CORRECTION.

In Madill v. McConnell, ante 672, 2nd line from bottom, for "J. Porter, Simcoe," read "C. H. Porter, Toronto."

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RIDDELL, J. NOVEMBER 18TH, 1907.

TRIAL.

WILLISON v. GOURLAY.

Executors—Legacy—Inoperative Direction to Invest Principal—Action for Legacy—Costs—Confinement to Costs of Summary Application—Executors Relying an Advice of Solicitor—Personal Liability of Executors—No Recourse against Estate.

Action by Barbara Willison against the executors of her deceased mother, Jane Gourlay, to recover the amount of a legacy, $600, less $50 paid.

W. J. Elliott, for plaintiff.

J. B. Clarke, K.C., and C. Swabey, for defendants.*

RIDDELL, J.:— . . . The late Jane Gourlay, by her will, bequeathed (among other bequests) to her daughter Barbara, the plaintiff, the sum of $600, and added: "I direct that all money coming to my daughter Barbara be invested by my executors, and the interest only and $5 yearly be paid to her." This was modified by a codicil whereby it was directed that the plaintiff should receive $50 the first year and $15 of the principal yearly thereafter. Of course, if

* The counsel for the defendants at the trial should not (by inference) be identified with the solicitor who advised the defendants before action, nor with the solicitor on the record. The two solicitors referred to were not in any way connected with the counsel.

this direction were followed literally, the legatee would need to live 37 years to receive her legacy in full. The defendants, the executors, thought she was hardly dealt with, paid her the $50, and desired to pay the remainder, but were afraid that they could not, in view of the provisions I have set out, legally do so. They allege that they consulted a solicitor (not the solicitor on the record), and were advised by him that they must invest the remaining $550 as directed in the will, and must pay this sum to her. They so informed the plaintiff. I had the opportunity of seeing one of these executors in the witness box, and I can safely find, as I do, that the executors acted in perfect good faith, and that they refused to pay over the balance solely because they thought the law would not justify them in doing so.

Our Rules 93 et seq. provide a simple, cheap, and expeditious method for the decision of just such questions, and these Rules are being applied every day. The solicitors for the plaintiff, being, as is said, of the opinion that these Rules did not apply, issued a writ of summons, instead of following the practice spoken of. Upon the delivery of the statement of claim, it was the plain duty of the defendants to have admitted the facts, taken objection to the more costly proceeding, and to have submitted themselves and their rights to the Court. Instead of this, a defence was put in, in which, after admitting the facts, it was pleaded that "the deceased died on 27th October, 1906, and the defendants submit that the action has been prematurely commenced, and should be dismissed with costs." At once orders to produce were taken out on both sides, and served, for what possible good purpose I am unable to conceive. Then the solicitors for the plaintiff wrote to the solicitors for the defendants that they did not think they would "require to examine defendants now, as there are no facts, so far as we can see, in dispute—the whole question is one of law, and would it not be well to deal with it summarily on a motion: we would consent to this." This is the first step in the proceedings that was proper, and had the suggestion been acceded to, the costs would not have been much increased. Instead of falling in with the suggestion, as he should have done, the solicitor for the defendants wrote saying that he thought it quite necessary to have both parties examined, at all events the defendants, so that a Judge might have all the facts before him—and adds that "the defendants can be examined at Guelph with very little expense." And

so the case came down to trial. The plaintiff was called, and proved the receipt of the $50, and the statement by the defendants to her that she could not have the remainder. Counsel for the plaintiff refusing to admit that the defendants had acted upon legal advice, one of them was called to prove that fact. Both these facts should have been admitted.

Counsel for the defendants admit that the direction to invest contained in the will is utterly invalid, and that there can be no question that the plaintiff is entitled to be paid the balance of her legacy at once, and to an assignment of the security if a security has been obtained. It is necessary, therefore, only to consider the question of costs. This I reserved that I might see if there were any possible excuse which could be found to justify any of the proceedings in this action. I have looked at the text-books and the authorities, and now dispose of the costs.

That the advice of the solicitor first consulted (if it was as sworn to) was wrong and inexcusably wrong is clear. For more than 60 years it has been certain that with a bequest of this kind the legatee is entitled to be paid at once.

Following a well known English Judge, one may say, "Heaven forbid that a solicitor, or even a Judge, should be held to know all the law!" Our law can, in its entirety, only be found by an examination of the "codeless myriad of precedents" of decision in former and present times, and of statutes that are in themselves a library—and no one head can carry all that knowledge. Many questions, too, are not yet decided, and no solicitor can be quite sure of what the law may be—the best he can do is to give his best judgment. But there are some principles that are beyond controversy, and that no ingenuity can gainsay; and one of these is that involved in this case.

The executors, then, have acted wrongly, and should pay such costs as have been rightly incurred. The solicitor for the plaintiff cannot be permitted to increase the costs through his mistake in practice. The costs then to be paid to the plaintiff are only such costs as would have been allowed had the cheaper practice been adopted.

The question remains whether the defendants are to be allowed to charge these against the fund, viz., the legacy to the plaintiff, or, if not, against the general estate. It would be unjust to make the plaintiff pay the costs of obtaining her own, costs which became necessary through the mistake

of the defendants, for which she is in no way responsible. And why should the "estate" pay? It is easy to speak of "costs out of the estate;" but that means that the innocent beneficiaries under the will have to pay for the mistakes of the executors, a result which I shall not bring about if it is my power legally to prevent it. There are two innocent sets of persons (in the assumption that the executors have acted upon the advice of the solicitor said to have been first consulted), namely, the beneficiaries and the executors themselves; on one of these must fall a loss; it is clear equity that the loss should fall upon those whose mistakes occasioned it. The Rules leave the costs in my discretion, subject to the provision, Rule 1130 (2), that "nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon before the Ontario Judicature Act, 1881, in courts of equity."

There can be no doubt that the usual rule was and is that if litigation is occasioned by difficulty in the will, the act of the testator himself, the costs should be borne by the estate of the testator, in some cases the particular fund; but I do not find any such rule laid down where there is no difficulty at all in the will, and the litigation is occasioned by the wrongful though honest act of the executors. And the fact of legal advice being taken does not take the case any further; that simply establishes good faith, and has no further effect. Amongst many cases I find Talbot v. Marshfield, 2 Dr. & Sm. 285, L. R. 4 Eq. 661, L. R. 3 Ch. 622. There the trustees had acted in good faith (see L. R. 3 Ch. at p. 625), and the Vice-Chancellor had, in fixing the costs up to the hearing of the plaintiffs in litigation, occasioned by the wrongful though honest acts of the trustees, at the sum of £200, directed that the defendants should pay that sum out of the estate. The Court on appeal, however, held that the defendants should themselves pay these costs, the result being (p. 633) "to leave the hostile parties to pay their own costs of the proceedings, and exonerate the general estate of the testator." Even in England it will be seen that there was no rule requiring the payment of costs of executors or trustees out of the estate or fund. And the cases in the English Courts as to the protection to be given to executors should, in my humble judgment, be read with caution as applicable to cases in Ontario. There the executor has no right to compensa-

tion, he takes upon himself an onerous duty, and is unpaid; here, on the contrary, he is paid a reasonable sum for his compensation, and his services are not rendered gratuitously. In case of any difficulty the Courts are always ready to relieve an executor, and there are many companies willing and anxious to administer any estate. One who accepts the position of executor must understand that if he omits to act prudently, he must suffer the consequences, as any other person would.

The result is that the executors will personally pay the costs of the plaintiff, properly incurred, and they will not receive an order to pay these out of the estate, nor to receive their own costs out of the estate.

I have the less regret in being obliged to make this disposition of the matter, as, unless there is more in the case than yet appears, they cannot be liable for the costs of their defence; and as to the costs they are ordered to pay, they have a good cause of action against the solicitor upon whose advice they say they have acted, if such is the fact; and, if such is not the fact, they should rightly suffer. If I had thought that the estate should pay the costs of plaintiff and defendants, I should have deducted from the amount now given to the plaintiff, the amount by which the defendants' costs were increased by the wrong method of procedure taken by plaintiff.

In nothing that has been said should it be considered that I charge the solicitors with bad faith, but the wrong advice of the one (if the executors are telling the true story) has occasioned needless litigation, and the others have made that litigation needlessly prolonged and costly.

The order will be as in In re Hodginson, [1893] 2 Ch. 190, with the exception of the costs already spoken of as payable to the plaintiff.

CLUTE, J. NOVEMBER 18TH, 1907.

TRIAL.

BURLEY v. GRAND TRUNK R. W. CO.

Railway—Shunting Car—Injury to Conductor Crossing Track in Yard—Consequent Death—Proximate Cause of Injury—Accident—Conjecture—Findings of Jury—Motion for Nonsuit.

Action by Steven Burley, administrator of the estate of Alonzo Burley, deceased, against the Grand Trunk Railway

Company, for damages for having caused the death of the deceased owing to their negligence.

J. R. Logan, Sarnia, for plaintiff.

W. J. Hanna, Sarnia, and W. E. Foster, Montreal, for defendants.

CLUTE, J.:—Alonzo Burley was a conductor on the defendants' railway, and left Sarnia on 24th April, 1907, in charge of a train for Mimico, by way of London. The train reached London East about 11 o'clock at night, and it was then found that the engine required to be run into the repair shop for repairs. The order for this purpose was given by the conductor to the engine-driver while standing on the station platform, London East. The driver started to obey the order, leaving the conductor on the platform. It was the last time, so far as the evidence shews, that the conductor was seen alive. The platform was on the north side of the tracks, which were 3 in number; the first track for west-bound trains; the second track for east-bound trains; and the third track for waiting trains. There was a switch to the west of the station and north of the tracks leading into the yard, and also a switch to the east of the station and north of the tracks leading into the repair shop. The deceased's train had come in and stood on the second track about opposite to the station, when the conductor gave the order to the engine-driver. There was an engine and train in the yard to the west of the station at this time. This train contained a car loaded with material which had been ordered into the repair shop. It would appear that this order was being executed about the time that the conductor and driver of the Sarnia train were talking on the platform. The car was run into the repair shop by what is called a drop or flying shunt; that is, the car and engine were cut from the rest of the train, the engine, which was in front of the car, when just opposite the station was checked, and the brakesman uncoupled the car from the engine, and the engine then proceeded down the first track easterly past the switch, the switch was turned, and the car run into the repair shop yard. Immediately after the car had passed, the body of the deceased was found by the night watchman at Rectory street, between the rails of the first track south of the station on Rectory street, which crossed the track at right angles east of the station. His shoulders were on the south rail of the track, his head to the

south, and the rest of his body between the rails. The broken glass from his lantern, the pencil which he carried, and his cap and a lock of his hair, were found a few feet west of the west boundary of Rectory street. No one saw the accident. The injuries found on his body caused death instantly. His scalp, as the report of the post-mortem shewed, "was clearly cut from the root of the nose over vertex to back of ear, peeled off from skull, and filled with dirt and blood. The skull and right orbit shattered into many pieces, and brain tissue disorganized. The upper jaw on the right side fractured, and also lower jaw about the centre. There was a bruise or dislocation of the left shoulder, and bruises from the side and shoulder to the hip. A punctured wound on the left leg 3 inches above the ankle"—and many other severe injuries and bruises.

The plaintiff's theory was that the deceased had entered upon the track in crossing to his train after the engine had passed, and was run over by the shunting car.

The defendants suggested that he had attempted to climb on the car as it was passing, and had got his leg entangled, and had dragged behind the car, and was finally thrown on the track. The engine carried a head-light and a rear light. The yardman, who uncoupled the engine from the car, carried a lantern on his left arm. He was on the south side of the car, standing with one foot on the engine and one foot on the car, facing the car, and looking west, when he uncoupled the engine. The ladder on the car was immediately opposite to him. After uncoupling the car he climbed up the ladder with the lantern still on his left arm, still facing west. He would take, according to the evidence, about 3 seconds to reach the top of the car. He then proceeded on the top of the car to the rear brake, with the lantern still on his left arm. There was no one in front of the car, as it proceeded after it was uncoupled, to give notice of danger, and no light.

