The cross-petition, not being prosecuted, was dismissed with costs. The petition was successful, and the seat was vacated with costs to follow the result, except as to the costs of uninvestigated particulars.

Argument as to these costs was heard at Toronto.

S. H. Bradford, for petitioners.

G. H. Watson, K.C., for respondent.

The judgment of the Court was delivered by

BOYD, C.—The total of votes polled was 3,400, and the respondent had a majority of 100. At the trial of the petition 16 witnesses were examined for the petitioners generally and with special reference to the particulars numbered 435, 172, 173, 171, 213, and 214, and these charges were taken up in that order. The total number of charges in the particulars of record was 685, and application was made at the hearing to add 8 or 10 more, which was held in suspense and ultimately so remained not disposed of. Upon one case of bribery being proved (and perhaps two) the respondent, by his counsel, admitted the responsibility for the corrupt act of an agent, and did not or could not claim the protection of the saving clause of the statute. Thereupon the Court declared

the seat vacated, and no further evidence was given—though this result was not suggested by or at the instance of the Court. Charges 213 and 214 were proved: all the others taken up failed. No costs should be given as to the failures —nor of any witnesses subpœnaed for the supplemental charges. It is said that 225 witnesses were subpœnaed and paid (in all) the sum of $530.

This number of charges, aggregating nearly 700, appears to be excessive. The practice of heaping up particulars after this cumulative fashion should not be encouraged — unless very good proof is given of their substantiality. Many of the charges are of wholesale character, implicating many persons against whom nothing has been proved or probably can be proved.

The object of giving particulars is to enable the opponent to inquire and be prepared to meet the matters seriously charged; but this excessive multiplication of accusations would defeat that object by distracting attention, and would also occasion much trouble and expense in their investigation by the respondent.

The English and Irish Judges have strongly reprobated this overloading of the case with details which turn out to be too unwieldy to be handled at the trial or too inaccurate to stand investigation: see Youghall Case, 1 O'M. & H. at p. 295; Hereford Case, ib. 196; Norwich Case, 4 O'M. & H. 91; Pontefract Case, ib. 201; St. George Case, 5 O'M. & H. 89, The salutary rule is expressed in the Waterford Case, 2 O'M. & H., by Hughes, B., who excluded costs of all witnesses not examined. He observed that of necessity growing out of the nature of the case (the necessity being to subpœna every one who appeared to be open to the suspicion of corruption) subpœnas were served upon almost every voter on the side of the respondent. "That," he said, "was an expense which, in point of speculation, it was necessary for the petitioner to incur, but which, in point of burden, ought not to be thrown on the respondent."

The general practice appears to be in England to withhold costs in respect of cases included in the particulars of which no evidence was given at the hearing: Ipswich Case, 4 O'M. & H. 75; Salisbury Case, 3 O'M. & H. 131; Rochester Case, ib. 161; and Meath Case, ib. 193. So in Welland Case, 1 Ont. Elec. Cas. at p. 416; Niagara Case, H. E. C. at p. 575; North Victoria Case, ib. 704.

That rule would be rather stringent in this case, for it is to be inferred from the attitude of the respondent's counsel

that there would have been some cumulation of illegal or corrupt acts, had he not acted as he did.

The fair thing, it occurs to me, is to give a reasonably approximate apportionment of the outlay for witness fees now under consideration, and fix it, without taxation, at the sum of $230, to be paid by respondent to petitioners.

IDINGTON, J. NOVEMBER 4TH, 1904.

CHAMBERS.

RE HARDING.

Will—Construction—Residuary Bequest — Church—Amount more than Sufficient to Answer Specified Purpose—Application of Balance Cy-près—Intestacy—Gift for Maintenance of Burial Plot—Perpetuity—Charity.

Motion by the executors and trustees under the will of Prudence Sarah Harding for an order declaring the construction of the will.

G. F. Ruttan, Napanee, for the executors and trustees.

W. E. Middleton, for Fanny Louisa Downey, only next of kin of deceased.

A. H. F. Lefroy, for the Synod of the Diocese of Ontario.

IDINGTON, J.—The testatrix died on or about 1st June, 1904. Probate of her will, which is dated 31st January, 1896, was granted to her executors . . . on 27th June, 1904. The estate consisted of personal property of about $10,218. Debts and funeral and testamentary expenses to about the amount of $1,076 have been paid by the executors; and when the other liabilities (if any) and the specific legacies are paid there will, of the residue, be more than necessary to satisfy the purposes particularly named in the following paragraph, which is the last bequeathing clause, of the will, and reads thus:

"All the rest and residue of my estate . . . I will, devise, and bequeath to the rector and churchwardens of the church of St. Mary Magdalene, Napanee, in trust to use $3,000 thereof in properly and suitably building and completing the tower of the said church, and placing therein a good, suitable, and proper bell for the use of the said church, and in trust to invest the surplus, if any, in the savings bank department of the Merchants Bank of Canada, Napanee, in the name of the rector and churchwardens of the

said church, in trust to apply the whole of the surplus in payment upon the principal of the debt upon the said church of St. Mary Magdalene, Napanee, so soon as a sum equal to the said surplus has been contributed by the members of the congregation of the said church by direct offertory (sic) towards the principal debt of the said church, and in the meantime to allow the said surplus to remain on deposit in the said bank, accumulating at bank interest."

