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APPELLATE DIVISION.

APRIL 19TH, 1915.

*McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Execution — Judgment — Satisfaction — Interpleader Issue — Judgment for Instalments of Purchase-price of Land—Resale of Mill on Land by Vendor—Sale of Interest in Land—Effect upon Judgment—Costs—Damages—Action on Interpleader Bond—Limitation of Amount Recoverable.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of MIDDLETON, J., 6 O.W.N. 678.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

W. Laidlaw, K.C., for the plaintiff.

G. H. Kilmer, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., was of opinion, for reasons stated in writing, in which he referred to the cases cited by MIDDLETON, J., and other authorities, that the contract for the sale of the mill to McGuire was not a contract for the sale of an interest in land, and that the resale by the plaintiff did not prevent the further enforcement of the judgment. The plaintiff's appeal should be allowed and the amount of the execution increased by the addition of the two sums of $2,500 and interest; and the cross-appeal dismissed with costs. Costs of the issue and motion to be paid by the defendants.

LATCHFORD, J., for reasons stated in writing, was of the same opinion as the Chief Justice with regard to the effect of the

*This case and all others so marked to be reported in the Ontario Law Reports.

contract for the sale of the mill. The judgment appealed from should be set aside, so far as it declared that the execution upon the judgments for the instalments on the mill should be withdrawn. The plaintiff should have his costs of the interpleader issue. In all other respects the judgment should be affirmed; and the defendants should have the costs of the appeal.

HODGINS, J.A., and KELLY, J., were of opinion, for reasons stated by each in writing, that the judgment of MIDDLETON, J., was right, and that the appeal and cross-appeal should be dismissed, both with costs.

The Court being divided upon the plaintiff's appeal, it was dismissed with costs; the defendants' cross-appeal was also dismissed with costs.

APRIL 19TH, 1915.

MITCHELL v. GRAND TRUNK R.W. CO.

Railway—Level Highway Crossing—Person Crossing Track in Sleigh Killed by Train Moving Reversely—Negligence—Contributory Negligence — Findings of Jury —Dominion Railway Act, sec. 276—Appliances for Warning Persons about to Cross—Incompetent Flagman—Damages.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex., ante 78.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

S. F. Washington, K.C., for the appellants.

T. J. Agar, for the plaintiff, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—1. There is evidence to support the findings of the jury.

2. The jury's answers to the questions, as amplified and explained by them orally, warrant and justify the entry of judgment for the plaintiff.

3. The damages ($1,000), although perhaps larger in amount than some of us would have awarded, cannot be regarded as so excessive as to demand a new trial or putting the plaintiff to the alternative of a deduction.

Appeal dismissed with costs.

APRIL 19TH, 1915.

*HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Master and Servant — Death of Servant — Miner Falling into Shaft of Mine—Action under Fatal Accidents Act—Negligence — Contributory Negligence—Evidence—Findings of Jury—Employment of Incompetent Hoist-man—Defective System—Mining Act of Ontario, R.S.O. 1914 *ch.* 32, *sec.* 164, *rules* 45, 98—*Cause of Accident.*

Appeal by the defendants from the judgment of LENNOX, J., 7 O.W.N. 403, upon the findings of a jury, in favour of the plaintiff for the recovery of $2,100 damages, in an action by the widow of Regis Hull to recover damages for his death while working for the defendants in their mine, by reason of the negligence of the defendants, as the plaintiff alleged. Hull was working on the top deck of the shaft-house, and fell down the shaft.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. E. Rose, K.C., and R. S. Robertson, for the appellants.

A. G. Slaght, for the plaintiff, respondent.

LATCHFORD, J. (after stating the facts) :—The jury find that there was no negligence on Hull's part, thus negativing the contentions of the defence as to carelessness or suicide. How the accident happened is obvious. In the interval between Hull's removal of a loaded car from the hoisted cage and his return with an empty one, the cage was hoisted without his knowledge, and he shoved the empty car into the opening, not clearly discernible in the dim light, where he had left the cage and still expected it to be, and was dragged down to his death.

As against the defendants, two grounds of negligence causing the accident are found—not having an experienced man to shew Hull the regular way of performing his duty, and not leaving an experienced man with Davis (the man in charge of the hoist) until Davis well understood the hoist, which, in the opinion of the jury, he did not understand.