The company's rule 219 provides that "when a train is being pushed by the engine (except when shifting and making up trains in the yard), a flagman must be stationed in a conspicuous position on the front of the proceeding car to immediately signal the engine-man in case of danger." It was in evidence that at night the flagman under this rule must carry a light. There is no rule which provides for a drop or flying shunt, as in this case.

The jury found that the defendants were guilty of negligence by not having the car protected by light according to the rules. Having regard to the charge and the answer to question 4, I take this to mean that in case of a flying shunt . . . . there should be the same protection afforded as provided by the rule above quoted. The jury also found that the personal injuries resulting in the death of Alonzo Burley, the conductor, were caused by reason of the negligence of the yardman who was in charge of the engine that night, by not having the car properly protected by light on the front of the car while being dropped into the siding; and that the deceased could not, by the exercise of ordinary care, have avoided the accident under the circumstances, as the car was not properly protected; and they assessed the damages at $1,080.

At the close of the plaintiff's case a nonsuit was moved for, upon the grounds (1) that no case was made under Lord Campbell's Act; (2) that there was no evidence of negligence; (3) that there was no evidence to enable the jury to say how the deceased came to his death.

These objections were renewed at the close of the trial. I think there was quite sufficient evidence of pecuniary loss on the part both of the father and mother, and reasonable expectation of their receiving further benefits from deceased, to support an action. The damages assessed were, I think, well within the mark. Something was said as to reducing the amount by reason of the insurance upon the life of the deceased, and a subsequent day was fixed for the argument; no further argument took place, but, instead, a telegram was shewn me purporting to come from the defendants' counsel, desiring judgment to be entered for the full amount or nothing, with the view, as I took it, to enable the defendants to go to the Court of Appeal in case judgment should be against them.

As to the second ground of objection, I think there was evidence of negligence which could not be withdrawn from the jury. The car, after it was uncoupled, was not protected by any one on the front of the car with a light to give warning, and the jury might well find, I think, that, the engine having passed, the car should have been protected. The deceased was in the discharge of his duty and had to cross the track to reach his train. He had no reason to expect that a car would follow without warning. The finding of the jury

that the defendants were guilty of negligence by not having the car properly protected by light on the front of the car while being dropped into the siding, was well supported by the evidence. It is difficult, I think, to conceive of a practice more negligent and likely to cause injury than permitting at night the flying shunt to be made without any person, or light, to give warning of the approaching car.

In support of the further point that there was no evidence to enable the jury to say how the deceased came to his death, the Wakelin case, 12 App. Cas. 41, was relied on, but I think the present case is distinguishable from the Wakelin case. In that case the train carried a head-light, which a person for half a mile down the track could see. In the present case, while the engine carried a head-light, the car was allowed to follow without light or other protection. The engine, so far from warning the deceased of the approach of the car, was rather likely to mislead him. Having regard to the evidence as to the injuries upon the body and the finding of the lantern and other articles belonging to the deceased, there could be no reasonable doubt, in my opinion, upon the findings of the jury, that the deceased had passed between the engine and the car, and that the car passed over him. It was a fair inference for the jury to draw that if the car had been properly protected he would have been warned. In other words, there was evidence that the negligence of the defendants was the proximate cause of the accident.

There is much in London and Western Trusts Co. v. Lake Erie and Detroit River R. W. Co., 12 O. L. R. 28, 7 O. W. R. 711, that throws light upon the present case. The deceased here, as there, was in the discharge of his duty, and not a bare licensee, as in Batchelor v. Fortescue, 11 Q. B. D. 474, and Hutchinson v. Canadian Pacific R. W. Co., 17 O. R. 347. In the present case the servants of the defendants who sent the car down the line without protection ought also to have anticipated that other persons might be engaged in the performance of duties upon the line who might be injured if the operating of switching the car was negligently conducted.

What is said by Osler, J.A., in the London and Western Trusts Co. case as to the contributory negligence of the defendants, applies with equal force in the present case: "It cannot be laid down by this Court, in following any authorities by which they are bound, that, as a matter of law, a person who, in the exercise of a right or the performance of

a duty, attempts to cross the railway track without looking to see whether a train is approaching, is guilty of such negligence as ipso facto to deprive him of the right to recover if he is struck by a train or car and is injured:" 12 O. L. R. at p. 32. See also Phillips v. Grand Trunk R. W. Co., 1 O L. R. 28.

To one listening to the evidence it seemed perfectly clear how the accident happened Th conductor in the discharge of his duty was proceeding to his train, an engine approached, he allowed it to pass, and proceeded to cross the track, when he was overtaken by a car of which he received no warning.

The plaintiff also relied upon sec. 276 of the Railway Act, which provides that "whenever in any city, town or village, any train is passing over or along the highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train or tender, if that is in front, which is then foremost, a person who shall warn persons standing on, crossing, or about to cross, the track of such railway."

This section as now framed seems to refer only to a train passing over or along a highway, and so does not seem to make provision except in respect of some person who might be standing on or about to cross the track on the highway. At the same time it is, I think, fair to presume that the conductor would have knowledge of the requirements of this section, as it would be likely to arise in the course of his employment, and as there was a highway immediately to the east, which the engine would have to cross. It could scarcely be urged that the deceased should be on the look out for a car about to cross the highway, unprotected and in contravention of the Act.

The question as to when a case may be properly submitted to a jury, where the facts to be found must depend upon inferences to be drawn from circumstantial evidence, is considered in Moxley v. Canada Atlantic R. W. Co., 14 A. R. 309; see the judgment of Patterson, J.A., 314-5, and Osler, J.A., 319-20; affirmed 15 S. C. R. 146.

At the request of both parties, the jury had a view of the car, and, on request of defendants' counsel, took measurements of the distance between the car and the rail and ties, to satisfy themselves as to whether or not the car could have passed over the body of the deceased.

Having regard to all the facts and circumstances of the case, I am of opinion that it could not have been properly withdrawn from the jury, and that, upon their findings, the plaintiff is entitled to a verdict for $1,090, with costs of action.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

McGUIRE v. GRAHAM.

Vendor and Purchaser — Contract for Sale of Land Made with Clerk of Vendor's Agent—Ignorance of Vendor of Position of Vendee—Right to Repudiate on Discovering Truth—Duration of Agency—Termination of Authority —Vendee Acting as Representative of Actual Purchaser.

Appeal by plaintiff from judgment of MACMAHON, J., 10 O. W. R. 370, dismissing an action brought by George F. McGuire against Mrs. Graham and one Hill for specific performance of an alleged agreement to sell to plaintiff the house and premises No. 190 King street west, in the city of Toronto, owned by Mrs. Graham. MACMAHON, J., held that Mrs. Graham, the vendor, who was, as she stated, ignorant that defendant Hill, with whom she entered into the contract of sale, was the manager of the business of A. G. Strathy, her agent and broker for the sale of the property, was not bound thereby, and that plaintiff, who was the real purchaser, and to whom Hill assigned his right, could not succeed in enforcing specific performance.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

C. Millar, for plaintiff.

G. H. Kilmer, for defendants.

RIDDELL, J.:—The defendant Mrs. Graham, the owner of certain land, and the plaintiff, an intending purchaser, were

both willing the one to sell and other to buy the property at a price fixed. The owner (through her solicitor) was objecting to sign a certain form of offer to sell; the purchaser objected (through his broker) to have his name appear in any offer to purchase. In this impasse, the defendant Hill, an employee of the plaintiff's real estate broker, offered himself to sign the contract for sale and take the risk of getting it through. He did so, it being the understanding that he should at once assign to the plaintiff. The defendant Mrs. Graham appears, at the time the contract was signed, not to have known who the defendant Hill was. Hill at once assigns to the plaintiff. All this takes place 31st December, 1906. Upon 2nd January, 1907, the first working day thereafter, the solicitor for defendant Mrs. Graham knows of the position of Hill, but on 4th January he sends a draft conveyance.

Hill had nothing to do with fixing the price or the terms of sale.

Under these circumstances . . . it cannot be said that Hill was in fact the real purchaser — all that he was doing was in the supposed interests of his master's principal, assisting in carrying out a proposed sale by lending his name. He was, it is true, incurring a liability on the faith of an understanding with the plaintiff, and might have got himself into an awkward situation if the plaintiff, for any reason, was unable to accept the transfer and carry out the purchase —but that we need not consider.

The cases cited by the trial Judge upon the question of the duty of an agent to his principal, and the right of a principal to repudiate a sale to an agent, while they lay down rules about which there can be no question, do not, in my humble judgment, apply in the facts of this case.

I would allow the appeal with costs, and give the plaintiff the usual judgment for specific performance with costs.

FALCONBRIDGE, C.J., agreed, for reasons stated in writing.

BRITTON, J., dissented, for reasons stated in writing.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

RE SHAFER.

Life Insurance—Benefit Certificate—Direction of Assured as to Disposition of Fund — Construction — Division among Wife and Children — Income—Corpus — Vested Interests—Application of Doctrine in Regard to Wills.

Appeal by Daniel L. Shafer and cross-appeal by the widow of George Alfred Shafer from order of RIDDELL, J., ante 409.

W. E. Middleton, for Daniel L. Shafer.

J. M. Ferguson, for the widow.

M. C. Cameron, for the infants.

A. G. F. Lawrence, for the Toronto General Trusts Corporation, trustees.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—Upon affidavit evidence it appears that the father, George A. Shafer, obtained a certificate of beneficiary character from the Ancient Order of United Workmen, for $2,000, in 1885. He died intestate in December, 1894. The Toronto General Trusts Corporation now represent his estate, which consists of nothing else than the proceeds of this insurance, which is now in their hands bearing interest at the rate of 4 per cent. The deceased left a widow and 5 children, 3 of whom (males) are over 21 years of age, and 2 are minors, a girl aged 19 and a boy aged 13. The 3 sons now of age appear to be doing for themselves as carpenter, baker, and railway employee. By the terms of the certificate the $2,000 was to be paid "at death to his executors, to be put at interest. Interest to be paid to his wife for benefit of herself and children. In event of wife marrying again or in case of her death, interest to be paid to his children until the youngest became of age, when the principal is to be equally divided among them." The interest, $80, has hitherto been paid to the mother, and the application now is by the eldest

son to be paid one-sixth of the corpus forthwith. The order in appeal declares he is entitled to one-sixth of the interest from year to year, and declares him not entitled now to be paid any share of the principal. The son appeals, claiming present payment of a share of the corpus. The widow cross-appeals in that any apportionment is made of a specific share of the interest, she claiming to receive the whole. The judgment proceeds on the theory that the children and mother are jointly entitled, and that each is entitled to receive one-sixth of the income.

The evident purpose of the assured was to provide from his scanty means a fund of $2,000 for the benefit of his family, which should be exempt from the claims of creditors. The widow is to get no part of the amount insured, which is to be distributed at her death (or re-marriage) and when the youngest child is of age. But by way of compensation she is to receive the whole of the interest meanwhile and handle it for the benefit of herself and the children. The trusts corporation (administrators) are discharged as to the interest when they pay it to the widow (as they have hitherto done), and she disposes of it for herself and family as long as she lives (and is a widow.) He does not contemplate his wife being alive when the youngest child comes of age, and does not in terms provide for that situation, but while she lives she is to draw the interest, charged with the obligation as to the children. One would naturally say that she is chosen as the recipient of the income because the husband had confidence in her as the head of the house after his decease. The intention was to keep the family together as far as possible and have them maintained out of this pittance as far as it would go, with the mother to manage the disposition of the money as best she could. It was not contemplated that each child on coming of age should claim an equal share with the mother—much less should claim to draw away a share of the interest-bearing fund. Nor was it intended that during minority each child should receive a specific and equally divided share of the income. As surviving parent she was intrusted with the whole yearly proceeds and to exercise her discretion in doing by each child and herself according to family needs and requirements. . . . Each child on coming of age is not expected to draw off successive shares of the income, and leave the mother in old age to comparative destitution. So long as the whole income to be received

by her is honestly handled and fairly and reasonably expended for the support of herself and her children needing it, the direction of the husband will be satisfied. The arm of the law is not to come between her and the reasonable exercise of her judgment in providing for the necessities of herself and children. It may naturally be expected that as the children come of age and go off from home and begin to make a living for themselves, their claims upon the small income will diminish, and they will agree to their mother having all for her own use. But that is not presently a matter to be dealt with. All that need be said is that the mother may so act or the children themselves who are of age may be so advised as never to give occasion for legal interference in the future.

