THE

ONTARIO WEEKLY REPORTER

VOL. 23 TORONTO, JANUARY 2, 1913. NO. 10

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

FLEMING v. TORONTO RAILWAY CO.

4 O. W. N. 323.

Negligence—Passenger on Street Car—Explosion from Controller—Panic—Personal Injury—Defective Apparatus—Inspection—Res Ipsa Loquitur—Evidence of Experts.

Action for damages for personal injuries sustained by plaintiff while a passenger on defendants' car, owing to a panic caused by the explosion of a controller thereon. The jury found that the accident was caused by the negligence of defendants in using a re-built controller in a re-built condition, not properly inspected, that the motorman was negligent in not applying the brake which would have prevented the accident, and there was no contributory negligence.

This was the second trial of the action, the judgment in favour of plaintiff at the first trial having been set aside and a new trial directed on account of the improper exclusion of evidence: see 20 O. W. R. 827; 25 O. L. R. 317.

COURT OF APPEAL, *held*, that there was no reason to disturb the jury's findings and, in any case, the controller being under the control of defendants, the doctrine of *res ipsa loquitur* applied.

Scott v. *London Docks*, 3 H. & C. 596, at p. 601, referred to.

Appeal dismissed with costs.

Appeal by the defendants from the judgment at the trial before Meredith, C.J., and a jury in favour of the plaintiff.

The action was brought by the plaintiff to recover damages said to have been caused to him while a passenger upon the defendants' railway owing to the defendants' alleged negligence.

The case has been twice tried, resulting each time in a judgment in favour of the plaintiff.

The jury, in answer to questions, found that the plaintiff's injuries were caused by the negligence of the defendants, such negligence consisting in using a rebuilt controller in a defective condition, and not properly inspected; the

motorman was guilty of negligence in not applying the brake, which would have prevented the accident; and there was no contributory negligence.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

D. L. McCarthy, K.C., for the defendants.

H. D. Gamble, K.C., for the plaintiff.

HON. MR. JUSTICE GARROW:—The only question which we are called upon to determine upon this appeal is, was there sufficient evidence proper for the jury upon which they might reasonably find, as they did, and in my opinion there was, except perhaps as to the motorman's negligence, and particularly as to its bearing upon the result. The latter, especially, I, upon the evidence, greatly doubt; so much so that if the case depended upon that finding alone I could not approve. But as the earlier findings are in themselves, if sustained, sufficient, I do not further discuss that aspect of the case.

The full and careful charge of the learned Chief Justice was not objected to.

In opening his address the learned Chief Justice said: "The main facts are simple. Any difficulties there are in the case arise from the view you take of the somewhat conflicting evidence by expert witnesses, and how far you give credit to the testimony generally of the witnesses who have been called."

This extract seems to furnish not only the keynote of the charge but of the case itself. It is not in dispute that something unusual occurred on the occasion in question, the outward manifestation of which was a loud explosion followed by flame and smoke, and by panic on the part of the passengers, in the course of which the plaintiff fell or was forced out of the car and received severe injuries.

Nor is it, I think, in serious dispute that the seat of the defect was in the controller, resulting in the formation of a short circuit. Both Mr. McCrae and Mr. Richmond seem to agree upon that, the former saying: "in my opinion if you take the area of the controller,—confined in the controller, is the area in which the accident occurred," and the latter, that the controller must have been in a defective

condition or the accident would not have happened. The latter, it is true, also criticised the original construction of the controller. But he admitted that it was of standard make, and of a type in general use, and was quite unable to point to a case in which his ideas had been carried out. So that if the controller had been otherwise perfect this criticism would, I think, have been harmless.

But the controller was not as originally built but had been "overhauled" by the defendants, which is explained as taking it apart and putting in new parts in the place of parts which had become worn.

The circumstances seem to me to bring the case within the principle often acted upon, laid down in *Scott* v. *London Dock Co.*, 3 H. & C. 596, p. 601, that "where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care." There is, as I have pointed out, practical agreement in the evidence of the experts that the accident was a very unusual one, and one that could not have happened if the controller had been in proper condition. It was certainly under the care and management of the defendants' servants. It had at one time, not long before the accident, become so worn out that it had to be rebuilt, and the onus under the circumstances was, I think, upon the defendants to shew that that had been properly done, an onus not in my opinion discharged by the evidence which was given.

Then as to the inspection—inspection from time to time of the controller is admittedly necessary, and inspection of a kind was, upon the evidence, probably had not long before the accident. But it too, as in the case of the evidence as to the rebuilding of the controller, was of an unsatisfactory, general nature, quite insufficient to convince that such an inspection had recently been had as would probably have discovered the defects if there were any.

Under these circumstances it seems to me that both questions were properly for the jury, and that the appeal should be dismissed with costs.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—If the defendants were entitled to a nonsuit on the first ground upon which this action is based, they ought to have had it at the first trial; or upon the appeal to this Court against the ruling refusing a nonsuit at that trial; I cannot therefore look upon this question otherwise than as settled adversely to the defendants, so far as this Court is concerned, by its judgment in the former appeal. It cannot be said that the case in this respect was less favourable to the plaintiff, on the whole evidence, at the later than at the earlier, trial.

There was too, I think, evidence to go to the jury upon the other branch of the case: evidence upon which reasonable men might find, as the jury in this case did find, that the accident was caused by a defect in the controller which proper inspection would have discovered in time to have prevented the accident.

The other questions were also all questions for the jury, and have now been twice found adversely to the defendants.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 20TH, 1912.

TRIAL.

PRUDHOMME v. LABELLE.

4 O. W. N. 388.

Vendor and Purchaser—Cancellation of Agreement—Default in Instalment — Whereabouts of Vendor — Purchaser bound to make Enquiry—Payment.

Action for a declaration that an agreement dated November 1st, 1910, for the sale of certain lands was binding on defendant. Plaintiff was the assignee of the purchaser under such agreement. The agreement provided for the sale of the lands in question for $700, payable eight years after the making thereof, with interest at 6%, payable half-yearly. If default were made in payment of instalments of interest, defendant was to be at liberty to cancel the agreement, and purchaser was to lose all he had paid thereon. Defendant had to put the collection of the first instalment of interest in a lawyer's hands, and when the purchaser defaulted in the payment of the second instalment for over three months, he cancelled the agreement by notice. Plaintiff claimed to have been anxious to make payment, but to have been unaware of defendant's whereabouts, though the evidence did not shew he had made any serious effort to discover them.

SUTHERLAND, J., dismissed action, with costs.

Action for a declaration that defendant was the beneficial owner of certain lands, and that a certain agreement

for the sale of such lands which he claimed to have rescinded was binding on him.

M. J. Gorman, K.C., for the plaintiff.

J. V. Vincent, K.C., for the defendant.

HON. MR. JUSTICE SUTHERLAND:—Under an agreement in writing dated November 1st, 1910, the defendant Damase Labelle sold to one Elie Gendron the south half of the west half of lot No. 20 in the first concession, new survey of the township of Cumberland in the county of Russell, for $700, payable in eight years with interest at 6% half yearly on the first days of May and November. Gendron did not pay the first instalment of interest which became due on the 1st May, 1911, but during that month arranged a sale to the plaintiff of his interest in the said land under said agreement and of another piece of land.

A real estate agent named Menard acted for both parties, and he and Gendron went on the 25th of May, 1911, to Montreal where the defendants were residing, to discuss the matter with the defendant Damase Labelle. The written agreement already referred to contains the following clauses:—

"Together with the appurtenances, for the price or sum of seven hundred dollars of lawful money of Canada, payable in manner following, that is to say: The said sum of seven hundred dollars to become due and payable at eight years from and after the date of this agreement with interest at the rate of six per cent. per annum computed from date and to be paid half yearly on each first day of May and November, first of such instalments of interest to fall due and payable on the first day of May next, 1911. Interest at the rate aforesaid to be charged after as well as before maturity, but no instalments of interest shall be allowed to run in arrears for more than three months otherwise the party of the first part shall be at liberty to cancel this agreement and the party of the second part to lose all he had paid thereon.

"The party of the second part agrees to clear four acres of land and keep same under cultivation every year for two years, making a total of 8 acres, also shall also build a substantial barn on the premises now conveyed in the course of one year from date."