It may be doubtful whether the finding that the absence of instruction contributed to the accident is warranted by the evidence. Much stronger inferences against the defendants were,

I think, open to the jury upon the facts established before them. However this may be, the second finding of negligence is, in my opinion, of itself sufficient to support the judgment appealed from.

Mining is dangerous work. There was danger on the top deck, as well as down in the workings, though doubtless, as the mine captain says, there was greater danger below. There is a necessity for much greater care than mining companies, in their anxiety to win ore as cheaply as possible . . . would ordinarily exercise without compulsion. Hence the obligations imposed by statute in all mining countries. The Mining Act of Ontario, R.S.O. 1914 ch. 32, sec. 164, rule 45, prescribes the code of signals for raising or lowering a cage, and by rule 98 requires, inter alia, that "the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety."

Having regard to the finding that there was no contributory negligence, the immediate cause of the accident was some negligence on the part of the hoist-man, Davis. There is evidence that Davis was incompetent. . . . The findings, such as they are, seem to me of necessity to imply condemnation of the system in use— that the manner of carrying on operations according to the particular circumstances, that is, the novel, onerous, and dangerous work the deceased was performing, uninstructed, and the inexperience and incompetence of Davis, subject to no proper supervision, did not conform, as the statute required it to conform, to the strictest considerations of safety.

Such being the statutory obligation cast upon the defendants and not discharged, they cannot escape liability on the plea that Davis was a fellow-servant of Hull. As in Choate v. Ontario Rolling Mill Co. (1900), 27 A.R. 155, the negligence was really that of the employers in omitting to provide a proper system by which the dangerous character of the employment might be lessened, and in putting in charge of a dangerous machine and keeping there for part of the day and the whole of the night, without supervision and instruction, a man incompetent to manage the hoist. They were thus, like the defendants in Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331, "either the sole effective cause of the accident or a cause materially contributing to it."

I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., agreed with LATCHFORD, J.

KELLY, J., agreed in the result, for reasons stated in writing.

RIDDELL, J. (dissenting):—. . . I cannot convince myself that the Legislature, by the very general language employed, intended to render mine-owners liable for an accident under such circumstances as are disclosed in the present case. It seems to me that something in the nature of definite negligence resulting in an accident must be brought home to the defendants; and that we are not to indulge in conjectures in such more than in other cases. . . .

Appeal dismissed; RIDDELL, J., *dissenting.*

APRIL 19TH, 1915.

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Assessment and Taxes—Appeal from Decision of Ontario Railway and Municipal Board—Questions of Law—Assessment Act, R.S.O. 1914 *ch.* 195, *sec.* 80(6), (7)—*Ontario Railway and Municipal Board Act, R.S.O.* 1914 *ch.* 186, *sec.* 48(3)—*Opinion of Court—Form of Judgment—Res Adjudicata.*

Motion by the Corporation of the Town of Fort Frances to vary the "minutes of judgment" as settled. The reasons for the opinion of the Court are noted ante 216.

The motion was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. H. Watson, K.C., for the applicant corporation.

Glyn Osler, for the company.

The judgment of the Court was delivered by RIDDELL, J.:—The ground taken is that the only appeal given being on a question of law, the form of the judgment (or opinion) is wrong.

(1) The Board had fixed the "actual value" of the land assessed at $1,000,000, and the only question of law (Assessment Act, R.S.O. 1914 ch. 195, sec. 80(6)) in respect of the land which was in question was, whether the Board should have fixed the "actual value" at $550,000 or $95,000. On the facts as disclosed

we held, as a matter of law, that the "actual value" for the purpose of the assessment was $95,000. (On settling the minutes $5,000 was added by consent, as this amount had been omitted by mistake.) We did not determine as a matter of fact that that was the value; what we did determine was a matter of law, i.e., that upon the Board's own premises they should have "fixed" the value at the lower sum.

(2) The second matter of appeal before us upon the appeal from the Board was this. As a matter of law, should the Board have followed the principle they did and fixed the assessment they did? Or should they have followed another principle and fixed a smaller sum? We decided that they were right as a matter of law in fixing the larger sum.