I think a fair reading of the certificate, coupled with the surroundings of the family, induces the conclusion that the intention of the deceased will be fully carried out by the administration of the yearly proceeds of the fund on the above lines. The certificate, as read in legal phrase, means that the mother is life tenant of the income—sole life tenant and not jointly with the children—but under obligation to deal with the same for their benefit—the support and maintenance of herself and the children in such proportions as she may deem expedient in the honest exercise of the discretion reposed in her by the husband.

The certificate is in the nature of a testamentary provision, and authorities upon wills shew the lines of decision applicable to the legal import of this instrument. . . .

[Reference to Gilbert v. Bennett, 10 Sim. 372; Bowden v. Laing, 14 Sim. 115. Jubber v. Jubber, 9 Sim. 503, distinguished. Reference also to Chambers v. Atkins, 1 Sim. & Stu. 382; Crockett v. Crockett, 2 Phill. 561.]

If a joint holding had been intended, the fund would not have been transferred to the mother, but would have been directed to be held in trust for equal benefit of mother and children. Here that view is emphasized by the fact that the certificate does provide for an equal division among the children of the $2,000 fund, but as to the income gives all to the mother charged for the children. . . .

[Reference to Briggs v. Sharp, L. R. 20 Eq. 319; Re Perth, [1899] 2 Ch. 285]

I do not dwell on the difference of meaning that may exist between the word "benefit" used in this certificate

and the word "maintenance" used in some of the cases I have cited. "Benefit" is susceptible of a larger meaning than "maintenance," but when it comes to the question of handling $80 per year for the benefit of a widow and young children, "benefit" will exhaust its meaning in the supply of their necessities, and becomes equivalent to "maintenance."

The ordinary meaning and the legal meaning of the certificate being in accord, there is nothing in the statute (R. S. O. 1897 ch. 203, sec. 159 (7)), which compels to a different result. True it is, the Act declares that where "two or more beneficiaries are designated, but no apportionment as among them is made, all the beneficiaries shall be held to share equally in the same." What is "the same"? It is evident by reference to the whole section that what is referred to is the insurance money—the amount insured—in this case the $2,000: see sec 157, sub-sec 3. That amount is provided for as to its apportionment by the terms of the certificate, and goes equally among the children at the wife's death (or earlier if she marries again). The husband, however, while suspending the distribution of the amount insured, provides for its investment and the formation of an income, to be paid to the widow. That provision for income falls outside of the scope and terms of the statute, and is in no way against its policy; it is not only permissible, but highly commendable. This subsidiary benefit is confided to his widow, who is to apportion it, according to her own judgment and discretion, among herself and children, according to their varying needs. There is, in truth, a direct apportionment of the principal and an implied apportionment of the interest by the terms of the certificate—the latter to be regulated and controlled by the widow.

The decision under review appears to be erroneous in holding that the children are equally entitled to share in the yearly interest, and in directing payment of one-sixth of it to the eldest son. That son's appeal is dismissed; the cross-appeal of the widow is allowed; and the costs of both proceedings should be paid by the son, who appeals and has failed.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

REX v. BRISBOIS.

Liquor License Act—Conviction for Selling without License —Imprisonment of Defendant — Habeas Corpus — Certiorari—Right of Court to go behind Conviction and Look at Depositions—Absence of Evidence to Sustain Conviction—Justices' Notes of Evidence not Signed by Witnesses—Discharge of Prisoner.

Motion by the defendant, on the return of a habeas corpus and certiorari in aid, for his discharge from custody under a conviction for selling intoxicating liquor without a license.

J. B. Mackenzie, for defendant.

J. R. Cartwright, K.C., for the Crown and the convicting magistrates.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—By sec. 5 of the Ontario Habeas Corpus Act, R. S. O. 1897 ch. 83, a writ of certiorari may issue in aid of the main writ, providing for the return of the evidence, depositions, conviction, and proceedings, that the same may be viewed and considered by the Court, and to the further end that the sufficiency thereof to warrant the restraint may be determined. That clause was first before the Court in Regina v. Mosier, 4 P. R. 64, and the practice was then established that the Court is bound to examine the proceedings anterior to the warrant and see if they authorize the detention, and, if not, to discharge the prisoner. This case and this course were approved in Regina v. St. Clair, 27 A. R. 308, 310.

This case is one of conviction under the Ontario Liquor License Act, and by R. S. O. 1897 ch. 90, sec. 1, the proceedings are to be conformable to the like proceedings under the Canada Criminal Code. That introduces the practice as to

the taking of evidence; witnesses are to be sworn and their evidence is to be taken down in writing in the form of a deposition, which is to be authenticated by the signature of the justice: Criminal Code, secs. 857, 856, and 590. The witness need not sign: sec. 856 (3). But, by the direct provisions of the Liquor License Act, R. S. O. 1897 ch. 245, sec. 99, in all cases the evidence of the witnesses examined shall be reduced to writing—shall be read over and signed by the witness. Here the evidence is very meagrely set down in writing, and is not signed by the witness or magistrate.

Formerly it was necessary to set out the evidence on the face of the conviction, and, if any lack of evidence existed as to some fact necessary to give jurisdiction, the proceeding would be quashed. If it now appears on the return of the evidence, in response to the certiorari, that any essential element necessary to a conviction is absent, it is open to the Court to quash. In this return there is a complete absence of evidence upon the material point of any liquor having been sold by the prisoner. He was present in the place where the liquor was kept, but it is not sworn that he sold or handed out the liquor. Very likely he did so, but it is the important fact, which cannot be assumed. If the justices have omitted to take down this part of the evidence, they have only themselves to blame. Where the liberty of the person is involved, there appears to be no case where the matter would be remitted to the justices to take further evidence on the point omitted. No evidence being before the justices on this head, they exceeded their jurisdiction in making a conviction: Re Bailey, 3 E. & B. 607.

The direction to take the evidence in writing, and, as far as possible, in the words of the witness, is for the protection of the magistrates themselves, as well as to preserve a record of the material on which the conviction is founded, in case of ulterior proceedings. The Court will not presume in favour of the inferior judicial officer "that he has done his duty unless he tells the Court so by his own acts," and his jurisdiction must "appear otherwise than out of his own mouth." See Regina v. Wernford, 5 D. & R. 490, and Rex v. Johnson, 1 Str. 261.

Upon the return of the proceedings, it appears that there is no evidence to support the conviction and the warrant, and the prisoner must be discharged.

NOVEMBER 18TH, 1907.

DIVISIONAL COURT.

LAWSON v. CRAWFORD.

Injunction—Interim Order—Contract—Prima Facie Right —Mining Operations — Interference—Threats—Dissolution of Injunction Obtained ex Parte.

Appeal by defendant from order of ANGLIN, J., ante 602, continuing an interim injunction until the trial.

S. R. Clarke, for defendant.

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

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The clause in the Judicature Act, sec. 58, sub-sec. 9, does not give any new right to claim an injunction—does not extend the jurisdiction of the Court, and does not alter the principles upon which the Court gives summary relief by interlocutory injunction.

In this case the materials filed shewed a prima facie right to ask an injunction, and the order was made ex parte. On the motion to continue, it is open for the defendant in shewing cause to claim that it should be dissolved, if no proper case appears on the new material then before the Court: McCuaig v. Conmee, 19 P. R. 45.

The case presented ex parte is quite displaced by the viva voce evidence given by the president of the plaintiff company. The interim injunction was to restrain the defendant from interfering with the mining operations now being carried on by the plaintiffs upon the location in dispute (granted ex parte 5th July, 1907). The only affidavit filed was one by the solicitor setting forth information derived from one Flynn, plaintiffs' agent on the location, to the effect that the defendant and his men were filling up the trenches and the shaft which the plaintiffs were digging in the course of their mining operations. Upon the facts it now appears that there is a travelled road running through the location, on which public money has been spent, and that there is a

house facing on that road which is occupied by one West as tenant of the defendant—who has some undivided interest in the mining location. The work done by Flynn was digging a trench or ditch on the road round and behind this house, with a view of making it uninhabitable. It is said that West was selling whisky to the men, and the plaintiffs wanted to get him out of the place. What West did was to fill up the trench in front of his house, whereby he got access to it from the road, and this is the act complained of and misrepresented in Flynn's telegram, and in that way, through the solicitor, misrepresented to the Court. The true state of facts is admitted by Mr. Martin, the president of the plaintiff company: "The reason Flynn made the trench was because West was selling whisky there, and that was the principal object—to get West away from there." The substratum of the application disappears, and there is absolutely no evidence that the mining operations have been interfered with, as alleged in the materials upon which the Court was set in motion. It is now attempted to support the injunction on the ground that the defendant has threatened to interfere with the plaintiffs' mining operations. I find no such evidence, not even in Mr. Clarke's letter which was referred to. There is, no doubt, in it vigorous assertion of the Crawford title to the whole; it is intimated that they desire to proceed at once to work the same free from interference by the plaintiffs; and there is a declaration that the plaintiffs will be held responsible for all loss and damage by the delay in getting to work. But no word or threat that the defendant intends to block on the ground any work of the plaintiffs in the course of mining—even if that would suffice to make amends for the original misleading of the Court. In brief, no overt act of interference is proved—it is disproved—and no evidence of any threatening or danger anticipated which would call for the summary interposition of the Court, even if the motion had been framed and presented on that line. See Castelli v. Cook, 7 Hare at p. 99.

The appeal should be allowed, the injunction dissolved with costs to defendant of motion and appeal in any event in the cause. This order to be without prejudice to any future application for injunction on proper material.

CARTWRIGHT, MASTER. NOVEMBER 19TH, 1907.

CHAMBERS.

RUSSELL v. RUSSELL.

Notice of Trial—Regularity—Close of Pleadings—Action to Establish Will — Defence Setting up Agreement with Testator—Joinder.

Motion by defendant D. Russell to set aside the notice of trial as irregular under Irwin v. Turner, 16 P. R. 349, in an action to establish a will.

J. E. Jones, for the applicant.

W. H. Blake, K.C., for the plaintiffs, the executors.

F. J. Dunbar, for the added defendants.

THE MASTER:— . . . The moving defendant opposes probate on the usual grounds. He also asks to have relief in respect of an alleged agreement made 20 years ago with him by the testator to leave him all his property if he would stay and work the farm, which he says he did. This is not strictly a counterclaim. Indeed that word does not occur in the statement of defence. The plaintiffs here are not, in the usual sense, making any claim against the defendant. But, no doubt, the whole matter may properly be tried at the same time, as was done, e.g., in Dixon v. Garbutt, 9 O. W. R. 392, though there it was strictly a counterclaim as an alternative defence, and that was afterwards made a matter of reference and not disposed of at the trial.

Here the only important question is, whether the cause was at issue on 14th November instant, when the notice of trial was served. It was stated in support of the motion that the defendant D. Russell desired to have the added defendants examined for discovery. It was stated by Mr. Dunbar, and not denied, that his clients were quite ready if the defendant so desired, and that in fact an examination had been fixed for to-morrow.

Here there is no claim against the added defendants different from that made against the plaintiffs, with whom these defendants make common cause, and no new issue is raised by their being added. Therefore, the whole ground

of decision in Irwin v. Turner is lacking, and I do not think that the motion should succeed.

If the will be set aside, the defendant D. Russell's claim must stand over until a personal representative has been appointed. On that see Mountjoy v. Samells, ante 605. In this view, it seems questionable whether the defendant D. Russell's claim is not somewhat premature. Certainly he need not have raised it in this action. But, as the parties seem desirous to have the questions raised all settled now, there is no reason why they should not be allowed to take the matter before the trial Judge.

