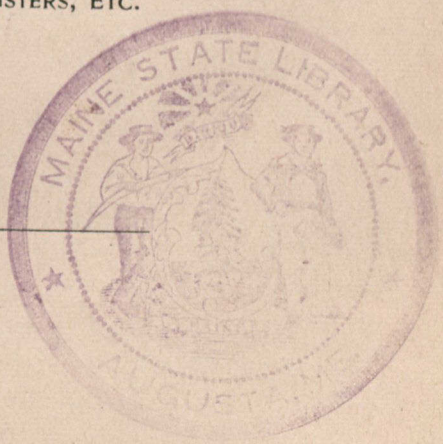
ONTARIO WEEKLY REPORTER

..AND..

INDEX-DIGEST

1902

EDITORS:
THOS. T. ROLPH AND E. B. BROWN, ESQUIRES
BARRISTERS, ETC.



TORONTO:
THE CARSWELL CO., LIMITED
1902

37219

TABLE OF THE NAMES OF CASES

REPORTED IN

VOLUME I. OF THE ONTARIO WEEKLY REPORTER

The figures indicate the pages of The Ontario Weekly Reporter on which the cases will be found.

A few cases published in the Ontario Law Reports during the year 1902, and not in The Ontario Weekly Reporter, are included in the table and in the accompanying digest.

D.

E.

F.

G.

THE
ONTARIO WEEKLY REPORTER
(1ST TO 11TH JANUARY, 1902, INCLUSIVE).

FALCONBRIDGE, C.J. 4TH JANUARY, 1902.

TRIAL.

DAVIS v. WALKER.

Donatio Mortis Causa — Solicitor — Lack of Independent Advice.

A practising solicitor, who had done any legal business which deceased had in her lifetime required to be done, was held not entitled to receive a donatio mortis causa from deceased, who had not had any independent advice with regard to it.

Walsh v. Studdart, 4 D. & War. at p. 171, applied and followed.

Action for a declaration that plaintiff is the owner of certain money evidenced and represented by certain bank books, a mortgage, and the title paper to about 20 acres of land, with an agreement of sale of the same representing the purchase price thereon, amounting in all to about $1,500, as a donatio mortis causa, and to have the same delivered to him by defendant, who was married to Betsy Ann Walker, deceased, late of the township of Colchester North, in the county of Essex, and is the administrator of her estate. The families of the plaintiff and deceased had been fast friends for over forty years and continually visited each other, and on the evening of 27th February, 1901, deceased, being then seriously ill, came to plaintiff's house and made the gift. The plaintiff is a barrister and solicitor practising in Amherstburg, and transacted any legal business that deceased required.

The action was tried at Sandwich.

W. R. Riddell, K.C., for plaintiff.

E. S. Wigle, Windsor, for defendant.

FALCONBRIDGE, C.J. — The rule that delivery of a chattel is essential in order to constitute a valid donatio mortis causa is satisfied by an antecedent delivery of the chattel alio intuitu to the donee: Cain v. Moon, [1896] 2 Q. B. 283; Richer v. Voyer, L. R. 5 P. C. 461. So far as the

law is concerned the things said to have been given here were all valid subjects of donatio mortis causa: Brown v. T. G. T. Corp., 32 O. R. 319. The three requirements of such a gift are here combined: Cain v. Moon, supra, per Lord Russell, C.J., at p. 286. There is sufficient corroboration in law and in fact of the statements of the plaintiff, whose evidence I accept, and who has, in my opinion, acted in entire good faith, but he is a solicitor and had done any legal business which the donor in her lifetime had to do, and was therefore her solicitor, and she acted without having any independent legal advice.

The principle which I consider applicable to this case appears to have been clearly laid down by Sir E. Sugden in Walsh v. Studdart, 4 D. & War. at p. 171; and he does not deal at all with the question of corroboration because he had already asked the question: "What proof is there that this conversation ever took place?" and then he lays down, at p. 171, the principle I have referred to, on the assumption that it did take place. See also Thompson v. Heffernan, 4 Dr. & War. 285, as to the rules laid down respecting such alleged gifts to a clergyman in attendance; and see also Godard v. Carlile, 9 Price 169; Liles v. Terry, [1895] 2 Q. B. 679. The action will be dismissed, and as the invalidity of the gift extends as well to the pieces of paper as to the moneys of which they are the indicia, the plaintiff will be ordered to deliver to the defendant all documents relating to the title to the property. No order as to costs.

Davis & Davis, Amherstburg, solicitors for plaintiff.

Fleming, Wigle & Rodd, Windsor, solicitors for defendant.

6TH JANUARY, 1902.

DIVISIONAL COURT.

Re THURESSON, McKENZIE v. THURESSON.

Mortgage—Release of Part of Land with Right of Way—Effect of—Covenant—Right of Mortgagee to Recover upon after such Release—Further Evidence.

The release by a mortgagee, without the request of the mortgagor, of lot one, part of the mortgaged land, "together with a right of way for all purposes over lot A," said lot A extending along the rear of the other lots covered by the mortgage, as well as lot one, is such a dealing with the mortgaged property as prevents the mortgagee from recovering under the covenant for payment in the mortgage, because he cannot restore the property as originally mortgaged.

Leave was granted to the mortgagee to give in evidence a release of the right of way, so as to enable him to restore the property to the mortgagor as it was when mortgaged.

An appeal by S. M. Abercrombie, creditor of the estate of Eyre Thuresson, deceased, from an order of Neil McLean, Official Referee, sitting for the Master in Ordinary, disallowing her claim under a covenant contained in a mortgage. Eyre Thuresson in October, 1887, made the mortgage in question to one Clare to secure $11,000, who therein agreed "to release and discharge at any time or times and without any notice or bonus, any portion or portions of the land having at least a frontage of 20 feet, upon payment by the mortgagors, their heirs, executors and administrators or assigns, at the rate of $71 per foot frontage for the portions required to be released or discharged. The land was described as lots 1, 2, 3 and 4, and block A on the north-west corner of Queen and Sorauren Streets in the city of Toronto, "said lots and block A having a frontage of 157 feet 2 inches on Queen street, by a depth of 117 feet. The lots had that frontage on the north side of Queen street, and block A was a piece of land having a frontage of 10 feet on the west side of Sorauren Street and a depth of 157 feet 2 inches and adjoined the rear or north limits of the lots—in reality a lane 10 feet wide in their rear. The mortgage was made pursuant to the Short Forms Act. In December, 1888, Thuresson conveyed his equity of redemption to one Bryce, who covenanted to indemnify against the mortgage. In June, 1889, Bryce conveyed to one Hickson, who gave a similar covenant to indemnify his grantor. Hickson died in January, 1891, and in administration proceedings one McQuillan purchased, and had conveyed to him, a portion of the land described as "the easterly 40 feet from front to rear of lot number one on the north side of Queen street and west side of Sorauren avenue * * * having a frontage of 40 feet by a depth of 107 feet; together with the right of way for all purposes over lot A shewn on said plan." Lot A is block A. Clare executed a statutory partial discharge stating that Hickson's executors had satisfied $2,200 of the mortgage money and describing the piece of land and right of way exactly as described in the conveyance to McQuillan. The appellant is the present holder of the mortgage made by Eyre Thuresson, and seeks, under the covenant in it, to prove against his estate for the balance remaining unpaid under the mortgage.

The appeal was argued on 12th December, 1901, before a Divisional Court, Falconbridge, C.J., and Street J.

E. D. Armour, K.C., and R. U. McPherson, for the appellant.

J. D. Montgomery, for executors.

STREET, J.—The rule is that as soon as the mortgage money is fully paid, it is the duty of the mortgagee to restore the estate, and if by his dealing with the property, otherwise than with the consent of the mortgagor, he has put it out of his power to restore the estate, he cannot recover in an action upon the covenant: Palmer v. Hendrie, 27 Beav. 349; Perry v. Barber, 13 Ves. 198; Gowland v. Garbutt, 13 Gr. 578; Munson v. Hauss, 22 Gr. 279; but in such action the mortgagor may redeem: Kinnaird v. Trollope, 39 Ch. D. 636.