The parties on settling the minutes before me agreed that what this Court should do was to "certify its opinion to the Board" under the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 48(3): and I acceded to their request to certify our opinion. It may be very doubtful whether the general provisions in the section just referred to apply in view of the express provision that in an appeal of this nature "the practice and procedure on the appeal to a Divisional Court shall be the same . . . as upon an appeal from a County Court:" R.S.O. 1914 ch. 195, sec. 80(6), (7). But I do not raise this objection in view of the position and request of the parties.

The form of the "opinion" as settled was as follows:—

"This is to certify that upon the motion made unto this Court on the 3rd and 4th days of March, 1915, by counsel on behalf of the appellant, in presence of counsel for the respondent, by way of appeal from the judgment pronounced herein by the Ontario Railway and Municipal Board on Saturday the 21st day of November, 1914, upon the grounds mentioned in the notice of motion filed, upon hearing read the evidence adduced before the said Ontario Railway and Municipal Board, the order herein of this Court dated the 14th day of January, 1915, and the proceedings herein, and the said order appealed from, and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said motion do stand over for its opinion, and the same coming on this day for its opinion:—

"1. This Court was of opinion that the actual value of the lands assessed should be fixed at $100,000.

"2. And this Court was further of opinion that the amount of business assessment of the appellant should be fixed at the sum of $210,000.

"3. And this Court did not see fit to make any order as to costs."

I think the form is right—there is no necessity for and no sense in setting out the facts and principles upon which we arrived at our result, any more than in the ordinary case of appeal; our conclusions are conclusions of law and not of fact. We do not say that as a matter of fact the value of the land, etc., is so much: but as a matter of law the Board should on the facts as found fix the value, etc., at so much.

Mr. Watson asked us to add the following: "This order shall not be deemed to operate as an adjudication or estoppel between the parties hereto upon the question of actual value for the purpose of assessment, under the Act, of the property of the appellant company."

Had this been suggested upon the "settling of the minutes," it would probably have been inserted, and Mr. Osler does not object to its being inserted now. But on mature consideration I think it should not be made part of the "opinion." We are passing upon matters of law arising in the appeal, and not on questions of fact. We are certifying to the Board our opinion on these matters of law, and we should not in such opinion add what the effect may or may not be. There can be no objection, however, to our saying here that the "opinion" has, in our view, no effect as a res adjudicata in any future assessment: nor do we express any opinion as to the actual value of the land or as to the amount at which the value would or should have been fixed had the proceedings taken a different course.

Motion dismissed with costs.

APRIL 20TH, 1915.

WIGMORE v. GREER.

Execution—Leave to Issue—Construction of Judgment.

Appeal by the defendants Jane Greer, Ethel May Greer, and Thomas Graves Meredith, executors of Benjamin W. Greer, deceased, from the order of SUTHERLAND, J., ante 250, giving the plaintiff leave to issue execution against the appellants under a consent judgment pronounced by FALCONBRIDGE, C.J.K.B., on the 10th June, 1914.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

Sir George Gibbons, K.C., and H. S. White, for the appellants.

J. B. Davidson, for the plaintiff, respondent.

THE COURT allowed the appeal with costs, upon the ground that, upon the proper construction of the consent judgment, the appellants were not liable to pay to the plaintiff the sum of money mentioned therein.

APRIL 20TH, 1915.

RE PULEY.

Will—Construction—Division of Estate after Death of Widow "between" Adopted Daughter and Children of two Sisters —Adopted Daughter Entitled to Half of Estate.

Appeal by the children of Mary Williams and Betsy James from the judgment of BRITTON, J., ante 42, upon the construction of the will of William Puley, deceased.

The will directed that at the death of the testator's widow the whole of his real estate should be converted into money and placed with the money previously invested, "and the sum total shall be equally divided between my adopted daughter Mary Ann and the children of my whole sisters Mary Williams and Betsy James."