At the date of the will there was a debt upon the church in question of about $6,500, but this was at the time of the death of this testatrix reduced to about $1,800. This result was brought about by the receipt of moneys which I do not think it can be reasonably said were at all likely to be present to the mind of the testatrix when she made this will. They certainly were not the "direct offertory" of the members of the congregation.

The residuary estate dealt with by the paragraph I have quoted is not (after applying the $3,000 for tower and bell) all required for the purpose of liquidating this balance of debt, upon the basis of one-half being taken out of the residuary estate and the other half being derived from the "direct offertory" of the members of the congregation.

The question is thus raised, whether or not the surplus can, by the application of the doctrine of cy-près, be used for other charitable purposes of this church, or must be paid to the next of kin.

I think it must go to the next of kin.

All that can be said of this residuary gift being for charitable purposes generally, could, with much greater force, have been said of numerous other gifts that have been held to have been given for a particular purpose only, and not for charity in any and every event.

I read this part of this will as intended, next after the completion of the tower and the placing of a bell therein, as providing for the payment of the church debt, and incidentally thereto evoking a spirit of charity in the congregation.

I see no other intention. The completed church fabric, freed from debt, having been secured, the entire purpose, of or for charity, ceases.

Upon such a reading of the will there is not any room left for the application of the cy-près doctrine in any way to this residuary bequest. . . .

[Re Rymer, [1895] 1 Ch. 19, and authorities reviewed by Lord Herschell at p. 27 et seq., referred to.]

The only feature of this case that seems to support the claim in behalf of the church is, that the bequest is a residuary one. Having regard to the surrounding circumstances at the time of the execution of the will, I think this must be given but little weight. It certainly is not to be inferred from the paragraph in question that the testatrix ever expected that there would be, as the result has shewn, a surplus. . . .

[Cherry v. Mott, 1 M. & C. 19, Mills v. Farmer, 19 Ves. 483, 485, and Attorney-General for Nova Scotia v. Power, 35 S. C. R. 182, 526, referred to.]

I think that it must be declared that so much of the residuary estate as may be necessary, with the accumulations thereof upon deposit, to pay one-half the debt of the church at the death of the testatrix, and interest thereon till the "direct offertory," within the words of the will, of the members of the congregation, has produced the other half, goes to the church under the bequest, and that in the meantime there should be deposited by the trustees a sum at least equal to one-half of the debt at the death of the testatrix, and so much more as will secure the difference between the rate of interest on deposit and that to be paid upon the debt until the "offertory" has satisfied the conditions of the will.

In regard to the balance of the residuary estate after payment of all expenses, there may, if the parties desire, be a declaration that it is payable to the next of kin.

Upon the argument a point was taken that the bequest to the rector in charge of St. Paul's church, Sandhwaft, so far as applicable to the keeping in proper care and order two burial lots in the church burial ground at the village of Adolphustown, and cutting the grass and repairing the fences and cleaning and re-lettering the monuments so as to keep the said burial plots in a neat, tidy, and orderly condition, is not valid, as it offends against the rule as to perpetuities.

I am of opinion that this part of that particular bequest is not for what the law recognizes as a charity, and therefore that if it stood alone it would be impossible to support it.

I think, however, that if it should be declared void the money necessary to fulfil it would have to go to the other objects named in the same trust, which are undoubtedly charitable objects, and as to them the rule against perpetuities does not apply: see Hoare v. Osborne, L. R. 1 Eq. 585, and In re Vaughan-Thomas, 33 Ch. D. 187. In re Rogerson, [1901] 1 Ch. 715, seems expressly in point.

Possibly, however, the parties would prefer to see it held as in In re Tyler, [1891] 3 Ch. 252, and other cases, as if the legacy for charity had been burdened with the charge to maintain the tombstone, and, if all parties consent, it may as to this small charge be, by their consent, so declared. Or possibly the parties can settle the matter amongst themselves without any formal declaration. . . .

Let the costs of all parties be paid out of the estate, and in the case of the executors and trustees as between solicitor and client.

MacMahon, J. November 4th, 1904.