Reading the release clause with the description, the proper construction is that the mortgagee must release on payment of $71 a foot on Queen street, the whole depth of the part released to the north limit of block A. The power of sale has not been exercised and therefore the mortgagee must be ready to restore on redemption the land covered by the mortgage, except any portion properly released. This she cannot do, for she has assented to the creation of a right of way over block A which cannot be restored except subject to that right. It is contended that the grant of the right of way does not affect in reality any part of block A excepting the part immediately to the north of lot one, the piece released, because there is no sufficient description of the purpose for which it is granted, no ex quo nor ad quem. It is not necessary to here determine the limits of the right. The grant of it was made by persons owning not only block A, but portions of land adjoining it on the south, and the grant will be taken most strongly against the grantors. The mortgagee has no right to encumber the mortgagor's rights even by the creation of a cloud to remove which an expensive law suit may be necessary. It would have been quite different had the right of way been limited to the portion of block A immediately north of the portion of lot one released. It was in the granting of the right of way over the whole of block or lot A that the mortgagee exceeded his authority. Formerly the mortgagee could have recovered at law, but would have been restrained in equity until in a position to reconvey: Perry v. Barber, supra; Munson v. Hauss, supra; Forster v. Ivey, 32 O. R. 175. The appellant asks leave to put in a release of the offending grant so far as it purports to give the right of way over any part of lot A, but that in rear of the 40 feet released, and the proper order to make is to dismiss the appeal with costs, but with a declaration that if within twenty days from the date of the

order the appellant brings into the Master's office evidence that she has put herself in a position to restore the estate so far as she is bound to do so under the terms of the mortgage, she be admitted to prove her claim. The question of quantum will of course then come to be considered, and the mortgagee will be charged with such a sum as would have entitled her to release the 40 feet, i.e., with $2,840. Against this she will be entitled to charge any disbursements properly made by Clare or herself in preserving the mortgaged property and allowable in such cases.

FALCONBRIDGE, C.J.—I concur. Perry v. Barker, supra, furnishes abundant authority for the declaration.

McPherson, Clark, Campbell & Jarvis, Toronto, solicitors for appellant.

Montgomery, Fleury & Montgomery, Toronto, solicitors for executors.

THE MASTER AT HAMILTON. 30TH DECEMBER, 1901.
FALCONBRIDGE, C.J. 7TH JANUARY, 1902.

HOLMAN v. TIMES PRINTING CO.

Special Jury—Notice of Striking—Time—Holiday.

Notice of striking a special jury under R. S. O. ch. 61, sec. 117, served on the 23rd December for the 28th December, is bad; Christmas Day is not to be reckoned in the four full days required: Rule 343.

Application on the part of the plaintiff for an order setting aside service of a certain notice served by defendants' solicitors upon plaintiff's solicitor on 23rd December, 1901, purporting to be in compliance with the provisions of R. S. O. ch. 61, sec. 117, and all proceedings taken thereunder subsequent to said notice, on the ground that the service of the said notice is insufficient and not a compliance with the requirements of the said section.

The facts appear in the judgment of the Master at Hamilton:—It appears from the affidavits and papers filed that the defendants on the 23rd day of December instant served a notice upon the plaintiff's solicitors, that they had sued out a ven. fac. jurs. in this action for the purpose of having a special jury struck herein, and that the sheriff of the county of Wentworth had appointed Saturday the 28th day of December instant, at half-past twelve p.m., for striking the said special jury.

Section 114 of ch. 61, R. S. O., enacts that any plaintiff or defendant in any case, excepting indictment for treason or felony, may in any such case triable by a jury have the

issues joined tried by a special jury upon suing out the necessary jury process for that purpose, and procuring such jury to be struck, etc.

Section 116 enacts that every sheriff upon the receipt of the writ shall, by a memorandum in writing upon the writ, appoint some convenient day and hour for striking such special jury, the day and hour so fixed being sufficiently distant to enable the party suing out the said venire to give the necessary notice to the opposite party.

And sec. 117 enacts that the party, his solicitor or agent, suing out the ven. fac. shall give notice in writing to the opposite party, his solicitor or agent, that he has sued out a ven. fac. and of the day and hour appointed by the sheriff for striking the same, and the notice shall be served on the opposite party, his solicitor or agent, four full days before the day so appointed, etc.

Rule 343 provides that where a period of less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, holidays as defined by Interpretation Act shall not be reckoned in the computation of such period.

The notice referred to in sec. 117 was served upon the defendants' solicitors on the 23rd December inst., and notified them that the sheriff had appointed the following Saturday, the 28th inst., for the striking of the said jury.

The plaintiff urges that Christmas Day, a legal holiday, intervening between the 23rd and 28th inst., did not count, and there remained only three full days instead of four as required by the statute, and I do not think there can be any doubt as to the correctness of his argument.

The plaintiff's solicitors notified the sheriff and the defendants' solicitors that they would not attend upon the appointment, as the notice was insufficient; the sheriff proceeded, however, and in the presence of the defendants' solicitor drew a list of forty special jurors in accordance (as he alleges) with said Act.

In view of the foregoieg facts, I find that the notice served upon the plaintiff's solicitors on the 23rd December inst., and all proceedings taken thereunder, should be set aside, and that the costs incidental to this application be costs to the plaintiff in any event.

The defendants by special leave appealed, and the appeal was argued before FALCONBRIDGE, C.J., at Hamilton.

P. D. Crerar, Hamilton, for defendants. Rule 343 only applies to days fixed by the Rules, and does not extend to a period of time fixed by an Act of the Legislature.

D'Arcy Tate, Hamilton, for plaintiff. Section 127 of the Judicature Act constitutes a council of the Judges to consider

procedure and the administration of law in the High Court of Justice, and sec. 129 of that Act makes the Rules of Practice prescribed by the said Council of the same force as if contained in an Act of the Legislature, and therefore Rule 343 governs where a period of less than six days appointed or allowed for doing any Act or taking any proceeding, and holidays, as defined by the Interpretation Act, must not be reckoned in the computation of such period. Striking a special jury is an act or proceeding within the meaning of the Rule, and therefore Christmas Day must be excluded.

FALCONBRIDGE, C.J., affirmed the order of the Master and dismissed the appeal with costs to the plaintiff in any event of the cause, reserving leave to defendant to appeal, if so advised, to a Divisional Court.

Carscallen & Cahill, Hamilton, solicitors for plaintiff.

Crerar & Crerar, Hamilton, solicitors for defendants.

MEREDITH, C.J. JANUARY 2ND, 1902.

CHAMBERS.

Re CURRIE.

Infant—Will—Advancement on Account of Legacy Payable at Majority—Executor.

Application on behalf of an infant twenty years of age for the approval of the court of the payment to her by the executor of the will of Kate Williamson, deceased, of $200 on account of a legacy of $1,500, payable to the infant with accrued interest when she attains majority. It was shewn that the executor and official guardian approved of the advance, and that the infant needed the money to pursue her studies in elocution.

F. W. Harcourt appeared for all parties.

MEREDITH, C.J.—I make the order in this case on the authority of Re Wilson, 14 P. R. 261, and I refer also to Re Coutts, 15 P. R. 162. The order must disclose on its face the consent of the executor, and that he admits that he has sufficient funds in his hands to meet the legacy when payable.

McCarthy, Osler, Hoskin, & Creelman, Toronto, solicitors.

JANUARY 7TH, 1902.

DIVISIONAL COURT.

HISLOP v. JOSS.

Appeal—Setting down—Christmas Vacation—Time of—Rules 790 (1), 352 (e).

The setting down of an appeal to a Divisional Court

under Rule 788 (2) is not "doing an act or taking a proceeding in appealing to a Divisional Court" within Rule 352 (e).