BRITTON, J., held that one-half of the estate was given to the adopted daughter Mary Ann Piper and the other half to the children of the two sisters, to be apportioned among them in equal shares per capita.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

R. J. McLaughlin, K.C., for the appellants.

D. B. Simpson, K.C., for the executors.

W. D. McPherson, K.C., for Robert Piper and others, certain of the next of kin of Mary Ann Piper.

J. Douglas, for Susan Piper and others, of the same class.

A. J. Armstrong, for Maria Puley and others.

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

LATCHFORD, J.:—. . . I concur in the opinion expressed at the hearing . . . that Hutchinson v. La Fortune (1897), 28 O.R. 329, is not of assistance in arriving at the testator's intention in the present case. . . .

[Reference to In re Walbran, [1906] 1 Ch. 64; In re Harper, [1914] 1 Ch. 70; Hawkins on Wills, 2nd ed., p. 149; Williams v. Yates (1837), 1 Jur. 510; Brett v. Horton (1841), 4 Beav. 239.]

On the whole, having regard to the cases, so far as they apply, and to the circumstances appearing from the will, I am of opinion that when the testator directed that the fund should be equally divided between the adopted daughter, whom he loved, and a class numbering not less than twelve or thirteen individuals, he intended precisely what his words in strictness express—an equal division *between* the daughter and the class.

I, therefore, agree in the judgment below, and would dismiss this appeal.

FALCONBRIDGE, C.J.K.B.:—I agree. The appeal will be dismissed; costs of all parties out of the estate.

KELLY, J.:—I agree in the result.

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

Appeal dismissed; RIDDELL, J., *dissenting.*

APRIL 20TH, 1915.

*REX EX REL. BOYCE v. PORTER.

*REX EX REL. BOYCE v. ELLIS AND NELSON.

Municipal Elections — Proceedings to Void — Municipal Act, R.S.O. 1914 *ch.* 192, *secs.* 161, 162, 163—*Fiats Granted by County Court Judge—Interest of Relator not Made to Appear—Fiats Improperly Granted—Jurisdiction of County Court Judge to Set aside Fiats—Rule* 217—*Fatal Omission —Duty to Set aside Proceedings—Right of Appeal from Order of County Court Judge to Divisional Court of Appellate Division—Persona Designata—Municipal Act, sec.* 179 (1)—*Judges' Orders Enforcement Act, R.S.O.* 1914 *ch.* 79, *sec.* 4.

At the municipal election of the 4th January, 1915, the defendant Porter was declared elected mayor and the defendants

Ellis and Nelson controllers of the City of Ottawa. On the 12th February, the relator obtained from the Judge of the County Court of the County of Carleton fiats, under sec. 162 of the Municipal Act, R.S.O. 1914 ch. 192, to serve notices of motion for orders declaring that the defendants were not duly elected. Notices were served accordingly, On the 17th February, 1915, the defendants served notices of motion for orders setting aside the fiats and all proceedings founded thereon. The County Court Judge held that he had no power to make such orders. He dismissed the motions, but gave the defendants leave to appeal from the orders dismissing the motions; and the defendants appealed.

The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

C. A. Masten, K.C., for the appellant Porter.

J. D. Bissett, for the appellants Ellis and Nelson.

J. T. White, for the relator, the respondent.

RIDDELL, J. (after setting out the facts) :—The main ground of the appeal is based upon the provisions of sec. 161(2) (as amended by 4 Geo. V. ch. 33, sec. 5), 162(1), and 163 of the Municipal Act.

In the affidavit filed by the relator, under sec. 162(1), he does not describe his interest, etc., except by reference to the proposed notice of motion—he says only that he "has an interest in the election as an elector."

The fiat is not in general terms; it simply orders that the relator, upon filing the statutory recognizance, "be at liberty to serve the said notice of motion."

The contention is that the interest of the relator in the election is not made to appear, as required by sec. 163. . . .