TRIAL.

FISHER v. CARTER.

Sale of Goods—Contract—Breach—Rescission—Damages.

Action for damages for the alleged breach of a contract, dated 8th July, 1903, by which defendant agreed to deliver to plaintiff three mixed car loads of staves, hoops, and headings. The contract was entered into at Grimsby, in the county of Lincoln, and a copy of the order given by plaintiff to defendant's agent was delivered by the latter to plaintiff.

G. Lynch-Staunton, K.C., and C. H. Pettit, Grimsby, for plaintiff.

W. M. Douglas, K.C., and J. Mulcahy, for defendant.

MacMahon, J.—The correspondence shews a completed contract between the parties.

A question was raised as to whether plaintiff was only to give notice as to when the car-loads after the first one were to be shipped, or whether he was also to give notice when he required the first car.

The order read: "Mr. W. W. Carter. Ship to A. R. Fisher at Grimsby one car 1st August; terms, 1st car three months; three mixed cars . . . staves, $7, hoops $9.50. heading, 5¼ cents; will write when to ship."

In my opinion, the first car was to be shipped by defendant at all events by 1st August, and the other two cars when plaintiff wrote to ship.

Plaintiff did not need the stock until 21st September, when he wrote asking defendant how soon he could ship to fill his order for the 3 cars. Defendant on the following day replied, "Am trying to get you off a car this week." . . . The car of stock not having arrived, plaintiff on 5th October asked defendant over the telephone when he would get the stock. . . . Plaintiff wrote on 12th October, and defendant answered on 14th, stating that the cost of manufacturing staves was as much as the price at which they were booked, and he would have to cancel the order and charge plaintiff a little higher price, and said he would . . . send a car by the first of the following week. . . .

Plaintiff went to Fesserton on 29th October and saw defendant, who said he had to cancel plaintiff's order for stock. Plaintiff wanted him to send one car at the old price, and in effect said that if that were done he would forego his right to the other two cars. Defendant would not agree to that, but said he would let him have a car of stock for which he would charge him $11 for staves and hoops and 6 cents for heading. Plaintiff agreed to pay the prices named for a car-load, which defendant said he would ship on 3rd November, but he failed to carry out his promise.

On 20th November defendant telegraphed plaintiff: "Can load car Monday at prices agreed. Shall I ship?" . . . Plaintiff did not reply. . . .

I find that plaintiff did not agree to a rescission of the old contract, and even had he orally agreed to rescind, there was no contract entered into on the part of defendant sufficient to satisfy the Statute of Frauds binding him to supply the one car-load at prices he had named. . . .

[Reference to Benjamin on Sales, sec. 218; Moore v. Campbell, 10 Ex. 323; Noble v. Ward, L. R. 1 Ex. 117, L. R. 3 Ex. 135.]

In the present case the alleged agreement to rescind was after breach.

A small car would contain 16,000 staves, 1,000 sets of headings, and 6,000 hoops. The largest cars have a capacity of about 28,000 staves, 16,000 sets of headings, and 10,000 hoops . . . and plaintiff is entitled to recover damages on the basis of the quantities which could be shipped on one small and two average sized cars. . . .

Judgment for plaintiff for $298 with costs on High Court scale.

BRITTON, J. NOVEMBER 5TH, 1904.

TRIAL.

CAMPBELL v. MORANG CO.

Master and Servant — Contract of Hiring — Publication of School Books by Master—Production and Adaptation by Servant—Original Work—Property and Benefit of Master —Injunction.

Action for an injunction restraining defendants from printing, publishing, selling, dealing in, or circulating certain educational books, of which plaintiff alleged that he was the author, known as "Our Home and its Surroundings" and "Our Earth as a Whole."

A. J. Russell Snow and C. B. Nasmith, for plaintiff.

J. H. Moss, for defendants.

BRITTON, J.—Plaintiff is an author and was a publisher of school and educational books, and defendants now carry on the business of publishers. . . .

Plaintiff alleges that in or about the month of April, 1900, an agreement was made between him and defendants, acting by George N. Morang, their president and managing director, that plaintiff should organize an educational department in connection with defendants' business, and that he was to be adequately remunerated therefor—the basis of such remuneration to depend largely upon the success of the undertaking—and that, in the meantime, until some definite arrangement should be come to, plaintiff was to be advanced the sum of $15 each week.

Defendants deny that there was any such agreement, and allege that, on the contrary, plaintiff entered into the employment and service of defendants at the fixed salary of $15 a week, with the statement by Mr. Morang that if plaintiff's services proved valuable and if he was retained, the question of increasing his salary would be considered. . . .