Motion to stay a taxation of costs as of an abandoned motion under Rule 790, or for an order confirming the setting down of the appeal. The judgment, at the trial without a jury, was granted on 13th November, 1901, and defendant Lyon served notice of appeal therefrom on 25th November. The plaintiff served notice of appeal on the 16th December, and set his appeal down on 20th December. On 24th December the defendant Lyon's appeal not having been set down, the plaintiff obtained under the following Rule: "790 (1).—Unless otherwise ordered, if a party who serves a notice of motion does not set the motion down, he shall be deemed to have abandoned the same, and the opposite party shall thereupon be entitled without an order to the costs of the motion"—an appointment for 26th December to tax the costs. On the 26th December the appeal of defendant Lyon was set down, and on the same day MacMahon, J., made an order, with costs to plaintiff in any event, staying the taxation until the first sittings of a Divisional Court to enable defendant Lyon to apply to it for relief, and accordingly this motion was made on 7th January, before a Divisional Court, Meredith, C.J., and Britton, J.

A. Mills, for defendant Lyon.

T. Hislop, for plaintiff.

The judgment of the Court was delivered at the close of the argument.

MEREDITH, C.J.—The practice has been for a long time to set down appeals in Christmas vacation, and as the matter is not res integra, it is better not to disturb a practice that is well settled. Costs throughout should be in the action.

BRITTON, J.—I concur.

T. Hislop, Toronto, solicitor for plaintiff.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for defendant Lyon.

JANUARY 2ND, 1902.

DIVISIONAL COURT.

TRUSTEES OF CARLETON PLACE METHODIST CHURCH v. KEYES.

Methodist Church—Trustees of, Have no Right to Allot Pews unless for a Money Consideration or Rent — But may Punish under Criminal Code any Person disturbing the service in the Church—47 Vict. ch. 88 (O.), schedule B.—47 Vict. ch. 106 (D.), schedule B.—Sec. 173, Crim. Code.

Appeal by defendant from judgment of County Court of

Lanark in favour of plaintiff in action in that Court for a declaration of the right of the plaintiff Young to the enjoyment of pew number 64 in the Carleton Place Methodist Church, and for an order restraining defendant from interfering with the plaintiff's control and enjoyment of the said pew, and for damages against defendant.

J. J. Maclaren, K.C., for defendant.

J. A. Allan, Perth, for plaintiffs.

The judgment of the Court was delivered by STREET, J.— The church is vested in the trustees, plaintiffs, by 47 Vict. ch. 88 (O.) and 47 Vict. ch. 106 (D.) upon the trusts set forth in schedule B. to each Act, and under paragraphs 2 and 7 of the schedule, the trusteees have no power to do as they have done here, viz., allot pews or seats to particular members, unless they rent to them for a money consideration, and not having done so all the seats are free, subject to regulation during service as to seating, and to prevent disorder and overcrowding: Asher v. Calcroft, 18 Q. B. D. 607: and any person wilfully disturbing the service in the church may be punished under sec. 173 of the Crim. Code. In this case both the plaintiff Young and defendant claim exclusive rights to the pew. The squabble is not a creditable one to either of them, but it seems to have been aggravated by the uncompromising position taken by defendant. Though there is a general power in the officers of any place of public worship to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during service: Asher v. Calcroft, supra; Reynolds v. Monkton, 2 Moo. & R. 384: that is not the right claimed here. The action must be dismissed without costs, and the appeal allowed with costs.

J. A. Allan, Perth, solicitor for plaintiffs.

Lavell, Farrell, & Lavell, Smith's Falls, solicitors for defendant.

FALCONBRIDGE, C.J. JANUARY 2ND, 1902.

TRIAL.

THORNDYKE v. THORNDYKE.

Gift—Parent and Child—Bounty not Bargain—Undue Influence—Mental Competence.

Action by Joseph Thorndyke, the executor and son of Elizabeth Thorndyke, deceased, to have a discharge of mortgage executed by her in favour of her son William, the defendant, set aside and its registration vacated, and for a declaration that the mortgage securing $2,400 is still in full force, and for its payment.

G. H. Watson, K.C., and R. Ruddy, Millbrook, for plaintiff.

A. B. Aylesworth, K.C., and J. J. Maclennan, for defendant.

FALCONBRIDGE, C.J.—The features of this case distinguish it from my decision in the case of Fisher v. Fisher, noted in the Globe and Mail and Empire newspapers of February 19th, 1901, and cases therein cited. Here there was no sign of coercion, and Mr. White, who had performed some casual legal services for deceased, though hardly to be called her solicitor, testified, as did also Miss Good, that Mrs. Thorndyke gave her instructions clearly, and knew what she was doing, and refused to take a bond from the defendant for her maintenance, saying that she could trust William. The deceased had, in 1897, remitted the interest then due, and there is abundant evidence that for years she had intended to give this mortgage to William. The transaction is to be looked upon as bounty and not bargain, and is one that deserves to be upheld. I dismiss the action, but without costs.

R. Ruddy, Millbrook, solicitor for plaintiff.

Robertson & Maclennan, Toronto, solicitors for defendant.

LOUNT, J. JANUARY 2ND, 1902.

CHAMBERS.

CHEVALIER v. ROSS.

Amendment—Pleading—Diligence in Moving—Rule 312.

Appeal by plaintiff from order of local Master at Cornwall refusing leave to plaintiff to amend the statement of claim by increasing the amount claimed for extras in paragraph 3 by $79.33, making $199.90, instead of $120.57, and to amend the reply by inserting the words "does not" before the word "accepts," and striking out the "s" from that word.

J. H. Moss, for the plaintiff.

I. F. Hellmuth, for defendants.

LOUNT, J.—The plaintiff clearly made a mistake in not claiming the larger amount, and has used reasonable diligence in moving to amend after discovering his error, nor will defendant be injured by allowing the amendment. This is a case to which Rule 312 applies with full force: see Cropper v. Smith, 20 Ch. D. at p. 710; Williams v. Leonard, 16 P. R. 544; 17 P. R. 73; Emery v. Webster, 9 Ex. 242.

I allow the appeal, but without interfering with the disposition of costs by the Master, and give leave to plaintiff to amend as he may be advised. The defendant may withdraw

the money paid into Court, and may also plead as advised, and plaintiff may then reply. Costs of appeal to be in the action.

Gogo & Stiles, Cornwall, solicitors for plaintiff.

Leitch, Pringle, & Cameron, Cornwall, solicitors for defendant.

JANUARY 3RD, 1902.

DIVISIONAL COURT.

JONES v. BISSONETTE.

Writ of Summons—Order for Leave to Issue for Service out of Jurisdiction—Will be Granted in a Proper Case and will Fix Time for Appearance—Rules 120, 128, 162 (g), 164—Separate Causes of Action—Joinder of.

Motion by plaintiff for order permitting issue of a writ of summons for service out of the jurisdiction. The plaintiff carries on business in Toronto, manufacturing a preparation for bronchial affections, called Carbo-Crea, and sells a vaporizer. He was arrested in Toronto by defendant Bissonette on a warrant issued in Montreal on the information of defendant Benedict, charging him with forging a testimonial respecting Carbo-Crea, hand-cuffed in spite of his protest, and taken to Montreal, where he was subsequently tried before a jury and acquitted. The defendant Bissonette is High Constable of Montreal. The defendant Benedict is the manager of the firm of Leeming, Miles, & Co., who are agents for a Vapo-Cresoline Co. The defendant Gibbons is the agent in Ontario of Leeming, Miles, & Co. The action is for malicious prosecution and false arrest, and plaintiff charges conspiracy by the defendants Benedict, Miles, and Gibbons to prevent his manufacturing his preparation, resulting in the laying of the information, the arrest, the hand-cuffing, and trial in Montreal. The Master in Chambers referred the motion to a Judge in Chambers, and upon its coming before Boyd, C., he referred it, on account of his decision in Oligny v. Beauchemin, 16 P. R. 508, to a Divisional Court.