[Reference to Regina v. Thirlwin (1864), 10 Jur. N.S. 206, 33 L.J.N.S.Q.B. 171, 9 T.L.N.S. 731; 12 Vict. ch. 81, sec. 146; Regina ex rel. Shaw v. McKenzie (1851),2 C.L. Ch. 36, 44, 1 U.C. L.J. O.S. 50; Regina ex rel. Bartliffe v. O'Reilly (1852), 8 U.C.R. 617; Rules of Michaelmas Term, 14 Vict. (Harrison's Municipal Manual, 1st ed. (1859), pp. 697 sqq.); Regina ex rel. Pomeroy v. Watson (1855), 1 U.C.L.J. O.S. 48; Regina ex rel. White v. Roach (1859), 18 U.C.R. 226; 22 Vict. ch. 99, sec. 127; Regina ex rel. Ross v. Rastal (1866), 2 U.C.L.J.N.S. 160; Regina ex rel. Chauncey v. Billings (1888), 12 P.R. 404, 407; Regina ex rel. O'Reilly v. Charlton (1874), 10 U.C.L.J.N.S. 105; Regina ex rel. Percy v. Worth (1893), 23 O.R. 688; the Municipal Act,

R.S.O. 1887 ch. 184, secs. 188, 208; Rules of 1888; 51 Vict. ch. 2, sec. 4; 55 Vict. ch. 42, sec. 188; Consolidated Rules of 1888, Rules 1038-1044.]

It is necessary to shew somewhere in the material before the Judge on granting a fiat that the relator has the right to interpose.

The statute, sec. 161(2), as amended by 4 Geo. V. ch. 33, sec. 5, gives the right to interpose to (1) candidates and (2) electors who gave or tendered their votes. An elector as such has no right to interpose, and "an elector" is all that this relator claims to be. While it may not be necessary to establish the status by affidavit (Regina ex rel Bartliffe v. O'Reilly, 8 U.C.R. 617), it must appear somewhere in the material. I think, therefore, the fiat was improperly granted.

The next question is as to the jurisdiction of the County Court Judge to set aside his order. I entertain no doubt that he has such jurisdiction. There was, under the former practice, much difference of opinion on this matter. . . .

[Reference to Regina ex rel. Grant v. Coleman (1881), 8 P.R. 497, 46 U.C.R. 175; Regina ex rel. O'Dwyer v. Lewis (1881), 32 U.C.C.P. 104; Regina ex rel. Grant v. Coleman (1882), 7 A.R. 619; Regina ex rel. Chauncey v. Billings, 12 P.R. 404; Regina ex rel. McFarlane v. Coulter (1902), 4 O.L.R. 520.]

The Rule introduced in 1888 (Con. Rule 536), which is now (substantially) Rule 217, gets rid of all difficulty when it is remembered that now "the practice and procedure of the Supreme Court" is applicable in every case not provided for by the statute or Rules of Court. . . .

There is no limitation in the Rule to any particular form of order, and the value of this Rule should not be diminished by judicial construction. . . .

[Reference to Barisino v. Curtis & Harvey (Canada) Limited (1915), ante 195.]

Then, while the proposed relator may in his new material establish a right to interpose, the omission is not an irregularity, and, as is shewn by Regina ex rel. Chauncey v. Billings, supra, and Regina v. Thirlwin, supra, it cannot be supplied. We are not considering whether the Judge could have made an order then for a fiat, but whether he could support the order he had made. . . .

I think, therefore, the County Court Judge should have set aside the fiat and all proceedings based upon it.

The more difficult question now arises as to our right to entertain the appeal.

The reasoning in Regina ex rel. Grant v. Coleman, 7 A.R. 619, that the Judge does not act as a Court in such proceedings, is equally applicable in the present state of the legislation. . . . The Judge . . . is persona designata. When the case first referred to was decided, there was no appeal from an order made by persona designata; 56 Vict. ch. 13 was the first general statute —and that (sec. 6) forbade an appeal unless expressly authorised by the statute conferring jurisdiction. It was not till 1900 that a further exception was made and an appeal authorised if leave should be granted by the persona designata or a Judge of the Court of Appeal: 63 Vict. ch. 17, sec. 14. In 1909, a Judge of the High Court was substituted for a Judge of the Court of Appeal (9 Edw. VII. ch. 46, sec. 4), and in the Revision of 1914 a Judge of the Supreme Court.

In the present case, leave has been given by the persona designata, and I think that we should entertain the appeal and allow it with costs.

Of course the appeal given in sec. 179(1) of the Act is from the ultimate decision of the Judge on the merits: In re Regina ex rel. Hall v. Gowanlock (1898), 29 O.R. 435, at p. 449: this appeal is to us under the Judges' Orders Enforcement Act, R.S.O. 1914 ch. 79, sec. 4.