Menard is a man of some education and experience as a real estate agent and conveyancer. Gendron and Labelle are illiterate and each speaks French but has a very imperfect knowledge of English. Menard's evidence is to the effect that on the day named he had two interviews with the defendant, as a result of which he wrote a memorandum of agreement in a small pocket notebook in the words following:—

"I, Damase Labelle of 1281 St. Catherine St. East, Montreal (at Hospice Gameline), hereby acknowledge that the amt. due me by Elie Gendron on the s. w. ¼ lot 20, con. 1, Cumberland, is $700, payable as stated in the agreement, and that there is no arrears except $21 due the 1st inst. That I consent to the transfer of the said land as made by Gendron to F. Prudhomme of South India, and I am aware that Prudhomme or E. J. Menard of Embrin will make the payments hereafter, and I agree to inform them or either of them in writing of my address and whereabout should I leave this place here. That in view of the transfer of the said land by Gendron to Prudhomme and in view of the increase in value of the said land, I consent that Prudhomme shall not be bound to fulfil the conditions of the agreement in so far as the building of the barn and the clearing of the land is concerned. That I am a beneficial owner of the said land and my sister Onesime has nothing to do with it. I agree to have any power of attorney or other document signed by my sister at any time if those I hold are found defective or not according to Ontario law so as to insure proper conveyance of the said land to Prudhomme. Signed, Thomas Labelle, his mark, Montreal, May 25th, 1911. Signed, Emile J. Menard, witness."

Menard also says that while the talk was in French, as the land was in Ontario and he understood how to write English better than French, he wrote the alleged agreement in English. He states that it was explained to Labelle, he understood it and signed it by making his mark thereto. As a matter of fact Gendron had not yet made a transfer of the land to Prudhomme as the deed was produced at the trial and is dated 26th May, 1911.

Damase Labelle on the contrary says that no agreement was entered into on that day at all, that Menard did not ask him to sign or make his mark to any document and that he did not do so.

Gendron says that they saw Labelle twice on the day named, and that they went back the second time after dinner to close the bargain. He says that it was agreed that a bonus was to be given to Labelle and that was the bargain made with him and which he accepted. He says that Labelle agreed to take Prudhomme in his place and made his mark to something in Menard's book in the morning. Afterwards he said that Menard made the mark, and again that he could not remember and could not say. Elsewhere he said that Menard was taking notes in his book to the knowledge of Labelle, but that he did not hear him read them over to Labelle. Labelle admits that Menard at the first of the interviews on the day in question did speak to him about the barn and the clearing of the land, but denies that there was anything said about releasing Prudhomme from the obligation to do those things. He also admits that he saw Menard writing something in a book, but he did not notice what it was. Labelle further says that Menard offered him a bonus of $50 to take his money in full under the first mentioned agreement, and finally before he left was told that if he would make the bonus $75 he would accept it. Some question had been raised about the land in question standing in the registry office in the name of the defendant, Onesime Labelle. He says that he also said that he would see that his sister would make the papers right. He says that Menard did not agree to pay the $75 by way of bonus but intimated that he would in the course of a few days. He says that he said himself that he would accept the principal and interest with said bonus if payment were not deferred too long.

On the 26th May the deed referred to was drawn from Gendron to the plaintiff of the said lands, with the other lands for a named consideration of $3,400. It was registered on the 2nd June, 1911. On the 26th May also a mortgage was made by the plaintiff to Menard on said lands for $3,500. Menard says that he took the mortgage in his own name because certain incumbrances upon the properties had to be cleared off before a trust company, with which he was proposing to place the loan, would take it, and that certain incumbrances have been paid off and a considerable sum of money has been obtained from the trust company in connection therewith.

The instalment of interest due on the 1st of May, 1911, under the agreement was not paid until the 30th August. Meantime the defendant Damase Labelle says that having waited for some time after its maturity, he wrote Gendron about the interest. Receiving no reply he says he put the collection of the instalment in the hands of a lawyer who obtained payment, and it appears from a letter dated 30th August and written by Lachappelle & Denis, advocates, of Montreal, to Menard that it was sent by him to them. This letter of acknowledgment only speaks of Gendron and Labelle, and Prudhomme is not mentioned in it.

Another instalment of interest came due on the 1st November, 1911, and was not paid. The defendant, Damase Labelle, says that he sent letters in advance to Gendron and hearing nothing in reply he came from Montreal to Ontario on or about the 1st November. He further says that he had no further news from anybody until the beginning of the next year. On the other hand, Menard says that about the 5th December he sent the $21 of interest by registered letter to Labelle to the same address in Montreal where he had interviewed him, not meantime having received any intimation of a change of address, and he produces the letter and cheque, which latter included bank charges.

Thereupon on the 9th December he sent a letter to Lachappelle & Denis at Montreal to the following effect: "I beg to enclose cheque covering the interest due Damase Labelle. I have been trying to locate this man for some time but cannot trace him. In view that I have received communications from you I thought that you would know where he is. Kindly hand the cheque over to him and ask him to give me his future address. I also wish to state that owing to the inconvenience to him and to me caused by the distance separating us, I would be prepared to pay him the full amount of his money. If he would accept it I think it would be of advantage to him also." The same cheque was enclosed in this letter.

On the 13th December Lachappelle & Denis wrote in reply returning the cheque and stating that they did not know Labelle's address. Labelle on coming to Ontario, it appears, took up his residence about five miles from the land in question, close to which the plaintiff was residing on another piece of land. It appears that the plaintiff

soon after the alleged agreement in May had gone on the land and cleared and sowed a small portion thereof.

Stanislaus Belisle, a nephew of the defendant, Damase Labelle, says that in Montreal about the last of July or the beginning of August, 1911, he was asked by Damase Labelle, who learned that he was going up into Ontario, to see Prudhomme and ask him to write the said defendant as to whether he had the land or not, and to give him the defendant's address. He says he saw Prudhomme and spoke to him as requested, but his reply was that he had no business to write to Labelle and that he could write to him himself if he wished. He says that he did not go back to Montreal, and under the circumstances did not write to the defendant.

It is not clear from the evidence whether sufficient clearing had been done by Gendron or the plaintiff upon the land in question to satisfy the terms of the agreement. It is admitted on all hands that neither of them built the barn referred to therein.

The instalment of interest due on the 1st November, 1911, not having been paid to the defendant, Damase Labelle, by anybody on the 19th March, he served a written notice on both Gendron and Prudhomme forbidding them to remove anything from or trespass upon the lands in question. This was brought to the attention of Menard who says that in consequence on the 21st March, 1912, he saw the defendant Damase Labelle and offered him the said interest, and that he then replied that he would not have anything to do with it, and that the farm was now his.

Joseph Belisle says that Menard came to see the defendant Labelle towards the end of March and offered him $75 by way of bonus, the same as he had offered the year before. He was told by Labelle that "you are now too late. I have no place to put my money." He intimated to him that if he wanted to make a bargain he would have to pay interest for the full eight years, to which Menard replied that that was too much. There was some talk then of the parties meeting in Montreal about the matter, but he heard nothing more as to this.

Menard also said they had some further talk and Labelle agreed to meet him in Montreal and that he went there, met Labelle and his sister, offered them the money, principal and interest, mentioned in the agreement, and ten-

dered a deed for their execution. Labelle says that he did propose to come to Montreal and pay what interest was owing, and that they met there sometime in March, whereupon Menard proposed to pay him the money due under the agreement and give him a bonus of $100, which he refused to accept. Nothing was paid on account of the agreement.

On or about the 23rd April, 1912, the defendant Labelle served on Gendron and Prudhomme a formal notice in writing cancelling the agreement dated the 1st November, 1910, and demanding possession of the land and also demanding a sum of $200 alleged in the notice to have been lent to Gendron and intimating that damages would be asked by reason of any unlawful retaining possession of the lands.

It appears further that early in May the defendant Labelle employed one Armadase Labelle to do some clearing on the land and to put up a little house or shack. He says that at that time the plaintiff Prudhomme saw the work that was being done but said nothing to him about it.

The writ in this action was issued on the 13th May, 1912, and the plaintiff seeks therein to have it declared that the defendant Damase Labelle is the beneficial owner of the lands in question, and the other defendant Onesime Labelle a bare trustee of the legal estate therein.

It was admitted during the progress of the suit that there is now no question about this as Damase Labelle is the beneficial owner of the lands in question. The plaintiff also asks for a declaration that the agreement of sale dated 1st November, 1910, and the assignment thereof by Gendron to the plaintiff are valid and binding on the defendants.