W. R. Riddell, K.C., for plaintiff.

The judgment of the Court (STREET and BRITTON, JJ.) was reserved, and subsequently delivered by STREET, J.—The proper practice under the Rules as they now stand is to obtain an order fixing the time for appearance in a writ proposed to be issued, and allowing it to be served outside the jurisdiction before the writ is issued. Reasoning from the terms of Rules 120, 128, and 164, it is evident that before the writ referred to can be issued it is necessary to obtain an order limiting the time for appearance, which order must also give leave to serve the writ out of the jurisdiction. Upon

the merits disclosed the other defendants are not responsible, for the only act complained of against Benedict was in executing the warrant of arrest, viz., hand-cuffing: Hamilton v. Massie, 18 O. R. 585. The plaintiff sets up two separate causes of action, and he cannot join them in one action: Gower v. Couldridge, [1898] 1 Q. B. 348; Smurthwaite v. Hannay, [1894] A. C. 494; Mooney v. Joyce and Faulds v. Faulds, 17 P. R. 244 and 480. But the plaintiff is entitled to an order as to the defendants Benedict and Miles, joining with them defendant Gibbons, who is within the jurisdiction, and who is charged as one of the persons who caused the laying of the information, and he is a proper party to the action, and that justifies an order for the issue of a writ and its service out of the jurisdiction under Rule 162 (g): Croft v. King, [1893] 1 Q. B. 419. If plaintiff fails in the action as to Gibbons, then his only justification for having brought it will be shown to have had no existence, and the order to be issued should contain a condition that in case the action be dismissed as to Gibbons the plaintiff will consent to its dismissal as against the other two defendants.

Beatty, Blackstock, Nesbitt, Chadwick, and Riddell, solicitors for the plaintiff.

MASTER IN CHAMBERS.
MEREDITH, C.J.

JANUARY 3RD, 1902.

CHAMBERS.

TAWSE v. SEGUIN.

Particulars—Further Particulars—Interpleader Issue.

Appeal by defendants from order of Master in Chambers requiring them to furnish to plaintiff particulars which were directed to be furnished by two previous orders.

The particulars ordered were in relation to the amounts alleged by the defendants to have been advanced to the deceased.

R. C. Clute, K.C., for defendants.
Gideon Grant, for plaintiff.

MEREDITH, C.J.—Held, that the particulars furnished prior to the order appealed against were not such particulars as the defendants by the two previous orders, or by either of them, had been required to furnish, and therefore the order was right, but it should be varied so as to point out more exactly what it is that the defendants have not done which they ought to have done. Costs to plaintiff in any event.

Dods & Grant, Toronto, solicitors for plaintiff.

Clute, Macdonald, MacIntosh, & Hay, Toronto, solicitors for defendants.

BRITTON, J. JANUARY 3RD, 1902.

TRIAL.

BLANQUIST v. HOGAN.

Master and Servant — Negligence — Voluntarily Continuing in Dangerous Employment.

Action tried at Port Arthur, brought to recover damages for negligence.

F. H. Keefer, Port Arthur, for plaintiff.

N. W. Rowell, for defendant.

The facts appear in the judgment.

BRITTON, J.—The plaintiff is a miner employed by defendants, and was injured by the premature explosion of dynamite placed in a hole drilled by plaintiff. It was alleged that defendant was (1) personally negligent in not thawing the dynamite, and (2) that he caused drills to be made smaller than those heretofore in use and too small for the cartridges being used. The plaintiff had lost to a great extent the use of his left arm and hand. A nonsuit was refused at the close of the plaintiff's case. The jury found in answer to eight questions submitted that defendant undertook to thaw the dynamite, that he was negligent in not knowing the exact size of the dynamite provided, that plaintiff knew the dynamite was partly frozen and dangerous, and he knew the dangerous character of the work, and voluntarily undertook it, but could not by the exercise of reasonable care have avoided the accident, and in answer to the fifth question that the smaller drills as used were sufficient for the use of one inch sticks of dynamite.

I do not think that there was any evidence of negligence of defendant to go to the jury. The plaintiff knew his danger, had the means of avoiding it, but voluntarily continued: Woodley v. Metropolitan D. R. W. Co., 2 Ex. D. 384; Thrussel v. Handyside, 20 Q. B. D. 359. The second branch of the case is disposed of by the answer to the fifth question. There is no evidence of use of any other than one-inch sticks, and the drills used were one and five-sixteenth inch bit. I dismiss the action, but do not give costs because the plaintiff did not ask for them.

Frank H. Keefer, Port Arthur, solicitor for plaintiff.

W. F. Langworthy, Port Arthur, solicitor for defendant.

JANUARY 6TH, 1902.

DIVISIONAL COURT.

RE GEDDES AND COCHRANE.

Landlord and Tenant—Renewal of Lease—Covenant—Construction of—Increased Rent—Average for Renewal Term.

Motion by the landlord for the opinion of the Court upon

a special case stated under the Arbitration Act, R. S. O. ch. 62. sec. 9, as to the construction of a renewal clause in a lease for 21 years from January 1st, 1880, at a rent of $106 for first year, $130 for the next four years, $145 for next five years, and $178 for next 11 years. The renewal was to be at an increased rent to be settled by arbitration, "payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents."

H. D. Gamble, for the landlord.

John MacGregor, for tenant.

The Court held that the arbitrators are bound to award.

The Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) held, approving In re Geddes and Garde, 32 O. R. 262, that the arbitrators are bound to award an increased rent, which may be a nominal increase, if they think proper, but it must be based not on the amount of rent for the last eleven years, but on the rent reserved for the whole term. That the arbitrators might make the increase either upon each year's rent or upon the average of the whole 21 years, but so that in the result the average annual rent is greater for the future term than for the past. No order as to the costs was made because upon the case submitted the Court had nothing to do with costs.

C. & H. D. Gamble, Toronto, solicitors for landlord.

John MacGregor, Toronto, solicitor for tenant.

FALCONBRIDGE, C.J. JANUARY 6TH, 1902.

TRIAL.

BOWERMAN v. TOWN OF AMHERSTBURG.

Municipal Corporation—Power to Permit Laying of Gas Pipes under Streets—Private as well as Public Purpose of their Use does not Affect—By-law—Valid if Signed by Presiding Officer Appointed by the Council in Absence of Mayor, under R. S. O. ch. 223, sec. 272—R. S. O. ch. 223, sec. 566 (3) as amended by 62 Vict. (O.) ch. 23, article (a 8) —1 Edw. VII. ch. 26, sec. 24.

Action tried at Sandwich, brought by plaintiff on behalf of himself and other ratepayers, and the Attorney-General for Ontario, to have declared invalid a resolution of the council of the corporation, subsequently confirmed by by-law, allowing defendant Fraser to lay metal pipes under the surface of certain streets for the purpose of conveying acetylene gas to his neighbours, to restrain defendants from laying the pipes, and for a mandamus to defendant Fraser to restore the streets to their former state of repair.

A. H. Clarke, Windsor, for plaintiff.

D. R. Davis, Amherstburg, and F. H. A. Davis, Amherstburg, for corporation.

J. H. Rodd, Windsor, for defendant Fraser.

FALCONBRIDGE, C.J.—The council had power under the Municipal Act, sec. 566 (3), as amended by 62 Vict. (O.) sec. 23, article (a 8), to authorize defendant Fraser to lay the pipes, notwithstanding 1 Edw. VII. ch. 26, sec. 24. The defendant Fraser is not supplying light for his own purposes only, but for municipal and public purposes of the municipality, and the public see fit to avail themselves, so far as the streets in question are concerned. The by-law passed pending the action and confirming the resolution is valid, though not signed by the mayor: R. S. O. ch. 223, sec. 272: but the presiding officer, who had power to sign. Action dismissed without costs between plaintiff and defendants or between defendants.

Franklin A. Hough, Amherstburg, solicitor for plaintiff.

Davis & Davis, Amherstburg, solicitors for defendants corporation of Amherstburg.