The case of Re Moore and Township of March (1909), 20 O.L.R. 67, is in the (former) Divisional Court of the High Court, and is not binding on us here. If anything that I said there indicates that an appeal does not lie here, I wholly recant it.

Except as to the costs, the question as to whether an appeal lies is largely academic. The County Court Judge would, no doubt, govern himself by our expressed opinion and decline to give the relator any relief.

FALCONBRIDGE, C.J.K.B.:—I agree.

LATCHFORD, J.:—. . . Assuming that the order was made by the Judge as persona designata by the Municipal Act, his leave to appeal would, upon the contention based on sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914 ch. 79, give an appeal to a Divisional Court against any order—interlocutory or otherwise—which he might make; while, under the Municipal Act itself (sec. 179), the appeal authorised is limited to an appeal from a final order only, and is to be made to a single Judge, "whose decision shall be final."

Where a statute under which a Judge acts as persona designata is silent as to appeals from his decision, sec. 4 of ch. 79 applies; and leave granted by the Judge may enable a Divisional Court to entertain an appeal from his decision, though a majority of the Court thought otherwise in Re Moore and Township of March, 20 O.L.R. 67. But, in my opinion, ch. 79 has no application to an appeal from a decision made by a Judge acting under the authority conferred upon him by Part IV. of the Municipal Act. If he is a Judge of the Supreme Court, his decision, under sec. 179, is final, and there is no appeal. Yet as Judge of the Supreme Court he is as much persona designata under Part IV. as is a Judge of a County Court. If ch. 79 had any application, a Judge of the Supreme Court could, by granting leave under sec. 4, enable a Divisional Court to entertain an appeal from his decision, which the Municipal Act expressly prohibits.

I therefore think the preliminary objection holds, and that the appeals should be dismissed.

KELLY, J., was of the same opinion, for reasons stated in writing.

Appeals dismissed; the Court being divided.

APRIL 21ST, 1915.

*WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Principal and Agent—Customs Broker—Breach of Duty—Depriving Principal of Control over Goods—Negligently Entrusting Sub-agent with Bill of Lading Endorsed in Blank—Misdelivery of Goods—Negligence of Sub-agent and of Carriers—Third Parties—Liability over—Damages—Costs.

Appeals by the defendants and the Great Northern Railway Company, third parties, from the judgment of MEREDITH, C.J. C.P., 33 O.L.R. 96, 7 O.W.N. 617.

The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley and J. J. Maclennan, for the defendants, appellants.

A. Haydon, for the railway company, appellants.

J. W. Bain, K.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—In this case, argued yesterday, my learned brethren thought that the appeals should both be dismissed.

I reserved judgment that I might look into the authorities cited. After an examination of these, I am unable to give effect to Mr. Tilley's argument.

The only possible doubt left was as to costs; but, in addition to the circumstance that costs are in the discretion of the trial Judge, is the rule, generally followed, that if the defence, however bonâ fide, be unreasonable, the party so offending is not entitled to be recouped his costs by another to whom he looks for indemnification.

Here the defendants should not have contested the claim of the plaintiffs, but should have paid without suit—then they might have sued those liable to them, if so advised.

The appeals should be dismissed with costs.

APRIL 22ND, 1915.

CANADIAN MALLEABLE IRON CO. v. ASBESTOS MANUFACTURING CO. LIMITED AND CREEPER & GRIFFIN LIMITED.

Contract—Agreements for Supply of Roofing Material and Construction and Placing of Roof—Defective Material—Defective Workmanship—Breach of Contract—Guaranty—Damages—Costs.

Appeal by the defendants the Asbestos Manufacturing Company Limited from the judgment of BRITTON, J., 7 O.W.N. 787.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. E. Rose, K.C., and J. W. Pickup, for the appellants.

C. A. Moss, for the defendants Creeper & Griffin Limited.

W. H. Wright, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

APRIL 23RD, 1915.

GRILLS v. CITY OF OTTAWA.

Highway — Nonrepair — Snow and Ice on Sidewalk Opposite Church Property Used as Rink—Injury to Pedestrian—Claim against City Corporation—Failure to Give Notice Required by Municipal Act—Claim against Trustees of Church Property Occupied by Separate Organised but Unincorporated Body — Owner and Occupier — Liability — Nuisance Created by Servants of City Corporation.