In Irwin v. Turner there were new parties brought in by defendants on their counterclaim. This would, perhaps, be a sufficient ground of distinction between this case and that. Under the general spirit of the Judicature Act, the substance is to be considered rather than the form, and here the conduct of the parties seems to require that the matter should go to trial.

The motion will, therefore, be dismissed, with costs as against the mover to the other parties in the cause.

CLUTE, J. NOVEMBER 19TH, 1907.

CHAMBERS.

PERKINS v. FRY.

McDONALD v. RECORD PRINTING CO.

CURRIE v. RECORD PRINTING CO.

Libel—Several Actions against Different Defendants—Consolidation—R. S. O. 1897 ch. 68, sec. 14—Identity of Libels.

Motion by defendants, under R. S. O. 1897 ch. 68, sec. 14, for orders consolidating the first named action with 20 others by the same plaintiff against different defendants, the second with 19 other actions, and the third with 10 other actions.

W. Nesbitt, K.C., and E. T. Malone, K.C., for defendants.

G. Grant, for plaintiffs.

CLUTE, J.:—These actions relate to alleged libels by defendants in publishing certain statements with reference to the proceedings taken against plaintiff Perkins on a charge of murder.

Mr. Nesbitt argued that while the different writings differed in form they were all substantially the same libel. They all referred to the charge of murder preferred by the Crown. Upon examining the statements of claim it will be seen that in a number of cases the publication in respect of one count is the same as that charged in another action in respect of a single count, but there are no other libels charged in the same statement of claim, so that the action in one case cannot be said to be for the same or substantially the same libel as in the other. Mr. Nesbitt relied upon Eddison v. Dalziel, 9 Times L. R. 334; Stone v. Press Association Limited, [1897] 2 Q. B. 159; and Odgers on Libel and Slander, 4th ed., p. 578.

These cases, I think, fall far short of supporting the defendants' contention. In the Eddison case . . . the libels being the same, the cases were consolidated, notwithstanding the different lines of defence set up by the several defendants. In Stone v. Press Association Limited . . . the libel was the same.

In Odgers, at p. 578. it is said. "So, too, it is sufficient if the libels be substantially the same, i.e., if they in fact contain the same imputation on the plaintiff, though the language used be different. . . ."

The unreported cases of Soper v. Star Printing and Publishing Co. and Soper v. Globe Printing Co. were also referred to. Upon examining the statement of claim in the former action and the notice before action in the latter, it is quite evident that the libel charged in each case was substantially the same libel, and Street, J., accordingly made an order for consolidation.

Where there are distinct libels, and one of the libels charged is substantially the same as a libel charged in another action, but the other libel is different, as occurs in a number of the above actions, I do not think there can be consolidation, because the statute, in my opinion, makes no provision for a case of that kind, nor can I see how it can be conveniently worked out. There are, however, a number

of cases where the libel is the same, and an order will go for consolidating these. . .

The costs in the cases consolidated to be costs in the cause; in the other actions costs to plaintiffs in any event.

CLUTE, J. NOVEMBER 19TH, 1907.

CHAMBERS.

BUTLER v. CITY OF TORONTO.

Municipal Corporations—Maintenance of Isolation Hospital—Liability for Negligence of Officers and Servants Employed—Death of Patient—Nonfeasance—Public Health Act—Pleading—Statement of Claim—Motion to Strike out as Disclosing no Reasonable Cause of Action—Rule 261—Summary Dismissal of Action.

Motion by defendants, under Rule 261, to strike out the statement of claim, on the ground that it disclosed no cause of action, and to dismiss the action.

The action was brought by George Butler, a resident of the city of Toronto, to recover damages for the death of his child, caused, as alleged, by the negligent management of defendants' Isolation Hospital.

F. R. MacKelcan, for defendants.

A. R. Hassard, for plaintiff.

CLUTE, J.:—The statement of claim sets forth:—

"2. The defendants maintain, conduct, and manage the Isolation Hospital in Toronto, which is their lawful duty, and they also employ the servants, agents, nurses, and physicians in the said hospital, which is also their lawful duty, and it likewise is their duty to properly care for and treat all patients placed in said hospital, and there were during January, February, and March, 1907, many patients undergoing treatment in the said hospital.

"3. On or about 28th January, 1907, the plaintiff's child, a girl . . aged 6, was taken ill with diphtheria, and was placed in the said hospital, where, for valuable consideration, and, in addition, as was their duty, the defendants agreed with the plaintiff and undertook to care for and properly treat her for diphtheria.

"4. The defendants, through their servants, agents, and nurses in said hospital, did not care for and did not properly treat the child, but negligently . . permitted her to . . wander at large through the hospital, and to enter and play in and about a bath-room which was at that time, to the knowledge of defendants, being constantly used by patients with scarlet fever, and the child did so . . wander at large . . and did enter and play in and about the said bath-room; and the servants, agents, and nurses of defendants negligently allowed . . the child to go into a downstairs ward where measles were raging, and she did go into said ward; and in consequence of defendants' said negligence the child contracted the following diseases besides diphtheria, namely, measles, croup, bronchitis, and pneumonia, and died of some or one of them in said hospital on or about 19th April, 1907.

"5. The defendants were guilty of negligence in the premises further as follows: they did not properly guard said child and keep her isolated from contagion from other diseases while in said hospital; and they did not keep a physician in said hospital all the time during the first 4 months of 1907; and they did not keep sufficient nurses and servants . . . as was their proper duty."

It was conceded that the Isolation Hospital in question was conducted under the Public Health Act, R. S. O. 1897 ch. 248. Sections 31-38 provide for the appointment of a health officer by the municipality on the request of the Provincial Board of Health. . . .

Sections 56 and 57 provide for the payment of the money required for work and services performed under the Act.

Section 104 provides for the erection and maintenance of Isolation Hospitals, which, by sec. 5, are subject to such regulations as may be made by the health officers or boards of health.

Section 93 provides for the isolation of persons infected or who have been exposed to infection of any of the infectious diseases covered by the Act. . . .

Section 62 provides that where an action has been brought against the local board of health, or any member of the council, or member, officer, or employee of the local board of health of any municipality, who has suffered any damage by reason of any act or default on the part of such local board of health, or any member, officer, or employee thereof, the

municipality may assume the same, or the defence thereof, and may pay any damages or costs for any member, officer, or employee who may be or has become liable in respect thereof, but the section does not extend to any officer or employee by reason of whose act or neglect the damage was caused. . . .

[Reference to Township of Logan v. Hurlburt, 23 A. R. 628; Sellars v. Village of Dutton, 7 O. L. R. 646, 3 O. W. R. 664.]

Even if the officers of the board of health are paid by the corporation of the city of Toronto, and in a sense may be considered the servants of the city, it does not follow that they are servants in such a sense that the corporation are responsible for their negligent acts: see Dillon on Municipal Corporations, vol. 2, secs. 974-7. . . .

[Reference to Hesketh v. City of Toronto, 25 A. R. 449.]

At most, the offence as charged is nonfeasance, and not misfeasance, and, in the absence of statutory liability, no action lay by an individual aggrieved: Cowley v. Newmarket Local Board, [1892] A. C. 345; Municipality of Pictou v. Geldert, [1893] A. C. 524; . . . Municipal Council of Sydney v. Bourke, [1895] A. C. 433; . . . Borough of Bathurst v. McPherson, 4 App. Cas. 256; . . Graham v. Commissioners for Queen Victoria Niagara Falls Park, 28 O. R. 1.

Applying these cases to the present action, I am of opinion that the officers and servants in charge of the Isolation Hospital are not servants of the corporation of the city of Toronto in such a sense as to render the corporation liable for their negligence. I am further of opinion that, even if it were held that the corporation are responsible for the acts of those officers and servants, an individual who has suffered injury can maintain no action for nonfeasance, and that the statement of claim charges no misfeasance.

The only doubt I have entertained is whether a motion of this kind ought to be given effect to, where, in order to do so, consideration of nice questions of law is involved. See Holmested & Langton, 3rd ed., p. 468, where the cases are fully collected. The rule seems to be that, where the Court is satisfied that the plaintiff cannot succeed at the hearing, his claim should be struck out: South Hetton Coal Co. v. Haswell S. and E. Co., [1898] 1 Ch. 465; Hodson v. Pare, [1899] 1 Q. B. 455; Law v. Llewellyn, [1906] 1 K. B. 487; Lawry v. Tuckett-Lawry, 2 O. L. R. 162.

The statement of claim will be struck out, on the ground that it discloses no reasonable cause of action, and the action will be dismissed, with costs of action and of this application, if claimed by the defendants.

MEREDITH, C.J. NOVEMBER 19TH, 1907.

CHAMBERS.

BROCK v. CRAWFORD.

Lis Pendens—Motion to Vacate— Cause of Action—Pleading —Statement of Claim—Guaranty—Payment into Court.

Appeal by defendants from order of Master in Chambers, ante 756, refusing to strike out part of the amended statement of claim and to vacate the registry of a certificate of lis pendens.

W. N. Tilley, for defendants.

H. Cassels, K.C., for plaintiffs.

MEREDITH, C.J., dismissed the appeal, but varied the order by reserving the right to move again to vacate the lis pendens. Costs in the cause.

RIDDELL, J. NOVEMBER 19TH, 1907.

TRIAL.

STACEY v. MILLER.

Fraud and Misrepresentation—Cheque Signed in Blank and Filled up for Large Sum—Procurement by Fraud—Unsound Mental Condition of Drawer—Gift—Confidential or Fiduciary Relationship.

Action to recover $5,000, upon the facts set out in the judgment.

James McCullough, Stouffville, and J. W. McCullough, for plaintiff.

R. McKay and C. R. Fitch, Stouffville, for defendant Miller.

RIDDELL, J.:—James Stacey was an old man of about 85 years of age. On 13th May, 1907, he signed a cheque in blank upon the Standard Bank, Markham, which the defendant Frank Miller afterwards filled in for $5,000 and presented at the bank. Miller drew $500, received a marked cheque for $2,500, and deposited the remainder, $2,000, to an account in the bank. A few days after, and on 21st May, 1907, James Stacey brought the present action, but died on 30th May, leaving a will in which his wife, Lucy Stacey, was named as executrix. The action was continued in her name. . . .

It was alleged for the defendant Miller that he had become insane, but this was vigorously contested by plaintiff, and I decided to go on with the trial as far as could be done, and reserve for the defendant Miller leave to move for the enlargement of the trial if it became manifest that it was necessary for him to be examined personally, and it appeared that he was not in a condition to give evidence. At the close of the case, however, counsel for the plaintiff agreeing that the whole of the examination of defendant Miller for discovery might be read as evidence, the defendant's counsel accepted that in lieu of oral evidence to be taken after an enlargement.

Judging of the credibility of the witnesses upon their conduct and demeanour in the box, upon such part of the evidence as I believe, I find the following to be the facts:—

James Stacey, being, as I have said, of some 85 years of age, was for some months at least before his death suffering from senile dementia, a form of unsound mind, in which there are remissions and exacerbations, so that upon one day or at one hour the patient may be fairly bright and capable of doing ordinary business, and the next day or hour quite clouded and incapable of understanding the effect of what he is doing, and sometimes even of making himself understood. The evidence of the lay witnesses as to the acts and conduct of the old man, given, as most of it was, without apparently any idea of its cogency toward proving this form of mental unsoundness, and the evidence of Dr. Robinson, called for the defendant Miller, make it, to my mind, clear that this was his condition. And I place great reliance upon the evidence of Dr. Young in the same sense.