Henry Clay, Amherstburg, solicitor for defendant Fraser.

FALCONBRIDGE, C.J. JANUARY 7TH, 1902.

TRIAL.

FITZGERALD v. FITZGERALD.

Dower — Equity of Redemption — Fraudulent Conveyance by Husband to Defeat, Valid.

J. W. E. seized in fee of certain land, mortgaged it. Afterwards the plaintiff married him, he promising, as an inducement to marriage, to leave her the land. Subsequently he conveyed the land, subject to the mortgage, to a son by his first wife, and died. The son was aware of his father's promise to plaintiff, and the intent to defeat her claim.

Held, nevertheless, that the plaintiff was not entitled to dower.

Finlay v. Chirney, 20 Q. B. D. at p. 498, Re Luckhardt, 29 O. R. 111, referred to.

A. B. Aylesworth, K.C., and J. W. Bennet, Peterborough, for plaintiff.

G. H. Watson, K.C., and E. B. Edwards, K.C., for defendant.

Action to have the above mentioned conveyance set aside was tried at Peterborough and dismissed without costs.

Roger & Bennet, Peterborough, solicitors for plaintiff.

E. B. Edwards, Peterborough, solicitor for defendant.

LOUNT, J. JANUARY 7TH, 1902.

WEEKLY COURT.

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC R. W. CO.

Highway—Made by Crown Surveyor becomes Road within both Municipal and Dominion Railway Act—By-law not Necessary to Enable Municipality to Exercise its Jurisdiction over—Direction to their Overseer Sufficient—Right of Railway to Cross Highway and Put Fence Across under sec. 90 (g) of Railway Act (D.) is Governed by secs. 183 and 194; and in Crossing must not Obstruct—Railway Committee has no Power to Deal with this Case, and the Court has—Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, and City of Toronto v. Lorsch, 24 O. R. 227, followed.

Special case heard at Ottawa. Action for an injunction to restrain defendants from obstructing the highway between the 5th and 6th concessions of the township of Gloucester, with fences, on either side of the tracks of defendants where they cross the highway, and for a mandatory order compelling the removal of the fences.

G. F. Henderson, Ottawa, for plaintiffs.

F. H. Chrysler, K.C., and C. J. R. Bethune, Ottawa, for defendants.

It was contended for defendants (1) that the highway in question, being a highway in law and not in fact—that is, an open public road used and travelled upon by the public—it is not a highway within the meaning of the Railway Act, 51 Vict. ch. 29 (D.); (2), that, as the road allowance where the fences cross, and for a mile on either side along the road allowance, has not been cleared and opened up for public travel and has not been used for a public road, it is necessary that the municipality should first pass a by-law opening it before the municipality can exercise any jurisdiction over it; (3) that under sec. 90 (g) of the Railway Act they had the right to construct their tracks and build their fences across the highway; (4) that the only tribunal having jurisdiction to deal with the questions in dispute is the Railway Committee of the Privy Council.

LOUNT, J., held as to contention (1), that the allowance for the road in question having been made by a Crown surveyor, it is a highway within the meaning of sec. 599 of the Municipal Act, and also within the meaning of the Railway Act; as to (2) that a by-law is not necessary; the council may direct the overseer or pathmaster to open the road, and such direction would be sufficient; as to (3) that this right is subject to sec. 183, which provides against any obstruction to the highway, and sec. 194, which provides for fences and

cattle-guards being erected and maintained; therefore defendants have no right to maintain fences which obstruct the highway; as to (4) that the question in dispute is not as to the construction of the railway along and across the highway within the meaning of sec. 11 (h) of the Railway Act; the railway committee have no jurisdiction, and this Court had jurisdiction: Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4; City of Toronto v. Lorsch, 24 O. R. 227.

Judgment for the plaintiffs for the relief asked with costs.

MacCraken, Henderson, & McDougall, Ottawa, solicitors for plaintiffs.

Chrysler & Bethune, solicitors for defendants.

ROBERTSON, J. JANUARY 7TH, 1902.

TRIAL.

McDERMOTT v. HICKLING.

Mistake—Money Overpaid on Mortgage—Ignorance of Facts—Executor—Costs against, if Estate Insufficient.

Marriott v. Hampton, 2 Smith's Leading Cases, 10th ed. 431, followed.

Action tried at Barrie, brought to recover money overpaid on a mortgage and interest thereon since 23rd February, 1901.

H. H. Strathy, K.C., and C. W. Plaxton, Barrie, for plaintiff.

W. A. Boys, Barrie, for defendant G. W. L. Hickling.

H. D. Stewart, Barrie, for both defendants as trustees.

ROBERTSON, J., after a lengthy review of all the facts:—The case is within the third proposition which is deduced from the law as it now stands, and put in the notes to Marriott v. Hampton, 2 Smith's Leading Cases, 10th ed., p. 431, that money paid in ignorance of the facts is recoverable, notwithstanding laches, providing that the party paying it has not waived all inquiry. Laches, in the sense of a mere omission to take advantage of means of knowledge within the reach of the person paying the money, is not sufficient to disentitle him to recover it back. Judgment for plaintiff for $306.88 and interest from 23rd February, 1901, against defendants as executors, who may have a reference if they desire. Costs of action and reference to plaintiff. If not sufficient estate in defendants' hands, costs on High Court scale to be paid de bonis propriis, but to be limited to such

as would be recoverable had plaintiff commenced the action originally against both defendants, and charged them as surviving executors. If defendant G. W. L. Hickling set up new matter after order allowing plaintiff to amend by adding C. M. Hickling, the defendant G. L. Hickling should be allowed the costs of the original statement of defence.

C. W. Plaxton, Barrie, solicitor for plaintiff.

McCarthy, Boys, & Murchison, Barrie, solicitors for defendant G. W. L. Hickling.

Stewart & Stewart, Barrie, solicitors for defendants as trustees.

ROBERTSON, J. JANUARY 7TH, 1902.

TRIAL.

ONTARIO BANK v. POOLE.

Promissory Note—Want of Consideration—Effect of—Bank—Receipt of Note for Specific Purpose—Notice—Effect of—"Holder in Due Course" — "Negotiate" — Bills of Exchange Act, 1890, sec. 29.

Watson v. Russell, 3 B. & S. 24, distinguished; Lewis v. Clay, 67 L. J. N. S. at p. 227, approved.

Action to recover amount of a promissory note made by defendant in favour of plaintiffs for $1,500, dated 30th March, 1901, and payable three months after date. The defendant alleged that the note in question was made by him as an individual shareholder in the Consolidated Pulp and Paper Co. for the purpose of obtaining from plaintiffs an advance of money for the company, of which the plaintiffs were aware, and received it from one Edwards with that notice, but have never made the advance. On 3rd May, 1901, defendant wrote plaintiffs demanding back the note, having learned for the first time that it was held and used for other purposes by them.

J. H. Moss and C. A. Moss, for plaintiffs.

E. D. Armour, K.C., and F. E. Hodgins, for defendant.

ROBERTSON, J.:—Watson v. Russell, 3 B. & S. 34, is distinguishable because here no consideration was given by plaintiffs, who refused to discount for the benefit of the company in the manner and for the purpose for which defendant had signed it. No property in the note passed, and plaintiffs could not apply it as collateral to an advance long before made, for which the maker was in no way liable. The plaintiffs are, therefore, not holders for value, and it is not necessary to show notice. The note was never negotiated, and the bank, moreover, is not "a holder in due course," in the sense required by sec. 29 of Bills of Exchange Act, 1890:

Lewis v. Clay, 67 L. J. N. S. at p. 227, per Lord Russell. On the whole case I do not think it necessary to decide whether the plaintiffs were put on inquiry as to the condition on which the note was handed over, as the case turns on the point that there was no value given, or, in other words, that the plaintiffs hold it without consideration and for a purpose other than defendant intended when he signed it. Action is dismissed with costs.

Barwick, Aylesworth, Wright, & Moss, Toronto, solicitors for plaintiffs.