Upon the evidence it is not clear to me that the defendant Damase Labelle signed the alleged agreement quoted above from Menard's notebook. It is clear, I think, that he never understood he was signing a document waiving any rights he had as against Gendron under the agreement of the 1st November, 1910, with reference to the clearing of the land and putting up of the barn or otherwise. He seems to have understood that the plaintiff was negotiating to buy or arranging to buy Gendron's interest in said agreement. If he put his mark to anything, as even Gendron at one point seems to think he did, it was apparently to signify his consent to Gendron transferring his interest to Prudhomme. I do not think he ever agreed that in case he

changed his Montreal address he would notify the plaintiff or Menard. The interest due on the 1st May, 1911, at the time Menard says the agreement referred to in his book was made, was then overdue. And while Menard says that the plaintiff intimated he was in no hurry for its payment it looks very unreasonable if the arrangements were as Menard says, that that interest was not paid by the plaintiff or Menard acting for him until August and then only after the matter had been placed in solicitors' hands for collection. It is plain from the evidence that the next instalment of interest which became due on the 1st November, 1911, was not paid upon that date nor was any attempt made to pay it for more than a month afterwards. The barn had also not been erected. In the meantime the defendant Damase Labelle had become uneasy about the matter and left Montreal and come into Ontario to see what was the matter and why no one was paying him his interest. He says that for some time after he arrived he was not in a very good health and obliged to keep more or less to the house. While it seems perhaps a little strange that under all the circumstances he did not go directly to Gendron or the plaintiff and find out just how matters stood, he was under no obligation to do so.

By the 19th March, 1912, default had been made in the payment of the interest due on the 1st November, 1911, for more than three months, as well as default in not erecting the barn. The defendant Damase Labelle was, therefore, within his rights when on the 19th March he served the notice given on that date. It was apparently intended by him as a notice cancelling the agreement. When on the 21st March Menard made the alleged offer of the interest in arrear to Damase Labelle, he declined to accept it, intimating that the land was now his. On the 23rd April, 1912, he had a more formal notice of cancellation of the agreement served. Subsequent to this date and before the writ was issued he appears to have retaken possession of the property in question.

I think, therefore, that before this action was commenced the contract was at an end, and that under the circumstances the relief asked for by the plaintiff cannot be granted. The action will be dismissed with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOV. 21ST, 1912.

TRIAL.

APPELBE v. DOUGLAS.

4 O. W. N. 389.

Landlord and Tenant — Alleged Misuse of Demised Premises — Forfeiture of Lease—Costs.

FALCONBRIDGE, C.J.K.B., dismissed, with costs, an action by a landlord against his tenant for alleged obstruction and nuisance caused to the demised premises.

Action by a landlord against his tenant for alleged wrongful and harmful acts in relation to the demised premises, and for forfeiture of the lease, tried at Sandwich and Toronto.

J. H. Rodd, for the plaintiff.

J. Sale, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—This case was tried in fragmentary fashion, including extension of the evidence and written arguments which did not reach me until after the long vacation.

Perusal of the evidence confirms the opinion which I formed when hearing the case that plaintiff has proved no substantial wrong or grievance, calling for the interference of the Court, either by way of injunction, damages or forfeiture of lease.

The alleged obstruction and nuisance have caused no visible and substantial or pecuniary damage to plaintiff's property.

It is a mere squabble between neighbours. Defendant has not always acted with due consideration of plaintiff's feelings, if not of his rights, and so, while I dismiss the action, I do so without costs.

NOTE.—This applies to the whole action and covers and overrides any interim ruling as to costs made in consequence of misunderstanding as to appointments in June and July.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

WELLAND COUNTY LIME WORKS COMPANY v. SHURR.

4 O. W. N. 336.

Mines and Minerals — Oil and Gas Leases — Agreement between Farmers and Company for Leases—To be in Usual Form—Company to Supply Farmers with Gas for Heating, Free—Refusal of Farmer to Sign Lease—Action to Compel Signing of Lease—For Injunction Restraining Farmer from Interfering with Company in Taking Gas—Rental for Wells—Costs.

SUTHERLAND, J., 20 O. W. R. 637; 3 O. W. N. 398, granted orders as asked, allowing company to take gas from wells on defendants' lands. If parties cannot agree upon terms of lease within two weeks, there will be a reference to Master at Welland to settle the form. Costs to plaintiff.

DIVISIONAL COURT, 21 O. W. R. 480; 3 O. W. N. 775, reversed above judgment and dismissed action with costs.

COURT OF APPEAL allowed appeal from judgment of Divisional Court, and restored judgment of Sutherland, J., with costs.

Appeal from judgment of Divisional Court reversing judgment of SUTHERLAND, J., and dismissing action for specific performance of an agreement to give a gas and oil lease.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

W. M. German, K.C., for the plaintiffs.

S. H. Bradford, K.C., and L. Kinnear, for the defendants.

HON. MR. JUSTICE MEREDITH:—I agree entirely with the learned trial Judge in his disposition of this case; and can find no cause for the Divisional Court's reversal of it.

The main question is whether the landowners were to give separate leases of their respective farms, or one joint lease of the two farms, though neither had any title or right to or interest in the farm of the other; and, under ordinary circumstances, and even in the case of an agreement quite silent on the subject, one might well ask why not separate leases? Why should each demise a thing which was not his, and in which he had no legal or equitable estate or interest?

But by the plain, the unmistakable, words which the parties used in the formal writing evidencing the agreement between them, the matter seems to me to be put beyond any kind of doubt; the landowners are to give "the usual gas and oil leases of their respective farms," and the words leases, nowhere lease, is used in two other places in this short agreement.

The provision in the agreement for supplying gas to heat the homes of the landowners, free of charge, is not at all inconsistent with separate leases; nor is the provision for heating the house of a tenant of one of the landowners in a certain event. These things may be several and respective, and cannot override the unmistakable words, "leases of their respective farms;" as well as the very nature of the transaction.

Then the common form of lease, which each of the parties has put in, accentuates the absurdities to which a joint lease would lead; the landowner is to have a royalty upon all oil produced; and so much per annum for each well of gas in paying quantities; and so much per acre for damage to the land in working it for gas or oil; all things obviously for the benefit of the owner only, not for another whose land is in no way touched by these particular things.

No reasonable care for reforming the agreement was made at the trial. Indeed it is the last thing the defendant wants—that is a reformation such as would support the joint lease-holding of the Divisional Court. That which each of these landowners wants is really a separate lease with a provision in it that the other of them—though not a party to it—shall have his home also heated with gas, the same as the landowner's is to be made under his lease; but there is nothing in the case to support an extraordinary claim of that character.

If there be a usual gas and oil lease, there is nothing in the defences of want of certainty, and the Statute of Frauds; whether there is, or is not, such a lease is to be the subject of an enquiry under the judgment directed to be entered at the trial.

I would allow the appeal; and restore that judgment.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

THE WELLAND COUNTY LIME WORKS COMPANY v. AUGUSTINE.

4 O. W. N. 338.

Action for Damages—Injunction—Supply of Natural Gas—Non-fulfilment of Conditions—Joint Contract—Relief from Forfeiture—Parties—Judgment in Previous Action—Res Judicata.

An action for an injunction to restrain defendants from interfering with certain gas wells claimed by plaintiffs and damages for alleged wrongful taking possession of said wells by defendants. The plaintiffs' rights in this case depended upon an agreement made between them and the defendants on November 20th, 1903. By this the defendants agreed to give to the plaintiffs the usual oil and gas leases of their respective farms "to continue so long as the plaintiffs continue to comply with the conditions agreed upon." That condition was mainly to supply free of charges sufficient gas to heat the defendants' houses. In *Welland Co. Lime Works* v. *Shurr*, Divisional Court, 21 O. W. R. 481; 3 O. W. N. 755, reversed judgment of Sutherland, J., 20 O. W. R. 637; 3 O. W. N. 398, holding that the agreement was a joint one and not severable as to Shurr. The Court also *held*, that the company had by its own act forfeited its rights under the agreement and had no *locus standi* in Court.

BOYD, C., *held*, 22 O. W. R. 235; 3 O. W. N. 1329, that the plea of *res judicata* relied on was a sufficient defence. The company must by some means, if possible, get rid of the forfeiture declared by the Court before they could be rightly in Court as to the gas well. The present action was not well advised and should be dismissed with costs.

COURT OF APPEAL, in view of the decision of the Court in the *Shurr Case*, *ante*, 397, reversed the judgment of Boyd, C., and gave plaintiffs the relief sought, but without costs.