Miller was the nephew of Mrs. Stacey, and Stacey had great confidence in him. As Mrs. Miller, the wife of the

defendant, says, the defendant was a sort of confidential adviser—he was the only man in the family to whom Stacey could look for advice. Miller had borrowed $1,000 from Stacey and paid back $500, leaving $500 still due, upon which he was paying interest at 6 per cent. Some little time before 13th May, the old man had come to Miller and had asked Miller to take up his business and look after it. Miller had agreed, and then Stacey had consulted him about giving his (Stacey's) brother Thomas a farm. Miller accompanied Stacey to Toronto, and went with him to the Bank of British North America, and there attempted to get him to make a present to him of $1,000. The bank manager found it impossible to get Stacey to understand what was wanted, and tells us that he found the old man too feeble to understand business, and therefore he refused to have any transfer made to the defendant. About the same time the defendant Miller went to Mr. Robinson, a solicitor who had acted for Stacey in some matters, and told him that he (Miller) was thereafter going to do all Stacey's business, but he would employ Mr. Robinson to do the legal work. Either then or at some other time he also stated to Mr. Robinson that he was to get $5,000 from Stacey, and suggested that Mr. Robinson ought to receive $1,000 from Stacey also. Mr. Robinson repudiated any right to receive anything from the old man but his costs. About the same time, or before, the defendant had also, in conversation with Thomas Stacey, said that he would get him a farm from his brother and one for him (the defendant); and he boasted of his ability to "work" the old man. I have no doubt from what subsequently took place that the defendant was intending to bribe both Mr. Robinson and Thomas Stacey in this way, that they would assist in his fraudulent scheme—which he had already formed.

Some days before the 13th May the wife of the defendant was at the house of Stacey, and asked him to come out and buy a mortgage; and on the Wednesday before, Frederick Stacey, being at Stouffville, saw defendant and was requested by defendant to tell Stacey on Sunday night or Monday morning to come out on Monday, as he wanted to see him about some mortgaged property. Accordingly, on Monday 13th May Stacey started for Stouffville, but accompanied by his brother Thomas to look after him. His conduct at the railway station shews that that day was not one of his

good days; and I accept the evidence of Thomas Stacey as to what took place and as to the conduct and actions of his brother upon that day. The defendant had previously been in possession of the bank books of Stacey, and knew the amount he had in the bank. Stacey and his brother went to the house of the defendant, and there the defendant asked Stacey if he would sign a cheque for him, that he wanted a small sum, and just wanted it for a few days. The old man assented, and a blank cheque was produced to and signed by him, and a few minutes thereafter he went home. I am unable to accept the story of the wife of the defendant and her sister or that of the defendant.

Thereafter the defendant tried to get Mr. Todd, a grain merchant of the place, to fill in the blank cheque. Mr. Todd refused, and the defendant filled in the amount, $5,000, himself. Thomas Stacey had been induced at the time of his brother's signature to add his own as a witness; and, after the defendant had filled in the amount, the defendant and his wife also signed as witnesses.

The old man rued what he had done as soon as he appreciated it, and an action was begun, as I have said, on 21st May. In the meantime Miller had paid $100 to Mr. Robinson, affecting to act as agent for Stacey, and upon Stacey's account; this sum Mr. Robinson at once returned when he found how it had been obtained. The conduct of this solicitor throughout was, so far as appears, honourable and straightforward.

I do not think it necessary to go through the somewhat voluminous evidence. At the conclusion of the case, I intimated what my impressions then were, and what I should find as facts unless these impressions were shaken by argument or by the perusal of the evidence of the defendant. After hearing argument and after reading that evidence, these findings I now make, and they may be referred to in case of further proceedings.

The defendant alleges that this sum of $5,000 was a gift. I find that it was not a gift; that the old man was induced by fraud to sign the blank cheque, it being represented that it was for a small sum only, and that as a loan; that in his then mental condition he was not able to thoroughly appreciate the effect of what he did; and that he repudiated it as soon as he could understand what he had done. No authority is needed for the proposition that with such a finding

the plaintiff is entitled to a verdict, and that is not contested.

There is another ground upon which I think the alleged gift could not stand. The defendant was in a position towards the deceased of a fiduciary character; he had no right to accept a gift from Stacey without making it perfectly clear that he understood and intended the full effect of what he was doing, even if it be, as contended, that it is not necessary that independent legal advice must be shewn to have been had, as to which I need not decide. Nothing in the cases cited: Trusts and Guarantee Co. v. Hart, 32 S. C. R. 553, Empey v. Fick, ante 144, and Jarvis v. Jarvis, ante 831, is at variance with this conclusion.

I am glad that there is nothing in the law to prevent me rectifying this wretched fraud.

There will be judgment for the plaintiff declaring that the cheque was obtained by fraud; that the money still in the Standard Bank is the money of the plaintiff; and that the plaintiff is entitled to recover from the defendant the sum of $5,000, and interest thereon from 14th May, 1907, the plaintiff crediting thereon the amount to be received from the bank; the defendant Miller will also pay the costs of the plaintiff and of his co-defendants.

NOVEMBER 19TH, 1907.

DIVISIONAL COURT.

LAMONT v. WINGER.

Fraud and Misrepresentation—Purchase of Property—False Representations as to Business—Findings on Evidence—Dismissal of Action—Suspicious Circumstances.

Appeal by plaintiffs from judgment of BOYD, C., ante 190.

G. T. Blackstock, K.C., and J. G. Wallace, Woodstock, for plaintiffs.

G. H. Watson, K.C., and A. G. Campbell, Harriston, for defendant.

THE COURT (FALCONBRIDGE, C.J., ANGLIN, J., RIDDELL, J.), dismissed the appeal with costs.

ANGLIN, J. NOVEMBER 20TH, 1907.

WEEKLY COURT.

RE COY.

Will—Construction—Specific Bequest to Wife—Lapse by Predecease of Wife—Residuary Clauses—Conflict—Declaration of Intestacy.

Summary application by the executors of John Coy, deceased, for an order determining a question arising under the will of the deceased.

D. C. Ross, Strathroy, for the executor and for James Coy, Jessie Davidson, Ellen Root, and Mary Waters.

F. P. Betts, London, for Roy Luce, an infant.

H. C. Pope, Strathroy, for Richard Coy.

ANGLIN, J.:—The material parts of the will of the late John Coy are as follows:—

"1. I give, devise, and bequeath unto my wife Sarah $1,000 to be her own absolutely. I also give, devise, and bequeath unto my wife the use of all my real estate and the use of the balance of my personal estate, of whatever nature, that I may die possesssed of, during her natural life, subject to the following.

"2. I give, devise, and bequeath unto my son Richard a mortgage of $1,000 which I now hold against his property, with any interest that may be accrued, and I direct my executor to discharge the same as soon as conveniently may be after my decease.

"3. I give, devise, and bequeath unto the trustees of the Union Cemetery—known as Cade's—$50 to be used in improving said grounds.

"4. At my wife's decease I give, devise, and bequeath all my real and personal estate to my son James and to my daughters Jessie, wife of Thomas Davidson, Ellen, wife of Abner Root, and Mary, wife of Asa Waters, in equal amounts, share and share alike, save and except $200, which I give, devise, and bequeath unto my grandson Roy Luce. If at my wife's decease my said grandson Roy Luce be not of

age I direct my executor to deposit said sum of $200 in the Union Bank to his credit, to be paid to him when he attains his majority with any interest that may accrue.

"All the residue of my estate not hereinbefore disposed of I give, devise, and bequeath unto my wife."

The question presented for determination is whether the $1,000 bequeathed to the wife, who predeceased the testator, passes under the gift of all the real and personal estate to the son and 3 daughters, or whether the intestate died intestate as to this sum of $1,000.

Had there been no lapse of any bequest, undoubtedly there would be no estate upon which the residuary clause in favour of the wife could have operated. The will without this clause, in that event, made a complete disposition of the testator's estate.

It is obvious that, had the wife lived, the provision in favour of the son and the 3 daughters would not have carried any interest in the $1,000 bequeathed to the wife. Does the circumstance that his wife pre-deceased the testator have the effect of enlarging the gift in favour of the son and daughters so as to make it include this sum of $1,000 bequeathed to the wife. The gift of $1,000 in favour of the wife, in the event of its failing, could not, in any circumstances, be the subject of disposition under the ultimate residuary clause in which the wife herself is named as a legatee.

I do not understand that the effect of the lapse of a legacy is to delete from the will for all purposes the provision containing such legacy. It may well be looked at to aid in construing the instrument as a whole, and to determine what effect should be given to the other provisions which the will contains. Here both the pecuniary legacy of $1,000 and the general residuary bequest lapse from the same cause. Yet I think both should be taken into consideration in determining the true construction of the paragraph numbered 4.

It is quite apparent that the clauses numbered 2 and 3 . . . are "the following" to which the gift in clause 1 is made subject. To properly appreciate the effect of this will, it should, I think, be read in this manner: "I give, devise, and bequeath $1,000 to my wife Sarah absolutely; and, subject to two bequests which I make, of a mortgage of

$1,000 to my son Richard, and of $50 to the trustees of Cade's cemetery, I give, devise, and bequeath to my wife, for life, the use of all my real estate and of the balance of my personal estate; and at my wife's decease I give, devise, and bequeath all my real and personal estate to my son James and my daughters Jessie, Ellen, and Mary, in equal shares, except $200, which I bequeath to my grandson Roy Luce. All the residue of my estate I devise and bequeath unto my wife."

The introductory words of paragraph 4 of the will—"at my wife's decease"—direct attention to the earlier part of the will to ascertain what property dealt with would, according to its terms, upon the death of the wife, become available for further disposition by the testator. Upon looking through the will it is clear that only the real estate and the portions of the personalty of which the wife was given the life use are in this position; and, although the testator uses the comprehensive terms "all my real and personal estate" in the paragraph numbered 4, having regard to the introductory words "at my wife's decease," the subject of disposition in that paragraph may well be, and I think should be, read, not as "all my real and personal estate," in the widest sense, but as "all my real and personal estate hereinbefore bequeathed to my wife for life." When the will is paraphrased as I have indicated, the position of the gift of realty and personalty to the sons and daughters following immediately upon the life interest given to the wife in both, and its introduction by the phrase "at my wife's decease," leave little or no room to doubt that the testator intended to give his son and daughters the remainder in or residue of the property in which he had given his wife a life interest.

The devise for life to the wife, and the gift of realty to the 4 children after the decease, of course contemplated the same property—all the testator's realty. The view that the testator, in the bequest of personalty to the wife for life, and in the gift of personalty to his 4 children, intended to deal with the same property, is further supported by the fact that both the life bequest and the gift to the children are made subject to the same deductions, viz., the mortgage bequeathed to Richard and the gift of $50 to Cade's cemetery.

The fact that a general residuary clause follows confirms this construction.

The presence of a subsequent general residuary clause in a will does not suffice to justify the Court in cutting down a previous disposition contained in the will which is clearly residuary in character, and which, upon any view of the whole will, is necessarily so comprehensive that it completely disposes of the entire estate, or of all the property of any one kind: In re Isaac, [1905] 1 Ch. 427; Johns v. Wilson, [1900] 1 Ir. 342. Indeed, a general residuary clause in such a will may, if necessary, be deemed to have been added merely "for the sake of greater caution or as a usual form:" Re Pink, 4 O. L. R. 718, 7 O. W. R. 772.

But the authorities indicate that if there is a later general residuary clause, and the earlier clause, though framed in language sufficiently broad to render it a general residuary disposition, can, upon any admissible construction, be read as relating to particular property, it may be so construed.

. . . .

[Reference to Jull v. Jacobs, 3 Ch. D. 703; Smith v. Davis, 14 W. R. 942; Woolcomb v. Woolcomb, 3 P. Wms. 112; Patching v. Barnard, 28 W. R. 886; Easwin v. Appleford, 5 My. & Cr. 56; In re Jefferson Trusts, L. R. 2 Eq. 276; Champney v. Davy, 11 Ch. D. 949.]

The bequest of the remainder in the personalty (an executory bequest—Jarman, 5th ed., p. 837 et seq.) to the son and daughters may, in a certain sense, be regarded as analogous to the gift of a particular residue, i.e., the residue of the particular property in which the widow had been given a life interest. That interest lapsing, upon the death of the testator the estate in remainder takes immediate effect in possession. If the remainder be regarded as a residue, the lapsed life interest would fall into it as the particular residue of the property out of which such life interest had been given: De Trafford v. Tempest, 21 Beav. 564; Theobald, 6th ed., p. 232.