McMurrich, Hodgins, & McMurrich, Toronto, solicitors for defendant.

JANUARY 7TH, 1902.

DIVISIONAL COURT.

GIRARDOT v. CURRY.

Deed—Reformation of—Mistake.

Appeal by plaintiff from judgment of County Court of Essex in action to reform or rescind an assignment of certain moneys, under the following circumstances:—Prior to November, 1900, plaintiff owned certain land and had made an agreement with McKee, allowing him to remove gravel on payment of $1,500 upon certain terms. Plaintiff sold the land in November, 1900, to one B., who resold to defendants, to whom plaintiff conveyed. Plaintiff, also, assigned, as they supposed, at defendants' request, the money to become due to plaintiff by McKee under his agreement. By mistake, however, plaintiff alleged, the assignment included principal money, $109, and interest, $58.42, accrued due.

F. A. Anglin, for appellant.

R. F. Sutherland, K.C., for defendants.

Judgment of the Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.), was delivered by STREET, J., dismissing the appeal, and holding that, as it was shewn in evidence that the defendants purchased on the faith of their vendor's statement that $1,195 was due under the contract with McKee, defendants were entitled to that sum, but that certain sums amounting to $62 were due from McKee in addition to the $1,195, and therefore the plaintiff was entitled to it, and the appeal should be dismissed with costs, but the order should contain a declaration that defendants must account and pay over to plaintiff, out of the first moneys they collect from McKee, the sum of $62, with interest from November 9th, 1901.

Murphy, Sale, & O'Connor, Windsor, solicitors for plaintiff.

Cleary & Sutherland, Windsor, solicitors for defendants.

JANUARY 8TH, 1902.

DIVISIONAL COURT.

LEISHMAN v. GARLAND.

Appeal—From County Court—To Divisional Court—R. S. O. ch. 55, sec. 51, sub-secs. 1, 2, 3, 5.

After judgment for plaintiff in an action in a County Court, tried without a jury, a motion was made in term to set aside the judgment and enter judgment for defendants upon the claim and counterclaim, or in the alternative for a new trial, or for such further order as might be just: Held, plaintiff was entitled to appeal to a Divisional Court from an order made on the motion setting aside the judgment and directing a new trial.

Appeal by plaintiff from order of the Judge of the County Court of York setting aside the judgment of the junior Judge in favour of plaintiff, and directing a new trial of action for damages for wrongful dismissal, and to recover a balance of amount due for commission on sales of goods and salary under the agreement between the parties, and of the counterclaim. The motion to the senior Judge was to enter judgment for defendants upon the claim and counterclaim, or in the alternative for a new trial, or for such other order as might be just.

B. N. Davis, for plaintiff.

W. R. Riddell, K.C., for defendants, objected that an appeal did not lie.

After argument on the objection, the case was heard on the merits, and the judgment of the Court, MEREDITH, C.J., and BRITTON, J., which was reserved, was subsequently delivered by

MEREDITH, C.J.—The motion falls within R. S. O. ch. 55, sec. 51, sub-sec. 2. It was to set aside the judgment and enter judgment for defendants, and none the less was it so because a new trial was asked in the alternative, and by sub-sec. 5 an appeal lies to the High Court. If the Legislature had intended otherwise, sub-sec. 4 would have been made applicable to all cases instead of to jury cases alone. It is not clear that sub-sec. 3 applies to a motion for a new trial, where the ground on which the party moves is that, upon the whole case, it is one in which in its discretion the Court should direct a new trial, and that it is not to be taken to be confined to cases where the ground is something ejusdem generis with that mentioned in the sub-section—the discovery of new evidence. The scheme of the section appears to be this:—There is to be an appeal at the option of the unsuccessful party, both in jury and non-jury cases, either

to a Divisional Court, or to the County Court, except that in jury cases if a new trial is moved for, either alone or combined with or as an alternative for any other relief, the motion must be made to the County Court, and no further appeal is given to either party. A motion for a new trial, on the ground of discovery of new evidence or the like, must be made, both in jury and non-jury cases, to the County Court, and no further appeal is given to either party.

Where a party having the right to appeal, either to a Divisional Court, or to the County Court, elects to appeal to the latter Court, he has no further right of appeal, but the opposite party has the right to appeal to the High Court. Sub-secs. 1, 2, and 5 govern the present case, and not sub-sec. 3. Brown v. Carpenter, 27 O. R. 412, Irvine v. Sparks, 31 O. R. 603, do not assist the respondent. The objection therefore fails. On the merits . . . the order below is reversed and the judgment restored with costs here and below to plaintiff.

Davis, Cook, & Smith, Toronto, solicitors for plaintiff.

R. C. LeVesconte, Toronto, solicitor for defendants.

MEREDITH, C.J. JANUARY 8TH, 1902.
LOUNT, J.

DIVISIONAL COURT.

McGUINNESS v. McGUINNESS.

Creditors' Relief Act—Different Creditors' Executions—Sale of Land under Second Execution within One Year—Costs—Advertisement is Seizure, and Second Creditor Entitled to his Costs.

Appeal by E. G. Porter, first execution creditor of plaintiff, from order of Judge of County Court of Hastings, setting aside the sheriff's scheme for distribution of proceeds of sale of land under execution, and directing that the costs of the defendant in this action, the second execution creditor, should, under R. S. O. ch. 78, sec. 26, be paid first out of the proceeds, because the lands were sold under the second writ. Both writs being in the sheriff's hands, the second execution creditor, before the expiry of a year, directed the sheriff to sell, and he accordingly proceeded to advertise the lands for sale, and sold after the year.

W. H. Wallbridge, for appellant.

H. L. Drayton, for respondent.

Judgment of the Court was delivered by MEREDITH, C.J.—The advertisement was in law the seizure of the lands under the second writ, and the sale was also under it, and there was no seizure nor sale under the first writ. The case

is within the very words of sec. 26. Appeal dismissed with costs.

E. G. Porter, Belleville, the first execution creditor in person.

J. English, Napanee, solicitor for second execution creditor.

MEREDITH, C.J. JANUARY 8TH, 1902.

CHAMBERS.

WARD v. BENSON.

Parties—In Same Interest—A Solicitor will not be Appointed to Represent Defendants, not Parties, as there is not Authority to do so under Rule 200.

That Rule provides for the authorizing of one or more parties to defend on behalf or for the benefit of all parties not already defendants, where there are numerous parties having the same interest, so as to dispense with the necessity of making them defendants.

Bedford v. Ellis, [1901] A. C. at p. 10, Wood v. McCarthy, [1892] 1 Q. B. 775, and Cornell v. Smith, 14 P. R. 275, at p. 277, referred to.

W. J. Elliott, Toronto, solicitor for plaintiff.

MEREDITH, C.J. JANUARY 8TH, 1902.

TRIAL.

McNEIL v. DAWSON.

Fraudulent Conveyance—Mortgage by Wife to Husband, in Effect a Preference, within 60 days of Creditors' Action—Presumption not Rebutted — R. S. O. ch. 147, sec. 2, subsec. 3.

Action tried at St. Catharines, brought on the 23rd May, 1901, by the plaintiff on behalf of herself and all creditors of defendant Loretta J. Dawson against her and her husband, to set aside as a fraudulent preference, a mortgage dated 10th April, 1901, made by her in favour of her husband.

G. H. Levy, Hamilton, for plaintiffs.

J. E. Varley, St. Catharines, for defendant G. Dawson.

G. F. Peterson, St. Catharines, for defendant Loretta J. Dawson.

MEREDITH, C.J.—When the mortgage was given, the wife was insolvent to her knowledge and that of her husband . . . there was an indebtedness by the wife to her husband at the time the mortgage was given, and the mortgage has the effect of giving him a preference, and the intent to

give it is presumed against the husband: R. S. O. ch. 147, sec. 2, sub-sec. 3. . . The evidence is not satisfactory of the existence of an antecedent agreement to give the mortgage, and on all the facts the husband has failed to rebut the presumption. Judgment for plaintiffs setting aside the mortgage, with costs.