An appeal by the plaintiffs from a judgment of HON. SIR JOHN BOYD, C., 22 O. W. R. 235, 3 O. W. N. 1329.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

W. M. German, K.C., for the plaintiffs.

S. H. Bradford, K.C., and L. Kinnear, for the defendant.

HON. MR. JUSTICE MEREDITH:—It follows from the decision, in this Court, of the case of *The Welland County Lime Works Co.* v. *Shurr*, that the plaintiffs in this action are entitled to the relief sought by them in it; but I do not think they should have their costs of it, as a separate action might easily have been avoided; the defendant Augustine might very well have been made a party defendant, in the other action, at some time; and all the necessary relief against him might have been had in it.

I would allow the appeal; and grant the injunction sought, which I suppose is all the plaintiffs now really seek, in this action.

CHAMBERS.

NOVEMBER 9TH, 1912.

MOORE v. THRASHER.

4 O. W. N. 302.

Costs—Security for—Præcipe Order — Assets in Jurisdiction — Title to in Question—Unnecessary Action—Counterclaim—Costs.

MASTER-IN-CHAMBERS refused to set aside a *præcipe* order for security for costs moved against, on the ground that plaintiff had assets within the jurisdiction, where the ownership of the only property relied on as assets of plaintiff was in question in the action. *Walters* v. *Duggan*, 33 C. L. J. 362.

Motion by plaintiff to set aside a *præcipe* order for security for costs regularly issued under C. R. 1199, alleging that she has assets within this province of a nature and amount to be ample security for the defendant's costs.

F. Aylesworth, for the defendant.

J. G. O'Donaghue, for the plaintiff.

MASTER IN CHAMBERS:—The only property relied on by the plaintiff is an hotel in Amherstburg, the ownership of which is in controversy in this action.

It was the property of the mother of the plaintiff and her half-brother, the defendant.

He commenced an action on 29th January, 1912, alleging that their mother had made a will in his favour of this property, as she had promised to do so for good consideration; that afterwards she went to reside with Mrs. Moore, who induced her to convey the hotel to her.

A previous action for the same relief, namely to have the deed to Mrs. Moore set aside, and for discovery by her of the alleged will was begun by Thrasher, on 14th March, 1910. This was not proceeded with as a settlement was being attempted, and plaintiff allowed it to be dismissed for want of prosecution, and at once begun the pleading action, as stated, on 29th January, 1912. This too was not pressed on, and statement of claim was only delivered on 26th October, and statement of defence on 1st November inst.

Meantime on 23rd September the action of *Moore* v. *Thrasher* was begun for possession and *mesne* profits or rent. This proceeded much more rapidly, so that statement of

claim was delivered on October 18th, and on 22nd October, the usual order for security was taken out. It does not appear why there are two actions, nor why defendant did not oblige plaintiff to proceed in due course with the action of *Thrasher* v. *Moore*, and then herself counterclaim in that action for the relief now claimed in *Moore* v. *Thrasher*, which she could probably have done without giving security. See Odgers on Pleading, 5th ed., p. 241.

Even now it would seem in the interests of both parties to have the actions consolidated or to have one stayed until the final disposition of the other, as the issue in both is one and the same. However that may be, it seems that this motion cannot prevail, as the only property put forward by the plaintiff is the subject of the litigation—see *Walters* v. *Duggan*, 33 C. L. J. 362.

It does not appear why the action of *Moore* v. *Thrasher* was necessary—and it seems that the proper order to make now, would be to let the action of *Thrasher* v. *Moore* go to trial at Sandwich on 2nd December prox., as defendant can require to be done under the practice, and in the meantime let the other action be stayed, and let the costs abide the result of that action, the costs of the present motion being in the cause, as the delay of the plaintiff in *Thrasher* v. *Moore* was perhaps some excuse for the present action. Defendant should have leave to counterclaim now in *Thrasher* v. *Moore*, if necessary, to have the whole matter disposed of in that action formally. This can perhaps be done without her giving security. This, however, requires the consent of the parties. If this cannot be had, then the present motion must be dismissed with costs to the defendant in the cause.

HON. MR. JUSTICE RIDDELL. NOVEMBER 11TH, 1912.

CHAMBERS.

RE GIBBONS v. CANNELL.

4 O. W. N. 270.

Mandamus and Prohibition — Division Court — Want of Territorial Jurisdiction—10 Edw. VII., ch. 32, secs. 72, 78, 79 (1) 100—Amendment to Statute—Costs.

RIDDELL, J., decided upon a motion for prohibition to a Division Court, that sec. 79 (1), of the Division Court Act 10 Edw. VII., ch. 32, did not give the Court jurisdiction, where it had none, simply because objection was not taken properly thereto.

Watson v. *Wolverton*, 22 O. R. 586, and other cases, followed.

Motion by defendant for prohibition to the 10th Division Court of the county of York.

E. G. Long, for the motion.

J. F. Boland, contra.

HON. MR. JUSTICE RIDDELL:—A special summons issued out of the 10th Division Court of the county of York, on an advertising agreement, whereby the defendant, a hotel keeper at Port Carling, agreed on certain terms and conditions to pay plaintiffs $50. The summons having been served September 21st, 1912, the defendant, September 26th, filed a notice, "the defendant disputes the plaintiffs' claim herein, and also the jurisdiction of the within Court to try the same." I take this to be a "notice . . . that he disputes the jurisdiction of the Court," within the meaning of (1910), 10 Edw. VII., ch. 32, sec. 78.

The plaintiff served notice of motion for judgment under sec. 100 at the same time as the special summons, *i.e.*, on the 21st September, 1912—and on the 27th September, on the return of the notice of motion, judgment was directed to be entered for the plaintiff for the amount of the claim and costs. The defendant was not represented at the motion; he swears that he instructed his solicitor to oppose the motion furnishing with an affidavit for that purpose, and that his solicitor, as he says, arranged with the plaintiffs' solicitor for a hearing of the motion during the week beginning the 30th September. The defendant denies also, on oath, the execution of the document.

The defendant now applies for prohibition. Upon the argument it was pointed out that there was no affidavit specifically denying that the defendant did not reside or carry on business within the 10th Division Court, division, etc. (sec. 72): but the plaintiffs' counsel most generously waived that objection, and I assume that the action was not properly triable in that division, under sec. 72, but that it should have been entered in another Division Court, sec. 79 (1).

The wording of sec. 79 (1) of the present Act is not quite the same as that of the former Acts: "sec. 79 (1) If it appears that an action should have been entered in another Court . . . it shall not fail for want of jurisdiction, but, etc., etc."—the former legislation was "shall not abate as for want of jurisdiction, but, etc., etc."

Under the former legislation it had been decided that the section in part quoted did not give the Court jurisdiction to try simply if no objection had been taken, or if taken, either not tried or wrongly passed upon.

Watson v. *Wolverton*, 22 O. R. 586 (a); *Re Hull* v. *Hicks*, 22 O. R. 390, and *Re Thompson* v. *Hay*, 22 O. R. 583, 20 A. R. 379.

A tempting argument is based upon the change in the language of the enactment—thus—the Act says that the "action . . . shall not fail for want of jurisdiction . . . ." This by implication gives the Court jurisdiction; and if the Court has jurisdiction, no mistake made by the Court is a ground for prohibition.

It may be at once admitted that if the Court had jurisdiction prohibition does not lie.

Long Point Co. v. *Anderson* (1891), 18 A. R. 401; *Ameliasburgh* v. *Pitcher* (1906), 13 O. L. R. 417.

But I am unable to convince myself that the slight change in the language of the legislation has wrought such a great change in the law.

A provision that an action shall not abate as for want of jurisdiction seems to me to imply a grant of jurisdiction to the Court as a provision that the action shall not fail for want of prohibition. The Courts which have jurisdiction in a particular case are as well and clearly specified now by sec. 72, as formerly when *Re Thompson* v. *Hay* was decided. Had the Legislature intended that a Court other than those named in sec. 72, should have jurisdiction, it would have been easy to say so.

I think I am bound by authority to hold that prohibition must go.

As to costs, the applicant would, under ordinary circumstances, have been entitled to his costs; but his material was defective, fatally defective, and it was only by reason of the generosity of his opponent that he was able to get on at all. Had the respondent's counsel insisted on his strict rights, the motion would have had to be adjourned to enable him to complete his material; this enlargement would, of course, have been at his expense. This is saved him by the eminently reasonable and proper conduct of opposing counsel, and I think the order must be without costs.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 25TH, 1912.

WEEKLY COURT.

HAWKES v. WHALEY ROYCE.

4 O. W. N. 394.

Injunction—Copyright—Interim Order—Damage Small—Balance of Convenience—Costs.