But the $1,000 given to the wife absolutely had been entirely segregated from the property thus dealt with. Forming no part of that property, the $1,000 would fall, not into the particular residue of the property in which the wife had been given a life interest, but into the general residue of the personalty.

Notwithstanding the strong leaning of the Courts against any construction of a will which leads to a partial intestacy, I think that the proper effect to be given to the several pro-

visions made by this testator, is that which I have outlined above.

An order will, therefore, issue declaring that John Coy died intestate as to the sum of $1,000 bequeathed to his wife. Costs of all parties out of the estate, those of the executor between solicitor and client.

RIDDELL, J. NOVEMBER 20TH, 1907.

TRIAL.

MURRAY v. CRAIG.

Principal and Agent—Agent's Commission on Sale of Mining Property—Negotiations for Purchase—Agent a Member of Purchasing Syndicate—No Contract Made—Subsequent Contract through another Agent—Introduction by Plaintiff.

Action for a commission on the sale of a mining property.

J. B. Bartram, for plaintiff.

J. L. Ross, for defendant Crawford Craig.

S. H. Bradford, for defendant B. A. C. Craig.

RIDDELL, J.:—The plaintiff is a mining broker in Toronto, and in November, 1906, he went to Latchford and examined a mine belonging to the defendant Crawford Craig. Some negotiations took place, which I do not think of much importance in view of what followed—but I think that, so far as Craig was concerned, the plaintiff appeared as an intending purchaser from and not as an agent to sell for him. It appears that a common practice in these mining deals is for a syndicate to buy a mine, pay down a certain sum, incorporate a company, sell stock in that company to pay for the mine, and take the remainder of the stock for their profit. It will be seen that it depends upon the price at which the stock can be sold what the profit of the syndicate will be—and that price depends upon the skill with which the company is floated, as well as (or perhaps rather than) the intrinsic value of the mine. And it is quite the usual thing for some member of such a syndicate to play the part

of broker and receive from the vendor a commission upon the sale, while the purchase is taken in the name of another or others of the syndicate. The commission apparently sometimes is and sometimes is not divided. Every business has its own methods, and its own code of ethics, and, while the method of proceeding spoken of looks odd at first sight, there is nothing improper in it, if thoroughly understood by all concerned. The defendant Crawford Craig thought that the plaintiff was a purchaser, as I find upon the evidence. If it should turn out that it be held that this is material, the evidence for the production of which I declined to adjourn the trial perhaps may be adduced on affidavit or otherwise. Had I thought it was material, I should have allowed the evidence to be put in on affidavit, or have adjourned the hearing, as might have been thought advisable.

Nothing, however, came of the negotiations, and, whatever may have been the capacity in which the plaintiff was acting, or affecting to act earlier, on 28th November be entered into a contract to purchase, and made a new agreement on 3rd December as a purchaser. These were not carried out. I do not think that Crowford Craig placed in the hands of the plaintiff the Craig property for sale after the other property had been withdrawn—and it must be found that the plaintiff was endeavouring to get up a syndicate to buy the property, and perhaps also as well trying to find a purchaser. The owner undoubtedly looked upon the plaintiff as a proposing purchaser, and not as a mere agent, from and after 28th November, 1906. And, no doubt, if the plaintiff had effected a sale either to an outsider or to himself or to a syndicate or partnership, of which he might be a member, the owner would have allowed him a commission. But he did not effect a sale. Morden, one of his quondam associates, got up a syndicate, of which the plaintiff was not a member—and he (Morden) went to the owner and upon inquiry was informed that the Craig property was still in the market and effected a sale, or purchase, whichever term may be preferred. This purchase nominally was by Kennedy, but in reality Kennedy, Morden, and Jackson were equally interested—paying each $2,000 and looking to the proceeds of the sale of stock in a company to be formed to pay the purchase price, $60.-000. Morden was the broker and ostensible agent through whom the sale was effected, and therefore he received the

commission, though the vendor thought that probably he was one of the syndicate himself. This commission has been paid, so far as it is due, to Morden. I do not think it of the slightest importance (if the fact be so) that Morden may have had his first knowledge of the mine or of Craig through the plaintiff—nor that Kennedy had.

The implied agreement by the owner was that he would pay a commission to the person who brought about an actual sale, and not merely tried to do so, or gave information that ultimately resulted in a sale. . . .

[Reference to Marriott v. Brennan, ante 159.]

Cavanagh v. Glendinning, ante 475, does not prevent the giving effect to my view of the law in this particular case. And my opinion is not shaken by the cases cited by Mr. Bartram in his very careful and exhaustive argument.

The action must be dismissed as against the defendant Crawford Craig with costs.

There is no semblance of evidence upon which the defendant B. A. C. Craig can be held liable, even if the action should succeed against his co-defendant.

BOYD, C. NOVEMBER 21ST, 1907

TRIAL.

BREAULT v. TOWN OF LINDSAY.

Highway—Non-repair—Defect in Sidewalk—Injury to Pedestrian—Supervision—Notice to Municipal Corporation—Notice of Accident—Sufficiency.

Action for damages for injuries sustained by plaintiff by a fall upon a sidewalk alleged to be out of repair.

BOYD, C.:—I give credit to all the witnesses as desiring to tell the truth, though I think some of them are mistaken as to details. The evidence is not in accord as to the very way in which the accident happened; but assuming that the person injured and the friend who was with her are the most accurate, it appears that the plaintiff fell because the plank on which she stepped gave way under their tread, and caused her thereby to trip and fall forward. The friend says that she was going a foot or so ahead of the plaintiff—

it being a narrow footwalk (3 feet wide)—and passed over the plank in question, which was not broken; when she looked back after the fall, she saw that the plank was broken. She described it as a 9 or 10-inch plank and broken about half way across at a place where it would be between the stringers or sills below. A son of the plaintiff, going to view the spot the same evening, found the plank in place, but loose; he stepped on it, and it went down. He judges that the plank had sprung into place after the plaintiff had stepped on it and before he saw it—so that the break was of such a character as to shew that the plank, though weak as a whole at that point, was not rotten all through. The witnesses, many of them, speak at large with reference to the whole extent of the sidewalk on that side of Sussex street—396 feet in all. It was said to be uneven, with boards or sills rotten, and planks loose. I went over the place after the trial, and I found, as the town witnesses said, that the whole was in fairly good repair, with this difference, that the north end (where the accident was) appeared to be in better condition than the south end. It is true that the walk was put down some 17 years ago—with 2-inch pine planks (taken from other streets) and new cedar stringers. . . . I saw no reason to doubt what was said, that the life of the wood, whether cedar or plank, was not run out, and that nails might hold in it for some years more. It was not proved that any planks were loose, in the sense of being kept in place merely by their own weight, but some of them were loose in this sense, that in hot dry weather (such as in June, when the plaintiff was hurt) the nails had a tendency to draw out to some extent, and so the board might shake a little. These call for attention, and it was said by Hepburn (whose duty it was to look after the board walks) that he was over this walk two days before the accident, and made fast any nails that were out of place. He appears to have made a weekly round for this purpose. No witness has said that the plank in question appeared to be loose or rotten before the accident, and no one ever saw a broken plank on the walk before this occasion. Considering the age of the structure, it was in as reasonable repair at this point as could be expected, and was safe for ordinary travel. It was not neglected by the authorities, and it was not considered expedient or necessary to expend more money on it

than was done, as it is soon to be replaced by a granolithic pavement.

I think my judgment may be safely placed on this ground, that there is no evidence of defective condition in the locus in quo existing so long or so conspicuously as to fix imputed notice of the defect upon the town. When the evidence as to the walk at large is brought down to the particular spot, there is too much vagueness to bring home liability to the corporation. The burden of proof resting on the plaintiff has not been satisfied. The evidence falls far short of what was proved in McGarr v. Town of Prescott, 4 O. L. R. 280, 1 O. W. R. 53, 439. More nearly in touch with this case is McNiroy v. Town of Bracebridge, 10 O. L. R. 360, 6 O. W. R. 75.

It is not essential to dispose of the issue raised as to the sufficiency of the notice. It gives the time (10th June), the place (in Sussex street south, in Lindsay), the accident (serious personal injuries to the plaintiff), and the cause of it (defect in the sidewalk). Perhaps it would have been better to indicate the particular side of the street, and that it was a defective plank (as was said by MacMahon, J., in McQuillan v. Town of St. Mary's, 31 O. R. 403.) Here, however, I think that the test suggested by Street, J., in McInnes v. Township of Egremont, 5 O. L. R. 713, 2 O. W. R. 382, was satisfied (having regard to the immediate action of the municipal authorities), that time and place were given with reasonable particularity so as to identify the occasion, and the corporation were not misled or prejudiced.

But I place my judgment on the merits, and dismiss the action: no costs.

TEETZEL, J. NOVEMBER 22ND, 1907.

TRIAL.

RUSSELL v. BELL TELEPHONE CO.

Negligence—Injury to Person—Findings of Jury—Judge's Charge—Nonsuit.

Action for damages for personal injuries sustained by plaintiff, owing to the negligence of defendants, as alleged.

Otto E. Klein, Walkerton, for plaintiff.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, for defendants.

TEETZEL, J.:—At the close of plaintiff's case and of the trial the defendants moved for a nonsuit.

The only question of negligence upon which there was, in my opinion, any evidence to be submitted to the jury were: (1) whether, in the circumstances, the defendants' foreman should have warned the plaintiff of danger from the adjacent electric power line; and (2) whether the foreman told the plaintiff that the power current was not in fact on the line. I instructed the jury that these were the only matters of negligence which were open for their consideration, and the charge was not objected to.

In answer to the first question submitted, the jury found negligence, and in answer to the second question, requiring them to "state fully in what such negligence consisted," they state that "the foreman should insist that the operator should wear gloves in such dangerous places."

By giving this specific answer I think it must be held that they refused to find in favour of the plaintiff, and did find in favour of the defendants, in respect of the other two matters mentioned.

The negligence found by the jury was not set up in the statement of claim or particulars, and there was no evidence directed to any such issue.

I must, therefore, give effect to defendants' motion for a nonsuit, and direct the action to be dismissed with costs.

NOVEMBER 22ND, 1907.

DIVISIONAL COURT.

TRETHEWEY v. TRETHEWEY.

Evidence—Motion to Divisional Court for New Trial—Discovery of Fresh Evidence—Examination of Witnesses on Pending Motion—Appointment for—Motion to Set aside —Rules 491, 498.

Appeal by defendant from order of ANGLIN, J., ante 684, reversing order of Master in Chambers, ib., and setting

aside an appointment obtained by defendant for the examination of witnesses upon a motion, of which the defendant had served notice, returnable before a Divisional Court, to set aside the judgment at the trial, and dismiss the action, or for a new trial.

R. McKay, for defendant.

W. E. Middleton and J. B. Bartram, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., TEETZEL, J., RIDDELL, J.), was delivered by

RIDDELL, J.:— . . . The action was tried at Toronto, 20th September, 1907, and resulted in a verdict for the plaintiff. A notice of motion to a Divisional Court was served "for an order setting aside the judgment pronounced at the trial . . and that judgment be entered in favour of the defendant, or for a new trial, or for such further or other order as to the Divisional Court shall seem meet, upon the grounds that the said judgment is contrary to law and evidence and the weight of evidence . . . and (4) for a new trial, upon the ground that since the trial of the action the plaintiff has discovered material evidence shewing that the proposed purchaser was not ready and willing nor in a position to carry out the purchase upon the terms as stated, and had abandoned any proposed purchase; and upon grounds, etc., appearing in the evidence had and taken at the trial, and in the evidence to be taken in support of this motion.

Notice was then given that in support of this motion would be read (amongst other things) "the examination of J. S. Thompson, H. S. Strathy, E. B. Cronyn, G. T. Sammers, and Frank C. Laing, to be taken upon and in support of this motion, the affidavit of W. G. Trethewey filed," etc.