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for plaintiffs.

G. F. Peterson, St. Catharines, solicitor for defendant Loretta J. Dawson.

J. E. Varley, St. Catharines, solicitor for defendant George Dawson.

MEREDITH, C.J. JANUARY 8TH, 1902.

TRIAL.

MUNRO v. TORONTO RAILWAY CO.

Infant—Lease by — Repudiation — Partition — Amendment —Parties.

Action tried at Toronto, brought to have declared void a lease by plaintiff and two others to defendants, for ten years from 1st April, 1896, of Munro Park, east of Toronto, in the township of York. On 10th August, 1900, plaintiff became 21 years of age, and at once repudiated the lease. The property was then fairly divided among the three lessors, and plaintiff brought this action, asking for a confirmation of the partition already made or for an order for another one and for possession of his portion.

C. Millar, for plaintiff.

J. Bicknell, for defendants.

MEREDITH, C.J.—The partition already made is not binding on defendants. They were not parties to it, and are not bound by it, even if fairly and equitably made, which, if their interests under the lease are to be affected by it, I think it was not: Cornish v. Gest, 2 Cox 27; Willis v. Slade, 6 Ves. 498; Baring v. Nash, 1 V. & B. 351. It would not be proper to allow plaintiff to amend at trial, and, making defendants parties, proceed. The proper course is to postpone the trial and give plaintiff leave to amend, adding his co-lessors as parties and otherwise as advised; and to defendants to amend as advised.

All costs to be disposed of by the Judge who tries the case on the amended pleadings. Leave to plaintiff, if he does not wish to amend as indicated, to speak to the case.

Millar, Ferguson, & Hughes, Toronto, solicitors for plaintiff.

J. Bicknell, Toronto, solicitor for defendants.

MEREDITH, C.J. JANUARY 8TH, 1902.

TRIAL.

THOMAS v. CALDER.

Fraudulent Conveyance—Creditor, Mortgagee as well as Simple Contract Creditor—13 Eliz. ch. 5.

Action tried at Stratford, brought by simple contract creditors to set aside a conveyance of land and bill of sale of goods made by defendant John Calder to his wife, defendant Catherine Calder.

G. F. Shepley, K.C., for plaintiffs.

J. Idington, K.C., for defendants.

MEREDITH, C.J.—Had the plaintiffs been only simple contract creditors they would be entitled to succeed, but the evidence establishes that they are secured creditors, having a second mortgage of the land in question, made before the conveyance, and it is ample security for their claims. The result is that the plaintiffs are not entitled to relief. It has long been settled that a mortgagee is not a creditor within 13 Eliz. ch. 5, unless the mortgaged property is not sufficient to satisfy the debt secured by his mortgage. Refer to May on Fraudulent Conveyances, 2nd ed., pp. 57, 163-4; Masuret v. Mitchell, 26 Gr. 435; Crombie v. Young, 26 O. R. 194; Sun Life Assurance Co. v. Elliott, 31 S. C. R. at p. 98.

It is immaterial that defendants attacked the mortgage and sought to set it aside, because they failed, with the result that the mortgage has been declared valid and plaintiffs are now and have always been fully secured creditors. Action dismissed, but, in view of all the circumstances, without costs.

Smith & Steele, Stratford, solicitors for plaintiffs.

Idington & Robertson, Stratford, solicitors for defendants.

MEREDITH, C.J.
LOUNT, J. JANUARY 8TH. 1902.

DIVISIONAL COURT.

PETERS v. WHYTE.

Trial—Jury—Judge's Charge—Malicious Prosecution—Want of Reasonable and Probable Cause—Before Judge Rules as to, Facts must be Passed upon by Jury.

Motion by plaintiff to set aside a non-suit entered by Ferguson, J., at the trial at Stratford of an action for malicious prosecution, and for a new trial. The trial Judge ruled that the plaintiff had not shown the absence of reasonable and probable cause for the prosecution, which was for

perjury. The charge of perjury was dismissed by the magistrate.

E. Sydney Smith, K.C., for plaintiff.

J. P. Mabee, K.C., for defendant.

Judgment of the Court was delivered by

MEREDITH, C.J.—Although it appeared in the plaintiff's case at the trial that a mass of evidence was given at the hearing before the police magistrate in direct contradiction of what he had there testified, yet as the appellant, who was examined as a witness on his own behalf at the trial testified that what he had deposed to was true to the knowledge of the respondent, the trial Judge was not in a position to determine whether absence of reasonable and probable cause was shown until the jury had passed upon the disputed question of fact, for if plaintiff's version was accepted by the jury there was not reasonable and probable cause for the prosecution, for upon that hypothesis what the plaintiff had sworn to was true to the knowledge of the defendant. There should be a new trial. Costs of last trial and motion to be in the action.

Smith & Steele, Stratford, solicitors for plaintiff.

McPherson & Davidson, Stratford, solicitors for defendant.

MEREDITH, C.J. JANUARY 8TH, 1902.
LOUNT, J.

DIVISIONAL COURT.

CLUNIS v. SLOAN.

Slander—Privileged Occasion — Proof of Malice Necessary—Social or Moral Duty—Question for Judge, not Jury—Damages not Excessive.

Motion by defendant to set aside verdict and judgment for plaintiff for $500 in an action for slander tried before Meredith, J., and a jury at Chatham, and to dismiss the action or for a new trial upon the grounds of misdirection and excessive damages. The plaintiff is married to the sister of the defendant. The plaintiff alleged that the defendant had on four different occasions spoken words accusing the plaintiff of having stolen binder twine. The defendant contended that one of the occasions was privileged, and the jury should have been told that unless they found express malice the defendant was entitled to a verdict, and there was no evidence proper to submit to the jury, as to other occasions. On the first occasion in question which was claimed as privileged, the defendant admitted that the words were spoken to his mother and sister, and he denied speaking on any other occasion.

R. C. Clute, K.C., for plaintiff.

M. Houston, Chatham, for defendant.

Judgment of the Court was delivered by

MEREDITH, C.J.—The first occasion was not privileged, and therefore proof of malice was not necessary. The existence of a social or moral duty upon which the privilege rests is one for the Judge and not the jury: Stuart v. Bell, [1891] 2 Q. B. 341. There was no such duty in the present case, and the objection to the charge fails. There is no ground for the interference, and the damages are not excessive. Motion dismissed with costs.

Scane, Houston, Stone, & Scane, Chatham, solicitors for plaintiff.

W. F. Smith, Chatham, solicitor for defendant.

MEREDITH, C.J. JANUARY 9TH, 1902.

TRIAL.

McGOWAN v. ARMSTRONG.

Limitation of Actions—Title by Possession of his Father's Land by a Son who does not Pay Rent nor Acknowledge Title for 11 Years—Assessment of Son as Tenant and both afterwards as Owners — Tenancy at Will — Settlement in Ignorance of Rights not Binding—Doe d. Bennett v. Turner, 7 M. & W. 226, distinguished—Fane v. Fane, L. R. 20 Eq. 698, followed.

Action tried at Toronto brought to recover payment of the first instalment, $333.33, of a charge payable in twelve annual payments, upon certain land in the township of Chinguacousy, created by the will of Edward Armstrong, deceased, who died in 1900, having devised the land, subject to the charge, to his son, the defendant. The plaintiffs are the executors and other beneficiaries under the will.