Plaintiff and Mr. G. N. Morang came together in April, 1900. Plaintiff says that he suggested that defendants should take up school book business, and that he, plaintiff, would shew defendants how to break up "the combine" which plaintiff alleged then existed in publishing school

books in Ontario. Plaintiff says that to this end the educational department in defendants' business, with plaintiff at the head of it, was established.

The fact that plaintiff, at the start, was to get $15 a week, puts the case altogether outside of the ordinary one where, from the mere doing of useful work for a stranger in his business, a promise to pay would be implied, and to pay what such work would be reasonably worth.

No doubt plaintiff expected to get more than the $15 a week, but he expected it because he supposed that some new definite bargain would be made.

Plaintiff continued, as he puts it, in defendants' service without any bargain. Is plaintiff in a position to say that he must now recover upon a quantum meruit, and so virtually be placed in as good a position as if defendants had made an agreement and had made it in accordance with plaintiff's offer? What plaintiff did was in the course of his employment. It does not seem to me material whether plaintiff or Mr. Morang is right as to the educational department being then first organized. . . .

In November, 1900, plaintiff asked for more money, and was allowed $20 a week. This amount he received weekly until November, 1902. On 29th April, 1901, realizing that there was no agreement beyond that of the weekly allowance, plaintiff says he wrote to Mr. Morang a letter, of which plaintiff kept and produced at the trial a copy. Mr. Morang has no recollection of ever having received such a letter, and he cannot find any such. There is no corroboration of plaintiff's evidence of that letter or its receipt by Mr. Morang. Suppose it was received, it was only a proposition that an arrangement be made on "something like the following basis:"—

1. Educational department to be kept separately.

2. Defendants to pay the $20 a week.

3. Defendants to pay plaintiff 20 per cent. on profits when the profits of the department amount to more than $5,000 per annum.

4. Defendants to pay plaintiff a royalty of 5 per cent. on all books prepared by him or in which a large proportion of the work was plaintiff's.

There was no reply to that letter. Mr. Morang says that plaintiff in conversation spoke about getting royalty, but

he, Morang, replied that he would not pay royalty—"would not think of it."

Although there was no reply to that letter, and no satisfaction when the matter was referred to in conversation, plaintiff did not follow the matter up, but continued to accept the $20 a week down to November, 1902, when he asked for more money, and Mr. Morang agreed to give him $125 a month. Plaintiff says this was increased "advance" on account. Mr. Morang says it was simply an increase of salary, he being always willing to treat plaintiff liberally. This continued until May, 1903, when plaintiff's services were dispensed with.

According to the evidence of Mr. Morang, plaintiff made no complaint except that he should get a month's notice or a month's additional pay in lieu of notice. Defendants gave to plaintiff pay for the additional month, intending it to be in full, and in corroboration of the evidence for the defence upon that point the cheque is produced, dated 18th May, 1903, for $125 "in full to date." Plaintiff says it was understood that the receipt of this cheque was not to prejudice his claim. Defendants say there was no such understanding, and further that plaintiff was not then putting forward any further claim.

In determining, upon the evidence of plaintiff and Mr. Morang, what the bargain really was, the ability, habits, and resources of plaintiff, at the time of his application for employment, are important factors. The evidence as to these gives a needed explanation of why such an engagement as Mr. Morang states, should be accepted, and gladly accepted, by plaintiff. Fair inferences in corroboration of Mr. Morang's evidence may be drawn from the letters of plaintiff. . . .

The publication of the geographies as set out in the statement of claim may be accepted as substantially correct. Plaintiff was a consenting party to the agreement between defendants and the MacMillan Co., New York, for the publication in Canada of the school geographies based on the text of Tarr and McMurray's geographies—and these were to be published by defendants after they were made by plaintiff's work suitable for Canadian schools. So plaintiff cannot now be heard to complain of defendants doing whatever may be necessary to carry out that agreement. Defendants are bound to pay a royalty to the MacMillan Co. on these books. I find, upon the evidence, that the copyright of the new or original work of plaintiff in these books, so far as it

is the subject of copyright, belongs to defendants as proprietors, within the meaning of sec. 18 of the Copyright Act, 1842. This seems to me a case where the inference may be fairly drawn that the copyright, so far as there was any copyright in plaintiff's work, was intended to belong to defendants as publishers and proprietors of the books. See Lawrence v. Aflalo, [1904] A. C. 17.

Defendants discontinued the use of plaintiff's name, and it did not appear in the edition published in 1904; and they say they do not intend to use his name as to any future edition.

Defendants are entitled to sell any of the books on hand of the editions of 1901, 1902, and 1903, in which are printed on the title page the words "Revised and adapted for Canadian schools by W. C. Campbell, author of Modern School Geography," etc.

Action dismissed with costs.