MIDDLETON, J., refused to make an order for an interim injunction restraining defendant from selling a certain book in alleged violation of plaintiffs' copyright, where the latter was attacked, and where the damages could only be trifling, only some 2 copies per week, of the book, being sold.

Costs to be in discretion of trial Judge.

Motion for an interim injunction restraining defendants from selling a certain book in alleged violation of plaintiffs' copyright.

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

W. B. Raymond, for the defendants.

HON. MR. JUSTICE MIDDLETON:—Motion for an interim injunction restraining the infringement of the plaintiff's copyright, by the sale of Otto Langey's violin tutor. The validity of the copyright is attacked.

The amount of damages cannot be large. It is said that the sale was not of more than two copies per week. The price marked on the publication is two shillings and sixpence.

I think the balance of convenience indicates that no interim order should be made. The amount of damages before a trial can be had must be very small. An injunction interfering with the sale could only be granted upon an undertaking to answer as to damages, if the claim is shewn to be unfounded. It would be difficult to assess these damages upon any satisfactory basis.

The motion will, therefore, be adjourned to the hearing, without any interim order, and the question of costs will be left to the trial Judge.

Even if the plaintiff succeeds in the action, the trial Judge may think that the motion for an interim injunction was not warranted by the circumstances.

MASTER IN CHAMBERS. NOVEMBER 9TH, 1912.

NIEMINEN v. DOME MINES.

4 O. W. N. 301.

Costs—Security for—Motion to Extend Time—Affidavit Based on Information and Belief—Not Filed until Return of Motion—Not Receivable—C. R. 312, 518, 524, 1199, 1203—Costs.

Motion to extend the time for giving security for costs. The affidavit on which the motion was based was made merely on information and belief, and was not filed until after the notice of motion was served.

MASTER-IN-CHAMBERS refused to consider the affidavit in view of its non-compliance with Con. Rules 518 and 524, but in view of the special circumstances, gave plaintiffs two weeks additional time to file a fresh affidavit and proceed with the motion, in default of which the motion and action were to be dismissed with costs.

Motion by plaintiff to extend the time for giving security.

H. L. O'Rourke, for the plaintiff.

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

CARTWRIGHT, K.C., MASTER:—The statement of claim asks damages for death of plaintiff's son, who was killed, as admitted, while working in defendants' mine a little over a year ago.

The statement of defence was delivered on 12th of September. It sets up the usual defences—and also release given on payment of 1,000 marks in gold to the plaintiff and his wife, who reside in Finland, as stated on the writ.

The action was begun on 7th June. For some reason no order for security for costs was issued until 17th September, the day on which issue was joined. It is possible that defendants thought that in view of the release above set up, the action would not proceed, especially as the release is not in any way impeached. The joinder of issue would not seem to do more than deny its existence as a genuine document.

The order for security was duly served on 18th September, but was never complied with.

No steps were taken by defendants to have the action dismissed under C. R. 1203—and on 2nd November inst., this motion was made to have the time for giving security extended for two months, stating that in support of the motion an affidavit would be read. It was not said that such affidavit had been filed and none was filed until the argu-

ment. It was suggested by defendants' counsel that when, as in this case, an order for security has issued under C. R. 1199, the action is at an end where default has been made, under clause 3 of form No. 95. But this seems disposed of by the terms of C. R. 1203, and by the fact of such an order being thought necessary. More formidable objections were—first that as no affidavit had been filed before service of the motion as required by C. R. 524, none could afterwards be received—and secondly that as the affidavit was made on information and belief, without stating the grounds of facts which admittedly were not within the knowledge of the deponent, the affidavit was insufficient and could not be received under C. R. 518.

The necessity for a compliance with this rule (as well as with C. R. 524), has frequently been emphasized. The headnote of the judgment of the C. A. in *In re J. L. Young*, 2 Ch. (1900), 753, states that such an affidavit "is irregular, and, therefore, inadmissible as evidence whether on an interlocutory or a final application."

Following the principle of C. R. 312, I am willing to apply forthwith the rigour of the law. It seems, at least, doubtful whether the plaintiff can really wish the action to proceed in view of the release above mentioned. If, however, a proper affidavit can be obtained from Mr. Findela, who is said in the affidavit filed to be "a Finnish interpreter in correspondence with the affidavit with respect to giving security for costs," the motion may be renewed not later than 15th inst. In default of this being done the present motion will be dismissed with costs, and the action itself dismissed with costs.

To prevent misapprehension the plaintiff will understand that payment of costs of this motion forthwith will be a term of any enlargement of the time for giving security.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 19TH, 1912.

DAVIES v. MACK.

4 O. W. N. 357.

Partnership—Dissolution—Arbitration Clause in Articles — Receiver.

SUTHERLAND, J., appointed an interim receiver of partnership property where the partners found it impossible to work harmoniously, pending a taking of the accounts.

This is an application at the instance of one of two partners doing business since the 29th day of June, 1909, under written articles of partnership, bearing that date, for an order appointing a receiver of the properties and assets of the partnership of Mack & Company, with all the necessary powers and directions, and for an injunction restraining his co-partner, the defendant, from carrying on business on his own account in the partnership premises or elsewhere in contravention of the provisions of the articles of partnership, and from dealing in any way with the partnership properties and assets pending an adjustment of the partnership affairs.

R. C. Levesconte, for the plaintiff.

H. E. McKittrick, for the defendant.

HON. MR. JUSTICE SUTHERLAND:—Clause 10 of the articles of partnership provides that in case of disputes or differences between the partners, the same are to be referred to arbitration in the manner mentioned in that clause.

In the material filed, charges and countercharges are made by the partners against each other. It was admitted during the argument that it is impossible for the partners to continue to work harmoniously together.

Under these circumstances, I think the proper order to be made is to appoint an interim receiver of the partnership to look after the property and assets of the business pending a reference to arbitration under the clause of the articles of partnership or the trial of this action.

I, therefore, appoint Mr. E. R. C. Clarkson, as interim receiver. Costs of this motion to be fixed by the arbitrators in case the matter proceeds to arbitration, or otherwise to be disposed of by the trial Judge.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 12TH, 1912.

CHAMBERS.

RE WILLIAM LAWS, AN INFANT.

4 O. W. N. 304.

Infant—Joint Tenant—Application for Sale—Payment into Court—Costs.

An application on behalf of an infant, one of two joint tenants of real estate, "to sanction a sale thereof and the division of the proceeds between himself and his adult brother, the other joint tenant."

H. S. Lazier, for the petitioner.

F. W. Harcourt, K.C., for the infant.

HON. MR. JUSTICE SUTHERLAND:—It seems on the material a proper case for a sale of the property in the interest of both parties. If the adult joint tenant will consent to all the purchase-money being paid into Court, and to remain there until the infant joint tenant shall come of age, and thereafter to be dealt with by agreement between them or further order, the order may go sanctioning the sale, and in that case the costs of this motion will be payable out of the purchase-money.

If not, I am unable to see how I can properly compromise the possible prospective rights of the infant in the way sought, and the motion will be dismissed without costs.

MASTER IN CHAMBERS. NOVEMBER 5TH, 1912.

NIAGARA & ONTARIO CONSTRUCTION CO. v. WYSE AND UNITED STATES FIDELITY & GUARANTY CO.

4 O. W. N. 248, 357.

Particulars—Action on a Guaranty Bond—Damage—Alleged Inability of Plaintiff to Furnish Details—No Answer—Reference Optional with Plaintiffs.

Motion by defendants, guarantors on a bond, for particulars of damage alleged to have been sustained by plaintiff by reason of the alleged default of one Wyse, made a third party in the litigation. Plaintiffs claimed that they had given all the particulars in their possession.

MASTER-IN-CHAMBERS, *held*, that the particulars given were inadequate, and that better ones should be furnished, unless defendants were willing to leave the question of damage to a reference and only go to trial as to the question of their liability.

Costs in cause.

SUTHERLAND, J., dismissed appeal from order of Master-in-Chambers, with costs.

Motion by plaintiff to have defendant company ordered to close pleadings between it and a third party and by defendant company for particulars of alleged damage sought to be recovered by plaintiff.

C. F. Ritchie, for the plaintiff.

W. B. Milliken, for the guaranty company.

CARTWRIGHT, K.C. MASTER:—Although the plaintiff cannot intermeddle with the third party proceedings, yet where, as in this case, the third party has not appeared nor moved to have the notice set aside, there can be no objection to the defendant noting the third party in default and closing the pleadings as against him. This though not expressly provided in Rules comes within the provisions of C. R. 3, which says: "As to all matters not provided for in these Rules, the practice as far as may be, shall be regulated by analogy thereto." I am informed by the Clerk of Records and Writs that this has frequently been done.