No such affidavit as that last mentioned was in fact filed, but, this notice of motion being served on 19th October, an appointment was taken out on the 22nd for the examination of J. S. Thompson, H. S. Strathy, E. B. Cronyn, G. T. Sammers, and Frank C. Laing, as witnesses on the pending motion, and this was served upon the solicitor for the plaintiff on 19th October.

Thereupon a motion was made by the plaintiff before the Master in Chambers to set aside the appointment, upon the ground, amongst others, that the leave of the Court had

not been obtained. The Master refused the motion, but upon appeal my brother Anglin reversed the decision of the Master, and set aside the appointment. The defendant now appeals.

The defendant's counsel, upon being asked upon the argument before us whether he, in order to succeed in the appeal, must not go so far as to contend that upon serving a notice of appeal to the Divisional Court he might examine without leave and of right all the brokers and miners and others in the province in order to strengthen his case in the Divisional Court, stated that he did make such a claim as of right.

That means that the contention is that when a litigant has failed in the trial Court, he may when he appeals examine compulsorily every person in Ontario, whether he knows anything about the case or not—and that without filing an affidavit of the appellant himself or obtaining the leave of the Court or a Judge. This is a most alarming claim to make—and before we accede to it we must see that it is well founded in the statutes or rules. Of course we must interpret the legislation as it stands, and not make new law, or hesitate to give full effect thereto without shrinking by reason of what we may think to be an unexpected result. A litigant is entiled to all that the law or practice gives him, and we have no right to dictate to him so long as he keeps himself within his rights.

The Rules governing examinations of this character are 489 et seq.

Rule 489 provides that "evidence upon a motion may be given by affidavit."

Rule 491: "A party to any action or proceeding may require the attendance of a witness to be examined before any officer having jurisdiction in the county where the witness resides, for the purpose of having his evidence upon any motion, petition, or other proceeding before the Court or any Judge or judicial officer in Chambers."

The case of Clisdell v. Lovell, 9 O. W. R. 687, 10 O. W. R. 203, shews how very far this Rule may be applied in cases to which it is held to be applicable. As at present advised, I would be of the opinion that if this were the Rule applicable to the present matter, the claim of Mr. McKay would have gone a short distance at least on the way to be substantiated. But 498 is the Rule which applies to motions of the kind.

498 (1): "In all appeals . . or hearings in the nature of appeals, and in all motions to set aside a verdict or finding of a jury, and to set aside or vary a judgment, the Court or Judge appealed to shall have all the powers and duties . . . and full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to or as may be directed—

"(2) without special leave if the matters have occurred since the judgment, but—

"(3) upon appeal from a judgment, order, or decision given upon the merits at the trial or hearing of any cause or matter, such evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court."

The claim now made seems to be based on the proposition that the applicant has, upon a motion for a new trial at least, the right to read the evidence of any person he thinks fit, and the Court has no discretion but to hear it. It could not be that the right exists to take evidence—an absolute right to take evidence—unless there were the absolute right to use it. It may be well to look into the former practice.

Before the Act the practice was well established that in order to allow of affidavits being read as to newly discovered evidence, the applicant must file an affidavit made by himself or (and) the person intrusted with the conduct of his case, shewing that the evidence could not by reasonable efforts have been discovered before trial. There was no absolute right on the part of the applicant to read any affidavit as to the alleged newly discovered evidence, and until he had complied with this pre-requisite the Court might, and in strict practice would, refuse to receive the affidavit setting out what this evidence was. The Court, upon hearing the grounds upon which it was desired to bring before it the new evidence, would allow the affidavit to be read or refuse it as the Court saw fit.

Many cases there are where the Courts have refused to listen to affidavits upon other grounds. For example, the Court will not receive affidavits of witnesses examined at the trial to explain or add to their evidence given thereat. "The general rule is not to hear affidavits of witnesses examined at the trial:" per Lord Abinger, C.B., in Phillips v. Hatfield, 10 L. J. N. S. Ex. 33. "The general rule is that you cannot

use the affidavit of a person who was a witness on the trial for the purposes of a new trial: "Bompas, Serjeant, arguing in Edgar v. Knapp, 7 Jur. 553, at p. 584; Chitty's Archbold Q. B. Prac., 12th ed., p. 1537.

And in many cases it has been laid down that, e.g., the evidence of jurymen as to what took place in the jury room would not be received: Farquhar v. Robertson, 13 P. R. 156.

It seems plain that before the change in the practice there was no absolute right to use any affidavit the applicant might desire to use—the application for a new trial is an appeal to the indulgence of the Court, and the Court has and must have full power to hear such material as the Court may think proper—and such material only.

Such, then, having been the state of the law before our Rules, have these Rules made any difference—in other words, on an application for a new trial now has the applicant the right to read any affidavit he sees fit? There is no such provision in the Act or Rules—and the right to read an affidavit must be now the same as before, and no higher. That being so, it must, I think, follow that the right to read an examination must also be given by the Court, and is not ex debito justitiæ. And if the absolute right to read such examination does not exist, I cannot think that the absolute right can exist to have such an examination taken.

But I do not think it is necessary to go beyond the wording of the Rules to decide this motion. Rule 498 provides for the case of evidence upon appeals of this kind—and I think thereby the application of Rule 491 is excluded. The Court is given "power to receive further evidence upon questions of fact;" but such evidence is to be "as directed." This, I think, means that before evidence of the kind is to be taken, a direction must be had as to the manner of taking it; and this quite irrespective of any supposed application of sub-sec. (3). Mr. McKay, however, contends that the Rule refers simply to such evidence as is intended to be used in connection with evidence already given, and not such evidence as will be of avail to secure a new trial. There is no such distinction made in the notice of motion; and it would appear that the evidence is desired for general use upon the appeal. But, even if it were so limited, I think that such evidence is still "evidence upon questions of fact," within Rule 498.

Then it is contended that this is not evidence sought to establish any fact, but evidence which it is desired to use in the endeavour to convince the Divisional Court that a new trial should be granted. This distinction is unsubstantial, and the evidence is still "evidence upon questions of fact."

There have been, so far as I know, only two cases in Ontario upon this point.

Kendry v. Stratton (10th June, 1893, not reported). In this case a verdict was given for the defendant at the trial. Upon motion for a new trial made by the plaintiff, upon the ground that it had not been proved that certain documents had been delivered, the defendants took out an appointment to examine a witness that they might establish this upon the motion. Mr. Winchester, Master in Chambers, set this aside, on the ground that no such examination could be had except after a direction by the Divisional Court. The motion to the Divisional Court came on immediately. Counsel for the defendants mentioned the matter to the Divisional Court, and asked to be allowed to go on with the examination, and for an enlargement for that purpose. The Court (Armour, C.J., Falconbridge and Street, JJ.), expressed an opinion that the appointment had been rightly set aside, and declined to grant the enlargement.

The matter came up again in Rushton v. Grand Trunk R. W. Co., 6 O. L. R. 425, 2 O. W. R. 654. In that case the Master had referred a similar question to the Divisional Court, and it came on before my Lord and Mr. Justice Street. Kendry v. Stratton was cited, but Mr. Justice Street does not seem to have considered himself bound by what was done in that case, and he says (p. 426) that he is of the opinion that in a proper case the evidence upon such a motion may be taken under Rule 491. My Lord did not join in this opinion, and the opinion itself is plainly obiter. It is to be observed that the appointment was set aside, thereby shewing that it is not ex debito justitiæ to take such evidence. If the test that I have suggested be a true one, Rushton v. Grand Trunk R. W. Co. should be fatal to this appeal. However that may be, the Rushton case is no authority for what is contended.

The appeal should be dismissed with costs.

It may be that on a proper case being made, the Divisional Court may give a direction that such evidence be taken —with that we have nothing to do.

RIDDELL, J. NOVEMBER 23RD, 1907.

TRIAL.

BENOR v. CANADIAN MAIL ORDER CO.

Company—Managing Director—Salary—By-law of Board of Directors—Approval by Shareholders—Money Expended for Company—Action by Assignee—Addition of Assignor as Plaintiff—Set-off—Misrepresentations—Payment for Stock Allotted to Managing Director for Services—Voluntary Winding-up.

Action by the brother and assignee of one J. T. Benor for salary alleged to have been earned by the latter as managing director of the defendant company, and for cash paid by him on account of the company.

R. W. Eyre, for plaintiff.

W. Proudfoot, K.C., and W. H. Grant, for defendants.

RIDDELL, J.:—One J. T. Benor . . . took up the study of the mail order business, examined into it theoretically for some time, and went to Chicago and was allowed to go through the various departments of a large mail order concern in that city. . . . On 11th May, 1905, Benor and one Crawford entered into an agreement with the Industrials Agency Limited, an incorporated company carrying on the business of procuring the incorporation of joint stock companies. The substance of this agreement was that the Industrials Agency were to procure the incorporation of a joint stock company under the Ontario Companies Act, by the name of "Canadian Mail Order Limited," or some similar name; Benor and his associate, at their own expense, to advertise the preference stock of the new company, and devote all their time to selling it. The Industrials Agency were to devote part of their time, and out of the first instalment paid upon all stock sold, except that sold to the directors of the company, the Industrials Agency were to receive 12½ per cent. in cash. This was afterwards somewhat modified. . . .

The Industrials Agency at once set to work to get suitable persons to incorporate the company and become directors, and Benor assisted, so far at least as procuring one Brown to become a director. Men of the highest respectability were induced to form the company and become directors . . . None of these, it is sworn, paid anything, but from some, if not all, was obtained a promise to subscribe and pay for 10 shares of the preference stock of the company, upon condition of obtaining 2,500 shares of the No. 1 common stock and becoming a permanent director of the company after incorporation. I think the fair inference from all the evidence is that it never was intended that the directors should pay anything, but that they were to receive a block of common stock for becoming directors and in effect giving the new company an appearance of solidity. . . . It is beyond question that Benor took advantage of the names of these directors in selling the stock of the company.

A charter was granted under the Ontario Companies Act on 21st June, 1905. Benor was not an applicant in form for this charter, and, while he had once signed an application for stock, this was not acted upon, but it had been abandoned before the application to the Provincial Secretary which was acceded to had been drawn up. I find as a fact that this document (exhibit 8) was signed by Benor when the name of the proposed company was not filled in, and that it is not a subscription for stock in this company, and was abandoned—it should have been destroyed when it was abandoned, and should not have been used against Benor or his assignee in this action. . . .

The provisional directors met on 3rd July, 1905, at 8 p.m.; appointed Mr. S. president and Mr. C. secretary, and passed a set of by-laws which had been prepared. They also passed a resolution which will be referred to later. On 4th July, at 10.30 a.m., a meeting of the shareholders of the company was holden; all the shareholders were present. . . . This meeting confirmed what had been done by the provisional directors, and elected all the shareholders (including Benor), except one H., directors. A resolution was also passed "that the directors be and are hereby fully authorized and empowered to take such steps as are deemed necessary to dispose of the remaining shares of the first preference stock on such terms and conditions as they may determine."

At 11 a.m. of the same day the directors met, organized the permanent board, and passed, amongst others, the following resolutions: "that James T. Benor be elected managing director of the company;" and "that the salary of the managing director and the secretary-treasurer until the company is in operation be fixed at $150 each per month."

Neither of these resolutions was ever confirmed at a general meeting of the company, and indeed no general meeting of the company was ever held thereafter. But on 5th July the following document was signed by all the shareholders: "We, the undersigned, being all the shareholders of Canada Mail Orders Limited, hereby confirm the minutes of the first shareholders' meeting of the company held . . . Tuesday the 4th day of July, 1905."

At the first meeting of the permanent directors it was arranged that Benor should devote his time for the present to selling the preference stock of the company (with a bonus of the common stock), and, as the money to be paid in on the stock sold was to be placed at once in the bank, it was arranged that Benor should advance money for expenses and commissions, etc., on such sale in the meantime. He had no money of his own, and accordingly borrowed largely from his brother, the plaintiff, for that purpose. Benor undoubtedly made every effort to effect sales, and used effectively the names of the directors in doing so. He is charged with making misrepresentations in his endeavours to effect sales. I do not find that to be the case. But, as it may become material to consider this in actions brought by others, this judgment will be without prejudice to any action that any one alleging himself to be deceived may have against Benor. In such actions further evidence may, perhaps, be adduced. . . .