E. D. Armour, K.C., and W. B. Milliken, for plaintiffs.

E. F. B. Johnston, K.C., and J. D. Montgomery, for defendant.

MEREDITH, C.J.—The defendant was put by his father in possession of the land in 1879, has continued in possession ever since, occupying it for his own benefit, though expecting some burden with respect to it to be imposed by his father: having the profits, paying no rent, and giving no acknowledgment of his father's title, and having made valuable improvements; and therefore upon such state of facts the father's title has become extinguished: R. S. O. ch. 133. The defendant was a tenant at will, the tenancy was never determined, and the defendant acquired title after eleven years: sec. 5, sub-sec. 7. There is no evidence that he was care-

taker or servant. If the tenancy had been determined, a new one would have to have been created to stay the running of the statute. No such tenancy was created. The fact that the property was assessed to the father as owner and the son as tenant in 1879 and 1880, and to both as freeholders from 1880 to 1899, and that in 1882 the assessment was at the instance of the son, does not authorize the drawing of an inference that a new tenancy at will was created within eleven years before action: Doe d. Bennett v. Turner, 7 M. & W. 226, is distinguishable. The agreement relied on by plaintiffs was made by defendant in ignorance of his rights, and is not binding: Fane v. Fane, L. R. 20 Eq. 698: and any election made by him to take under the will is part of the same transaction and falls with it. Action dismissed without costs.

Mulock, Mulock, Thompson, & Lee, Toronto, solicitors for plaintiffs.

Montgomery, Fleury, & Montgomery, Toronto, solicitors for defendant.

MEREDITH, C.J. JANUARY 9TH, 1902.

CHAMBERS.

EVANS v. JAFFRAY.

Discovery — Production — Examination — Promotion Agreements and Expenses.

Appeal by defendants Cox and Ryckman from order of Master in Chambers requiring defendant Ryckman to file further and better affidavit on production, and requiring defendants Cox and Ryckman respectively to attend and answer certain questions which they had declined to answer upon their examination for discovery, and to be examined as to all matters consequent on or arising out of or necessary to make complete their answers to these questions.

E. F. B. Johnston, K.C., and C. W. Kerr, for defendants Cox and Ryckman.

F. A. Anglin, for plaintiff.

MEREDITH, C.J.—Held, that the questions intended to elicit from defendants information as to the source from which came the $20,000 received by defendant Jaffray from defendant Ryckman after the company which was formed had been floated, are irrelevant and such as defendants are not bound to answer; that the other questions which defendant Cox declined to answer relate to the agreements which were ultimately entered into for the purchase of the businesses which were transferred to the company formed, and are relevant and should have been answered; that as to questions 17, 19, and 67, 17 and 19 cover practically the same

point, and these questions have no bearing on the issues between the parties, at all events at this stage of the proceedings, and that this is one of the cases in which as to these questions the proceeding by examination for discovery is being abused; that upon the whole the order appealed from should be varied by confining it to requiring defendant Cox to re-attend and submit to be examined as to the nature of the agreements which were entered into on behalf of the promotion syndicate with the companies; but that, if the plaintiff takes nothing by the further examination of defendant Cox, the costs of such further examination must be borne by plaintiff; that defendant Ryckman ought not to be required to answer as to the contents of the agreements made by the promoters. If in writing he is not bound to produce them, and if he is privileged from producing them, he cannot be interrogated as to their contents. Costs of appeal and below to be in the action. He referred to Bray on Discovery, p. 429, and Davies v. Waters, 9 M. & W. 608.

Murphy, Sale, & O'Connor, Windsor, solicitors for plaintiff.

Ryckman, Kirkpatrick, & Kerr, solicitors for defendants Cox and Ryckman.

BRITTON, J. JANUARY 9TH, 1902.

TRIAL.

BARR v. BIRD.

Fraud—Estoppel—Patent—Registration—Mortgage — Notice.

Action tried at Rat Portage, to compel the registration of a patent of mining location McA. 163, Rainy River, to establish a mortgage against it, and for damages for cutting and removing timber.

The plaintiff lent $500 to defendant C. A. Spence, who represented that defendant R. S. Spence owned the location, and that the patent to him would soon issue. Subsequently C. A. Spence procured an assignment of the interest of R. S. Spence, and the patent issued to C. A. Spence for a half interest, the other half going to D. & E. Coxwill, not parties to the action. Plaintiff registered the mortgage and a caution in the local Land Titles office and commenced this action.

G. F. Shepley, K.C., and T. R. Ferguson, Rat Portage, for plaintiff.

C. A. Masten and W. B. Towers, Rat Portage, for defendant Bird.

BRITTON, J.—Held, upon the facts, that defendant C. A. Spence was estopped from setting up his ownership of the

undivided half so as to defeat plaintiff's claim; that defendant Bird cut the timber with full notice of the mortgage and caution, and is liable for reduction in value; and directed judgment for registration and that plaintiff is entitled to have his mortgage registered and to a declaration that it is binding on the undivided half interest now in name of defendant C. A. Spence, and to $187.50 damages and full costs. The $187.50 to be credited on the mortgage.

T. R. Ferguson, Rat Portage, solicitor for plaintiff.

W. B. Towers, Rat, Portage, solicitor for defendant Bird.

MEREDITH, J. JANUARY 10TH, 1902.

CHAMBERS.

REX v. KENNEDY.

Conviction—Prisoner not consenting—Habeas Corpus—Criminal Code, sec. 783.

Motion upon the return of a habeas corpus for discharge of prisoner tried, but without his consent, under sec. 783 of the Criminal Code, and convicted.

E. B. Stone, Peterborough, for prisoner.

J. R. Cartwright, K.C., for the Crown, offered to consent to order being made under sec. 752 of the Criminal Code.

MEREDITH, J.—The prisoner must be discharged, and, his counsel consenting, there will be the usual clause in the order protecting the magistrate. There seems no reason against his being again convicted if the authorities choose to proceed.

MEREDITH, J. JANUARY 10TH, 1902.

CHAMBERS.

BROTHERS v. ALFORD.

Municipal Corporation—By-law — Validity of — Conviction and Fines under, for Breaking Hired Buggy—Appeal to Sessions—Dismissal on Preliminary Objection—Not a Bar to Certiorari.

Motion for certiorari to remove a conviction by the police magistrate of Stratford. Defendant hired a horse and buggy from a liveryman, and the buggy was injured, and under the consolidated by-laws of the city of Stratford the defendant was fined for refusing to pay the damage sustained owing to the breaking of the buggy. It was pointed out on behalf of prosecutor that an appeal had been taken to the General Sessions of the county of Perth and the conviction affirmed.

J. J. Coughlin, Stratford, for defendant.

D. L. McCarthy, for prosecutor.

MEREDITH, J., granted the writ, it appearing that the appeal had really not been heard owing to it being dismissed on preliminary objections.

Mabee & Makins, Stratford, solicitors for prosecutor.

Woods & Coughlin, Stratford, solicitors for defendant.

MEREDITH, J.

JANUARY 10TH, 1902.

WEEKLY COURT.

RE SOUTHWOLD SCHOOL SECTIONS.

Public Schools — Alteration of Boundaries — Reference for — Award on — Uniting instead of Altering, Invalid — 1 Edw. VII. ch. 39, sec. 42, sub-sec. 1.

Motion by John Culver and the board of public school trustees for school section number 13 of the township of Southwold for an order setting aside an award dated the 19th November, 1901, made by arbitrators appointed by the county council of the county of Elgin, under 1 Edw. VII. ch. 39, sec. 42, sub-sec. 1, to hear an appeal to the county council against the refusal of the township council of the township of Southwold to alter the boundaries of school sections 12, 13, and 14, for the purpose of enlarging school section 12, by which award the arbitrators purported to consolidate into one school section the sections numbered 12 and 13, and for an order for payment of the costs of the application.

A. B. Aylesworth, K.C., for applicants.

J. M. Glenn, K.C., for township of Southwold and county of Elgin.

T. W. Crothers, St. Thomas, for individual ratepayers of township.

MEREDITH, J., held that the arbitrators had no power to unite two school sections, upon an appeal against a refusal to comply with an application to alter boundaries only. The ratepayers must consent by an application to the township council for the specific purpose. Order made, but without costs, for there is no person or corporation against whom they can rightly be awarded.

Andrew Grant, St. Thomas, solicitor for complainant.

J. M. Glenn, St. Thomas, solicitor for corporation of county of Elgin and township of Southwold.