The defendant company being only a guarantor for defendant Wyse is entitled to definite particulars of the way in which the plaintiff's claim to recover the full penalty of the bond for $10,000 is made up. The plaintiff's officer examined for discovery was not able to give any satisfactory information as to this. The plaintiff alleges that it has

suffered damage by reason of some default on Wyse's part of almost $20,000, and that for this it is entitled to be indemnified by the guaranty company up to $10,000.

It is apparently admitted that Wyse completed the work but did not pay for the labour and material supplied.

But the officer examined could not give the items (see qu. 47, *et seq.* 172, 103 and 104-134, 156.

It may be that the only issue determined at the trial will be whether the guaranty company is liable to indemnify the plaintiff against any default on Wyse's part and that if it is so decided the damages could be assessed on a reference as is usually done in actions on bonds. If that course is agreeable to both parties and can be arranged between them, there would be no necessity for particulars as yet.

If, however, this question of amount is to be gone into at the trial, the plaintiff must furnish particulars as definite as would be required in an action for goods sold and delivered. If this was not done, the guaranty company would not know what case the plaintiff would present at the trial.

The order need not issue until the parties have considered what is best to be done.

The costs of the motions will be in the cause.

Plaintiff appealed to a Judge in Chambers against the above order requiring them to give particulars, and the appeal was heard by SUTHERLAND, J., on November 19th, 1912.

The same counsel appeared.

HON. MR. JUSTICE SUTHERLAND:—This is a motion by way of appeal from an order of the Master in Chambers, dated 5th November, 1912, requiring the plaintiff to furnish particulars under paragraph 7 and 8 of his statement of claim. There are two defendants, one Wyse, with whom the plaintiff company had entered into a contract in writing, under which it is alleged he was to supply certain material and labour for the construction of certain telephone lines for the Hydro-Electric Power Commission of Ontario, and the United States Fidelity and Guarantee Company. By guarantee bond, dated 19th February, 1909, the two defendants are alleged to have bound themselves jointly and severally to the plaintiff in the sum of $10,000 for the due performance of the aforesaid contract.

The paragraphs in question are as follows:—

"7. The defendant, Wyse, made default in performance of the said contract, and failed to carry out the same according to the terms thereof, with the result that the work provided for in the said contract had to be taken over and completed by the plaintiff.

"8. By reason of the failure of the defendant Wyse to carry out and perform the said contract according to the terms thereof the plaintiff suffered damage to the extent of upwards of $20,000."

The plaintiffs in the action are claiming from the defendant company the sum of $10,000 being the penalty in the bond.

One of the officers of the plaintiff company has been examined, and has failed to give particulars under said two paragraphs, and says the plaintiff company are unable to give the same.

He also says that such particulars can only be furnished through the McGuigan Construction Company, under whom the defendant Wyse was directly doing work. He admits that this company furnished some particulars on which the plaintiffs have acted in connection with the action, but says that that company and the plaintiff company are not now on friendly terms, and he is unable to get particulars from them.

It seems to me, clearly a case in which the defendant company ought not to be compelled to go down to trial without fairly complete particulars under the paragraphs in question. The Master in his reasons for judgment says: "It may be that the only issue determined at the trial will be whether the guaranty company is liable to indemnify the plaintiff against any default on Wyse's part, and that if it is so decided, the damages could be assessed on a reference as is usually done in actions on bonds. If that course is agreeable to both parties and can be arranged between them, there would be no necessity for particulars as yet."

Counsel during the argument informed me, that while they had conferred with one another with respect to this suggestion, they had been unable to come to any agreement to adopt it.

I think the order of the Master was right, and that the plaintiffs should be required to give particulars of the alleged damage sought to be recovered by them.

The appeal will, therefore, be dismissed with costs.

HON. MR. JUSTICE KELLY. NOVEMBER 19TH, 1912.

CHAMBERS.

REX v. DAVIS.

4 O. W. N. 358.

Intoxicating Liquors—Conviction—Selling Liquor without License—Defendant Simply a Messenger—No Sale—Conviction Quashed—Order of Protection.

KELLY, J., *held* that a person who simply acted as a messenger for the purchase of liquor, making no profit thereon, could not be convicted of the sale of liquor without a license.

Motion to quash a conviction of defendant by the police magistrate for the city of Toronto, for having on August 5th, 1912, sold liquor without a license.

On that day the defendant was a waiter in the National Café, in Toronto, and one of two persons who were together in the café gave him a dollar and asked him to go out and get them some beer. Acting on this, the defendant brought back four bottles of beer and returned to the person who gave him the dollar, forty cents in change, placed two of the bottles on the table for those for whom they had been procured and put the others in the ice-box.

W. A. Henderson, for the defendant.

E. Bayly, K.C., for the Attorney-General.

HON. MR. JUSTICE KELLY:—There is no evidence that these persons offered to buy liquor from the accused or that he offered to sell them, or that the accused did anything more than act as messenger in the purchase of the beer for the persons who desired it, and unless I am to make assumptions not warranted by the evidence I am unable to find that the accused was guilty of the charge on which he was found guilty.

The conviction will therefore be quashed with costs, and there will be protection to the magistrate.

MASTER IN CHAMBERS. NOVEMBER 6TH, 1912.

RE HEITNER & MANUFACTURERS LIFE INSURANCE CO.

4 O. W. N. 251.

Insurance—Rival Claimants—Payment into Court—Costs.

MASTER-IN-CHAMBERS allowed an insurance company to pay into Court the amount of a policy where it was claimed by two claimants. *Confederation Life* v. *Cordingley*, 19 P. R. 89, referred to.

Application by the company for leave to pay into Court $1,000, amount of a policy on life of David Heitner, deceased.

M. R. Gooderham, for the applicants.

CARTWRIGHT, K.C., MASTER:—The policy was made through the Winnipeg agency. It was payable to his wife Robie Heitner when issued less than three years ago. But on 7th February, 1912, the assured revoked this designation in favour of the Orthodox Jewish Home for the aged, at Chicago.

Both of these parties claim the proceeds.

The claim of the Jewish Home is based on sec. 15 of ch. 83, R. S. Manitoba, which gives power to the assured to do what he did in this case.

The widow relies on the fact that the contract was apparently made in Manitoba, and it was suggested by her counsel that the claim could only be tried in Manitoba. In support of this contention, sec. 40 of R. S. M., ch. 82, was cited, which makes the money payable there. In answer to this sec. 3 (as of same statute, it was cited, which says that this sec. 40 amongst others) "shall not apply as to a company licensed by the Dominion of Canada."

At present, however, any consideration of these questions is unnecessary.

The facts of this case do not seem distinguishable from those in *Re Confederation Life & Cordingley*, 19 P. R. 89, where an order was made such as is asked for here.

In the judgment of Osler, J.A., at p. 91, *et seq.*, will be found a full discussion of the principle on which such orders are made—and of the effects of same on the company and the respective claimants. The order will, therefore, go as asked, with costs to the company, fixed at $30, unless taxation is preferred.

MASTER IN CHAMBERS. NOVEMBER 15TH, 1912.

STEWART v. HENDERSON.

4 O. W. N. 355.

Discovery—Commission—Terms—Payment into Court.

MASTER-IN-CHAMBERS, *held*, that he had no discretion to refuse a commission to Seattle to examine a witness in an action, but made it a term of the order that plaintiff applying should give security in the sum of $200.

Ferguson v. *Millican*, 11 O. L. R. 35, and *Toronto Industrial* v. *Houston*, 5 O. W. R. 349, referred to.

The facts of this case appear sufficiently in the report of a previous motion in 4 O. W. N. 166; 23 O. W. R. 135. On examination of plaintiff for discovery, he stated that his father, a resident of Seattle, was present at the first and second interviews with defendant (see questions 145, 146, 147, 151, 305). He also said (question 311, etc.), that his father had an interview with Sir D. Mann, but that he was not informed of its purport.

The examination was then adjourned, and a motion made for a commission to examine Stewart, senior, at Seattle.

J. Grayson Smith, for the motion.

S. Casey Wood, for the defendant.

CARTWRIGHT, K.C., MASTER:—The affidavit of plaintiff is filed in support of the motion. It alleges that his father is a necessary and material witness on his behalf, and that he cannot come to Toronto for the trial.

On the pleadings it is not easy to see how any evidence of oral statements made by defendant in June or July, 1911, can be material when the agreement sued on, dated 10th April, 1912, concludes with the words "This absolutely cancels any and all former commission contracts to you."