Many applications for stock were received, and shares were allotted to those subscribing. I find as a fact that Benor did not subscribe for stock in the company, but that he did act as director. By-law No. 13, drawn up by him or prepared with his cognizance and approval, provides that "any shareholder who holds 100 fully paid up shares may be elected a director." At the meeting of the provisional directors a resolution was passed reciting that Benor had spent time and money in gathering information, that he had

offered to "supply and transfer to the company all such information and data and the benefit of all such labour, in consideration of the receipt of 25,000 fully paid and non-assessable shares of the 2nd preference stock and 25,000 fully paid and non-assessable shares of the common stock of the company." The resolution then goes on—"that the said offer of Mr. J. T. Benor be accepted, and that, therefore, 25,000 fully paid and non-assessable shares of the 2nd preference stock and 25,000 fully paid and non-assessable shares of the common stock be forthwith allotted to the said J. T. Benor." The president and secretary were authorized to execute the certificates of 2nd preference stock and common stock to Benor accordingly. All this, as I have pointed out, was before the attempted confirmation by the shareholders already spoken of. A stock certificate for 25,000 shares of fully paid up common stock was executed by the president and secretary on 23rd September, but never was actually detached from the book. However, Benor must be held to have accepted the stock, as we find him executing transfers from time to time of common stock, and he also makes transfer of 1,000 shares of 2nd preference stock to each of the 7 gentlemen (shareholders), except H., and to one W., a certificate for the 25,000 shares of this stock having been executed at the same time as the certificate for the common stock, and also remaining in the book undetached. Other transfers of this stock seem to have been made as well.

Benor went on selling stock from time to time, and also paying commissions, etc., for services rendered to the company. The company never in fact embarked upon the business for which it was incorporated; but I am not able to find that thereby the company suffered loss. No evidence was given or offered to shew that had the company actually engaged in business, they would either certainly or probably have made money or would not have been worse off than they are. Every one connected with the company seems to have lost heart, and finally it was put into liquidation. Benor, having borrowed money from his brother, the plaintiff, assigned to him his claim. At the time the plaintiff was ignorant of any existing or possible claims of the company against Benor. When I have added that I find that Benor did not act treacherously or improperly by the company, I think all the facts appear upon which to rest a judgment.

The action is twofold: (1) for the salary to which Benor claims to have been entitled; (2) for cash paid by Benor on account of the company. . . .

Had it not been for the decision of the late Mr. Justice Rose in Re Ontario Express and Transportation Co., The Directors' Case, 25 O. R. 587, I should have thought that a director by being called or appointed "managing director" did not better his position, but that he remained as regards remuneration in the same position as an ordinary director. But that decision I do not find overruled or questioned, and I must follow it—coming, as it does, after and with a full consideration of the effect of Livingstone's Case, 14 O. R. 211, 16 A. R. 397.

As to the claim that the board who appointed Benor managing director and fixed his salary were not duly elected, and the members thereof were not duly qualified, I do not think this objection open to the company. Five of these were shareholders by the charter, and these 5 would be a quorum—these 5 indeed were the board by the charter, and so continued unless the election of the 7 was legal.

The second claim is, I think, free from difficulty. The money expended by Benor was expended for the company, and certainly under the bona fide belief that he was doing so under the authority of the company lawfully given. The company have had the full advantage of the expenditure, and it would be monstrous to hold that the money should not be repaid.

Then as to the claim for set-off—it will be necessary to set out certain further facts to dispose of this claim.

Benor having assigned all his claim against the company to the original plaintiff on 21st September, 1906, the assignee did not serve notice of the assignment upon the company, but immediately and upon the same day he issued the writ in this action.

An application was made under the Ontario Winding-up Act, R. S. O. 1897 ch. 222, to the County Court of York, and upon 11th October, 1906, an order was made for winding-up, and also appointing a liquidator. An order seems to have been made in the County Court on 18th April, 1907, but that may be disregarded, as it is superseded by another of 1st May, 1907. This order provides that the action may proceed,

and that the action and all proceedings shall stand in the same plight and condition as they were at the time of the winding-up order—and the liquidator is not made a party to the action.

It does not appear that any order had been obtained under sec. 23 (2) or sec. 33 of the Act; and I am not quite sure of the reason for the order of 1st May. At all events the present action proceeded as an ordinary action against the company. No reference to the winding-up order is made in the statement of defence, and the action has been studiously conducted without reference to the winding-up. The fact that there had been a winding-up order came up incidentally, and it was at my request that the proceedings were put in. This is not a proceeding under the Winding-up Act, and the rights of the plaintiff must be determined as they were at the time of the issue of the writ.

There are two grounds of set-off which have been urged. First, that the assignor misrepresented the amount of stock that he was receiving and had received, and the amount of cash he had put in or was going to put in. I find the fact in favour of the evidence of Benor in this respect, and my findings at the trial may be looked at in case of further proceedings. But, even if there were misrepresentations by Benor, they were not made to the company, but to certain persons whom Benor was desiring to induce to become interested in the company, and, if anything, the company profited by the alleged misrepresentations. And I have no evidence to shew that if Benor had put in $2,000 cash, the company beginning business would have made a profit, and would not rather have been much more likely to make a great loss.

Then it is said that Benor should pay for the stock which he received under the resolution of 3rd July. At the general meeting of the company held on 4th July, 1905, at which were present all the shareholders of the company, this act of the provisional directors was confirmed by the general meeting. And remembering that of the $1,000,000 capital stock of the company, $500,000 was made first preference stock, upon which were to be paid dividends of 7 per cent. per annum, in priority to all else, and to be entitled upon distribution of the assets to priority to the par value of the stock and unpaid dividends—and that thereafter came the

$25,000 second preference stock, with the same privileges, subject to the first preference stock—and that the common stock was only to share pro rata in the remainder of the profits and assets with the first and second preference stock—I am not inclined to say that the common stock was worth anything. That seems to have been the view of those interested in the company, as it was given away lavishly as a bonus to those who would buy first preference stock. And as to the second preference stock, I think that it was worth very little indeed, if anything. Now it was $25,000 of the second preference and $25,000 of the common stock . . . that Benor was getting for all his knowledge (I am not forgetting his small salary) and for the benefit of his labours. No fraud can be found in this transaction, and I do not think that the company can now call upon Benor to pay for that which he took only in payment for some benefits he was conferring on the company. I am not deciding what would be the result if this were a proceeding under the Winding-up Act to make Benor a contributory. In the view I have taken, it is not necessary to decide whether either of these claims, if established, could be set off against the plaintiff, who honestly took the assignment of Benor's claim without any notice or knowledge of the alleged set-off, or facts which might justify any such claim.

There will be judgment for the plaintiff for the sum of $1,800, and interest from the teste of the writ, also for the remainder of the amount sued for, with interest from the same date, unless the defendants shall on or before 3rd December elect to take a reference as to the amount (excluding the $1,800 and interest, which is not to be referred). In case of a reference the Master will find and report the amount of money, with dates and items, expended by Benor for or on behalf of the company, including personal disbursements and the like—reserving to myself further directions and subsequent costs, if a reference be had. The defendants will pay the costs up to and including this judgment. . .

Having, upon his written consent filed, added J. T. Benor as a party plaintiff ab initio, I need not consider the troublesome question as to the effect of an assignment without notice to the debtor.

NOVEMBER 23RD, 1907.

DIVISIONAL COURT.

COLE v. CANADIAN FIRE INS. CO.

Stay of Proceedings—Fire Insurance Policy—Action on—Arbitration Act, sec. 6—Waiver by Pleading—Time for Applying.

Appeal by plaintiffs from order of MEREDITH, C.J., staying an action upon a policy of fire insurance.

G. C. Gibbons, K.C., and C. A. Moss, for plaintiffs.

W. H. Hunter, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., ANGLIN, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—The plaintiffs were insured by the defendants under a policy which, for the purposes of this motion, may be considered as containing the statutory conditions only. A fire took place on 15th April, 1907, and it appears that as to a certain part of the loss an appraisement was had. For some reason, not of any significance here, the insurers and insured did not agree as to the other property destroyed, and proofs of loss were delivered on 7th May. Some skirmishing took place in respect of a proposed appraisement, but no conclusion was reached, and upon the expiration of the 60 days (7th July) a writ was issued and served. On 26th July a formal demand for arbitration was served by the defendants, but no further proceedings were taken until the service of the statement of claim on 3rd September. The defendants delivered a statement of defence in which they deny the damage by fire, the amount of the damage, and the proportion payable by the defendants, deny the adjustment of the part and proofs of claim of the remainder, as well as the lapse of time for payment. They then plead specially the refusal of the plaintiffs to go on with the appraisal, the demand for arbitration, and the right of the plaintiffs to appoint an arbitrator, and conclude by saying that "they have been at all times ready and willing to pay and are still ready and willing to pay, according to

their policy, the true amount of their liability under the said policy, and that it is owing to the conduct of the plaintiffs in not proceeding first with the appraisal aforesaid, and in the second place in not proceeding with the arbitration aforesaid, that the said loss has not been paid;" and they "say that this action should not be proceeded with until after the said arbitration has been had." Issue was joined on 17th September, and notice of trial given for the imminent jury sittings to be held on 8th October at London.

A motion was made on behalf of defendants on 25th September before Meredith, C.J., to stay the action; and before him all defences . . . were withdrawn, and it was represented that the whole matter in dispute was the amount of the loss. The Chief Justice made an order staying all proceedings until further order of the Court.

Upon the appeal before us two grounds were relied upon.

First, that by the effect of clause 17 of the statutory conditions the cause of action had accrued before demand for arbitration, and the action being properly brought should not be stayed. Upon principle it is impossible to give effect to such a contention, and if authority were needed it is supplied by Hughes v. London Assurance Co., 4 O. R. 293.

The other objection is more formidable, based as it is on sec. 6 of the Arbitration Act, R. S. O. 1897 ch. 62. Insurers and insured under a policy containing or subject to clause 16 of the statutory conditions have been held to come within the words "any party to a submission" in this section and its predecessors: Hughes v. Hand-in-Hand Ins. Co., 7 O. R. 615, and other similar cases. The power given the Court to stay proceedings under this sec. 6 of R. S. O. ch. 62 is upon an application after appearance and before pleading or any other step in the proceedings. An application after delivery of statement of defence, as in this case, must be refused: West London Ins. Co. v. Abbott, 29 W. R. 584. And the case so much relied upon by counsel for the defendants, upon examination, does not support his contention.

In Hughes v. London Assurance Co., 4 O. R. 293, Hughes v. Hand-in-Hand Ins. Co. 3 C. L. T. 600, 4 C. L. T. 34, appearance was entered on 2nd November, 1883, and upon the same day notice of motion was served returnable 5th November. It will be seen that the insurance companies . . . brought themselves within the provision of what constituted at that time what is now sec. 6 of the Arbitration

Act, and were in a different position from that of the defendants here.

The fact that the right to arbitration is given by legislation does not make that right, when given, any higher than if it had been obtained by private contract, and I am of opinion that the application is too late.

There is no hardship in so holding. No claim can be made against the insurance company until the lapse of 60 days from the delivery of the proofs of loss. This is surely ample time to allow to an insuring company to determine whether they desire to contest the amount. Then, even after the accruing of the cause of action and issue of the writ, they have some 18 days before their statement of defence is due. During this time an application may be made for a stay; and if the defendants, instead of moving for a stay, choose to put in a pleading, they must be held to have elected that method of having their rights determined and to have waived the provision for arbitration. Upon an application to stay (if made at the right time) the Court could make an order staying the action generally, if the only question were that of amount, or staying the action so far as regards the amount, if there were other issues. The only other statutory provision for staying an action is to be found in the Ontario Judicature Act, sec. 57; and, no doubt, that reserves to the Court all its former powers. But this is not a case within such powers.

Appeal allowed with costs in this Court and below.