However, since *Ferguson* v. *Millican*, 11 O. L. R. 35, an order of this kind cannot be refused though proper conditions must be imposed.

Considering the magnitude of the plaintiff's claim, which is $500,000, the defendant may require counsel here to attend on the examination.

I do not think I can do better than follow in measure the order made by a very careful Judge in *Toronto Industrial* v. *Houston*, 5 O. W. R. 349, and let an order go on plaintiff giving security for the costs of same, which I fix at $200.

DIVISIONAL COURT.

NOVEMBER 29TH, 1912.

EVERLEY v. DUNKLEY.

4 O. W. N. 406.

Will—Testamentary Capacity — Claim by Daughter to Moneys Deposited in Bank — Trust — Evidence—Joint Account—Survivorship—Conduct of Bankers.

Action by executor of one Elizabeth Kenny, deceased, for the sum of $542.17, alleged to belong to the estate of the said deceased, and for an injunction restraining defendants dealing with the same. Defendant, Esther Dunkley, claimed the moneys in question were hers on the grounds that (1) her mother was mentally incapable of making a will; (2) the moneys after her father's death were held in trust for her under an alleged prior agreement between her father and mother; (3) the money was held by the defendant bank on a joint account of the testatrix and herself with a right of survivorship in herself.

This latter claim was based on the following order to the Bank signed by testatrix in August, 1911, some six months prior to her death, and when laid up in the hospital with bronchitis: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny."

KELLY, J., held (22 O. W. R. 820; 3 O. W. N. 1607) that defendant Esther Dunkley had failed to prove that her mother was incapable of making a will or that there was any trust in her favour.

That the order to the bank relied on by her did not constitute her a joint owner of the moneys on deposit, but was only given for the convenience of the testatrix.

Payne v. *Marshall*, 18 O. R. 488, and other cases referred to.

Judgment for plaintiff with costs.

DIVISIONAL COURT dismissed appeal with costs.

Review of authorities by CLUTE, J.

An appeal from a judgment of HON. MR. JUSTICE KELLY, reported 22 O. W. R. 820; 3 O. W. N. 1607, where the facts are set out in detail.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE SUTHERLAND.

O. L. Lewis, K.C., for the defendants.

M. Houston, for the plaintiffs.

HON. MR. JUSTICE RIDDELL:—It was argued, however, that as Mrs. Dunkley swore that being told at the bank that the money was to be put to the joint account of herself and her mother, that she reported this to her mother and her mother said that was all right, etc., the mother must be

taken to have ratified the act of her daughter in having the amount put to a joint account: and consequently whatever the effect of the writing of August 18th there was a placing by the mother of the money to joint account.

If this did take place it would perhaps be hard to resist the conclusion desired; but the learned trial Judge does not find that what is alleged did take place in fact. He finds that the daughter "returned to her mother and told her that either of them could draw it and that the mother was satisfied." As my learned brother did not specifically find that what is alleged as taking place about a joint account, I have thought it well to see Mr. Justice Kelly in the matter, and he informs me that he did not believe the statements of Mrs. Dunkley first above referred to.

We are therefore to take the facts as found by the learned trial Judge (on this point) as the only facts in the case, and all question of ratification is consequently removed.

Much of the argument addressed to us on behalf of the appellant was based upon the proposition that the bank was a trustee. But since the case of *Foley* v. *Hill*, 2 H. L. C. 36, the relationship of banker and customer has uniformly been held to be not that of trustee and *cestui que trust* but that of debtor and creditor. There is nothing sacred in the position of banker, he sells the use of money—nor is there anything abstruse or recondite in his relation to his depositor—he is an ordinary debtor.

The bank in this case took Mrs. Kenny's money on the implied agreement to return that to her or her personal representatives when called on so to do. They have paid it to another—they must justify their action.

I am of opinion that the document of August 18th, 1911, has a plain meaning—that it is a direction to the bank to place the customer's money in such a condition as that Esther Dunkley can draw it—and that only. There is no gift of the money to the daughter: if that had been the case there would have been no necessity of directing an arrangement that she might draw. There is no authority to place the money in a joint account in such a way that the survivor should have all. No objection could be taken to the opening of an account protected in such a way that

while the daughter might draw during the lifetime of her mother, her authority would then cease—if this further consideration were borne in mind that the mother might at any time cancel the arrangement and revoke the authority of her daughter.

It seems to me that the last consideration is fatal to any claim by the bank to create a "joint account" with all legal consequences. Must it not be perfectly plain that this document does not prevent the customer at any time revoking the authority to her daughter—and resuming sole control? If so, how can such an account be properly opened? An account giving the daughter a vested interest in any part of the fund in existence at the time of her mother's death. In my opinion the document is nothing but an authorisation to the bank to arrange matters in such a way as that the old woman would not herself be forced to sign cheques, etc, etc.

Had I been of a different opinion I should not have been satisfied to give the bank judgment without further evidence concerning the circumstances of Mrs. Everley's visit to the bank.

Mrs. Everley asked the manager in reference to Mrs. Kenny's account if anyone could draw it in case of her death. The manager told her: "Nobody can draw another person's money except her executor or whoever appoint." The manager says that he looked upon this as a hypothetical question—in a sense that is true, but the question was asked about a definite existing, and by no means hypothetical, fund in his bank, and it was as I think his duty to find out the exact situation of that fund and answer accurately any question put to him in reference thereto by any one who had the right to ask it.

But I do not think that there is any need to find out all the circumstances of this transaction.

There is nothing in any of the objections urged against the judgment appealed from, in my opinion, and the appeal should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND:—I agree.

HON. MR. JUSTICE CLUTE:—The plaintiff, as the executor of Elizabeth Kenny, deceased, brings this action to recover $542.17 from the defendant Esther Dunkley, and the Canadian Bank of Commerce. This sum stood to the credit of the testatrix, Elizabeth Kenny, in the Canadian Bank of Commerce at the time of her death, which occurred on the 27th February, 1912.

On the 9th March, 1912, the defendant, Esther Dunkley, withdrew this sum from the bank and placed the same to her own credit in the same bank, and now claims it as her own.

The circumstances under which this claim is made, are as follows: The testatrix, Elizabeth Kenny, being ill, gave to her daughter, Esther Dunkley, a memorandum in writing in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny, Chatham, August 18th, 1911."

It is not disputed, as the evidence shews, that this was intended for the local agent of the Canadian Bank of Commerce, at Chatham. This instrument was taken to the bank, and on the 26th August, 1911, the defendant, Esther Dunkley, drew from the bank $5 and gave a receipt therefor in her own name, the money being in the savings bank department. On September 2nd, 1911, Elizabeth Kenny drew $5 from the bank, signing her own name to the receipt, and on the 29th October a further sum of $35, signing her own name to the receipt.

On the 9th March, 1911, the defendant, Esther Dunkley, had the whole amount placed to her credit by signing a receipt therefor to the bank. The defendant claims this money upon two grounds: First, that there was a verbal trust declared in her favour by her father, whereby she was to receive certain moneys, of which this formed a part, after her mother's death. The trial Judge has found against this claim, and I think justly so. The evidence falls far short, in my opinion, of creating a trust in her favour.

A further claim is made that the late Elizabeth Kenny authorised a joint account and upon her death the right to the money in the bank survived to Esther Dunkley. The memorandum above referred to was signed by Elizabeth Kenny while in the hospital; that on the day it was signed

she (Esther Dunkley) took it to the bank and on its being presented to the accountant at the bank he changed the heading of the deposit account so as to read as follows: "Made joint account August 18th, 1911, Elizabeth Kenny and Esther Dunkley, or either," after which she says she returned to her mother and told her that either of them could draw it and that the mother was satisfied. The deposit book remained in the possession of the deceased until the time of her death.

Esther Dunkley described the conversation which took place between her mother and herself in this way: "She," meaning the mother, said: "I want you to take my money and do the best you can with it." I said, "I could not cheque your money without you gave me some authority to do it." She said, "You get a pen and ink." I got it, and she started to write, and then she said, "No, you write it;" and I wrote it, and read it over and she signed it." This refers to the memorandum on which the agent of the bank acted in changing the account. She says that she read it aloud to her mother and her mother said it was all right, and signed it. She further says: "She told me to take it to the Bank of Commerce and have it arranged in the bank so that I could draw her money or she could, and I took it." She then took it to the bank. The manager not being in she told a Mr. Watson, accountant in the bank, that "my mother gave me this and wanted me to have her money arranged in the bank so I could draw it; and he took the paper and read it, and he said he made it a joint account so that I could draw it or my mother could." She then returned to the hospital and told her mother it was all right. The paper was all right and that it made a joint account; that she (the mother) could draw it or I could draw it, and that if anything happened to her I could draw it all, and the mother said it was all right.

The first question is whether the money became the joint property of the mother and daughter during the mother's lifetime? What is the meaning of the words, "Arrange my money in Esther Dunkley's name so she can draw it?" Draw whose money? Plainly, I think the mother's money, the intention being that the mother desired her money in the bank to be placed that the daughter could draw it instead of the mother drawing it. There is

no indication or hint of intention to make a gift of the whole or any part to the daughter. The trial Judge says, "The present case is not one where the money became the property of the mother and daughter jointly. It was the mother's, and though the memorandum authorised it being placed in the daughter's name so that she could draw it, it remained the property of the mother, the daughter's power or rights being limited to the power to draw," and he finds that there was no intention on the part of the mother to make the daughter part owner of the money or to give it to her by survivorship. The money continued to belong to the mother and on her death it became a part of her estate. In *Re Ryan*, 32 O. R. 224, the husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by the evidence uncontradicted that money of the wife went into the account and that both drew from it indiscriminately. It was there held that she was entitled as survivor to the whole fund.

The present case I think is distinguishable in this that here no part of the daughter's money went into the account. The mother retained the deposit book. She did not authorise, as far as the evidence shews, a joint account; that the money should be so placed that her daughter might draw it, but it was the mother's money that she was to draw. It is true, that the daughter states that on her return to her mother she told her that it was placed to their joint account, and the mother said it was all right, but the trial Judge has not accepted the accuracy of her statement in this regard.

In *Hill* v. *Hill*, 8 O. L. R. 710, the plaintiff's father owned $400 on deposit in the bank to his credit. He procured a bank deposit receipt for this amount "payable to William Hill, senior, and John R. Hill, his son, or either, or the survivor." The understanding between father and son was that the money should remain subject to the father's control and disposition while living and that whatever should be left at his death should then belong to the son. The father's request to the bank manager was, to fix the money so that his son John would get it when he was done with it. The father told his son that he wanted him to

get the money when he was gone. He, however, retained the deposit receipt in his own possession, and it was found among his papers at the time of his death. The trial Judge in giving judgment said that if the deposit receipt stood unexplained so that it might be treated as evidencing the substance of the transaction, the plaintiff's contention might be sustained upon the authority of such cases as *Payne* v. *Marshall* (1889), 18 O. R. 488, and *Re Ryan* (1900), 32 O. R. 224. But he found as a fact that the purpose of the father was by the means there employed to make a gift to his son in its nature testamentary, and as such it could only be made effectually by an instrument duly executed as a will.

It appears to me that that is the effect of what took place here, that there was no intention to make a present gift of any part of the property in the money so on deposit to the defendant, the intention from the whole evidence being to authorise her, during her mother's lifetime, to draw from the bank such sums as might be required and that probably it was her intention that after her death the daughter should have the balance. In *Schwent* v. *Roetter*, 21 O. L. R. 112, *Hill* v. *Hill* is distinguished, it being held that in the circumstances disclosed in the *Schwent Case* that the money was during the joint lives joint property with right of survivorship. Of this the plaintiff was not able to satisfy the trial Judge, and upon the whole case I agree in the result at which he arrived.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 21ST, 1912.

CHAMBERS.

SCULLY v. ONTARIO JOCKEY CLUB.

4 O. W. N. 379.

Parties—Action of Trespass and Assault—Ejection from Race-meeting—Motion for Representation—Con. Rules 200 and 201—Tort-feasors—No Community of Interest—Plaintiff to Select Defendants.

MIDDLETON, J., in an action of trespass and assault for ejection from a race-meeting, refused to appoint the President of an unincorporated voluntary association to represent all the members thereof as defendants, on the ground that there could be no community of interest under Con. Rules 200 or 201 among various alleged tort-feasors.

The action was brought by a "bookmaker," who alleges that he was ejected from the grounds of the Hamilton Jockey Club by a private detective employed by the Canadian Racing Association; which is a voluntary association that had undertaken to police the grounds of the club during a race meeting. The plaintiff charged that this ejecting was a trespass and assault, and he claimed damages for it.

J. P. McGregor, for the plaintiff.

Ritchie, for the defendants.

Motion for an order under Rule 201, appointing the defendant Seagram to represent all the members of the Canadian Racing Association.

HON. MR. JUSTICE MIDDLETON:—I think the motion is entirely misconceived. Rule 201 can only be invoked where the right of the class to be represented depends upon the construction of an instrument. It is probable that the application intended to refer to Rule 200, which sanctions the making of an order authorising any party to defend an action on behalf of all "numerous parties having the same interest."

It is quite impossible to say that all the members of the Canadian Racing Association have the same interest. The plaintiff seeks to make them responsible for what he charges to be a tortious act committed at the instance of Seagram.

The interest of the other members would be to cast upon Seagram the responsibility for any tortious act committed by or for him, and he would not be a fitting representative to defend them. Of course, if Seagram's act was not tortious then this action will fail, and the class will need no protection.

If the plaintiff is correct in thinking that he has been injured by a body of tort-feasors, as he swears, he must either content himself by suing those whom he selects from this body or must give each an opportunity of defending himself.

No case has gone so far as to justify an order such as sought, where the action is really a common law action for trespass. *Temperton* v. *Russell*, [1893] 1 Q. B. 435, has been much qualified by what was said in *Bedford* v. *Ellis* [1901] A. C. 1; but it is as yet an unheard-of thing that a pecuniary verdict should pass against a person without his being in fact sued.

Motion dismissed, with costs to defendant in any event.

MASTER IN CHAMBERS. NOVEMBER 23RD, 1912.

FUMERTON v. RICHARDSON.

4 O. W. N. 393.

Venue — Motion to Change Milton to Whitby — Delay in Moving — Balance of Convenience—Allegation that Plaintiffs' Counsel Unduly influential in County of Trial.

MASTER-IN-CHAMBERS refused to grant an order to change the venue where a clear case of preponderating convenience was not made out, and, where the order would have had the effect of delaying the trial, and defendant had been dilatory in moving, and held that an allegation that plaintiff's counsel had such influence in the county where the trial was to take place, as to preclude the defendant from obtaining a fair trial could not be urged in support of the motion.

Motion by defendants other than defendant Gormley, to change the venue from Milton to Whitby, on the usual ground of convenience. The action was brought by a resident of Sask., claiming damages against defendants for alleged deceit and breach of warranty on a sale by defendant Gormley, alleged to have been the agent of his co-defendants, of a horse to plaintiff in Sask. Milton was named as the place of trial in the statement of claim, delivered on 19th October. Joinder

of issue was delivered on 1st November, and jury notice next day.

D. D. Grierson, for the motion.

W. Douglas, for the defendant Gormley.

Wm. Laidlaw, K.C., shewed cause.

CARTWRIGHT, K.C., MASTER:—I do not think the motion can succeed.

In the first place it is made too late especially as a speedy trial is very important for the plaintiff.

On the 7th November an order was made for a commission to take evidence in Saskatchewan, of witnesses on behalf of all parties, and it was expressly agreed that it should be executed in week commencing 18th inst., and leave not later than 23rd, so as to be in time for the Milton sittings, which commence on 2nd December. If any motion was to be made to change the place of trial it should have been made then. In addition to this perusal of the pleadings shews that the only issues are as to the alleged misrepresentation and warranty and the character of the horse in question. All that can be found only in Saskatchewan, except the evidence of the defendants themselves and of the plaintiff, who is said to be on his way for the trial, or to have made arrangements to do so.

It was also urged in the affidavit in support of the motion that plaintiff's counsel had such influence in the county of Halton, that a fair trial could not be had. This ground, however, was not pressed on the argument. It is only noticed in order to refer to the cases of *Oakville* v. *Andrew*, 2 O. W. R. 608; and *Brown* v. *Hazeel*, *ib.* 784, where analogous objections were not given effect to.

In any case it would only afford ground for applying at the trial to dispense with the jury. The motion will be dismissed with costs to plaintiff in the cause as against the moving defendants.

It should have been noted that plaintiff will also require witnesses resident in the county of Perth to shew the deficiency in breeding qualities of the horse, which had been sold to a resident of that county before being sold to the plaintiff. For such witnesses Milton would be much more convenient than Whitby.