Appeal by the defendants the trustees of a church from the judgment of MIDDLETON, J., 7 O.W.N. 520.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley, for the appellants.

G. D. Kelley, for the plaintiff, respondent.

RIDDELL, J.:—. . . There is no doubt that the accident (25th January, 1914) occurred by reason of a sheet of corrugated ice being formed from water running off the land of the appellants upon the sidewalk, and the respondent has a good cause of action against some one. Nor can any fault be found with the amount of damages awarded. The real question is as to the liability of the appellants.

The appellants are trustees of the church and are the owners of the lot from which the water flowed upon the sidewalk. In the church there is an organisation called the "Young Men's Bible Class," with a "president, vice-president, secretary-treasurer, and two members of a committee."

Representatives from this class went to the trustees and asked them "for permission to use the vacant lot for a rink for the benefit of our whole class—the idea was to make a hockey club of our own class." The permission was granted, and complete control was given for the winter months, upon condition that the class was to pay all expenses, and repair any damage to the property—the trustees to be at no expense and to exercise no supervision over the property "until they were through with it in the spring." The class took possession accordingly, early in November, and remained in exclusive possession till the end of March or later. They enclosed the rink with 2 x 10 x 16

spruce boards of double height and banked outside with frozen snow and earth. It is not possible in Ottawa for a private person to flood a rink area himself; he must first procure a permit from the engineer's office, and, after he has paid $3 for it, the engineer sends men to turn on the water. Mr. Jenkins, acting for the Bible class, took out the permit in his own name "for permission to flood rink at First Baptist Church"—and gave directions to flood the rink 5 inches. That depth would have been perfectly safe: but the city employees were not satisfied to flood 5 inches—they flooded 20 inches, thereby causing the overflow.

Under such circumstances, it would be hard to find ground for making the Bible class liable: but in any event, I am unable to see how the trustees can be held.

The law of owner and occupier of land, upon which something is done which causes damage has been considered by the Court of Appeal in Earl v. Reid (1911), 23 O.L.R. 453. It may be thus stated. The owner of land is not liable for anything done thereon in the way of a nuisance (not by himself) if the land is in the control of another as tenant or occupier, unless such tenant or occupier is his agent expressly or by implication, or the agreement with such tenant or occupier contemplates the creation of the nuisance. "The fact that there is a possibility, even a manifest possibility, that the work would be done in such a way as to do harm, cannot fix the landlord with liability:" 23 O.L.R. at p. 466. The cases are cited in the report of that case.

There can be no doubt that a rink could have been made with perfect safety upon the vacant lot, and that the act of the city corporation's employees was the real cause of the nuisance. The flooding not being in any sense the act of these appellants, they were not called upon to do anything in the way of making the sidewalk safe, etc., even if they could lawfully have interfered with the condition in which the city corporation, through its employees, had put it.

I think that there is no difficulty arising from the fact that the Bible class is not an incorporated body—much law is to be found in the various reports of the long litigated case Metallic Roofing Co. of Canada v. Local Union No. 30 Amalgamated Sheet Metal Workers' International Association, in our Courts. See (1905) 9 O.L.R. 171.

The appeal should, in my view, be allowed with costs and the action dismissed with costs.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

KELLY, J.:—While entertaining some doubt in this matter, my doubt is not such as to induce me to disagree with the opinion of the other members of the Court.

Appeal allowed; KELLY, J., *dubitante.*

APRIL 24TH, 1915.

MacDONELL v. DAVIES.

Arbitration and Award—Ground Rent of Premises Fixed by Award—Action for Value of Use and Occupation — Fair Rental Value of Premises—Evidence.

Appeal by the plaintiff from the judgment of LENNOX, J., ante 48.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. H. Watson, K.C., and S. J. Birnbaum, for the appellant.

M. H. Ludwig, K.C., for the defendant, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—The Court of Appeal (MacDonell v. Davies (1913), 4 O.W.N. 620) has authoritatively decided that the defendant had a right to renewal of his lease, unless the landlord should buy his buildings at an amount to be fixed by arbitrators. The amount was paid, and consequently the buildings became the plaintiff's, but there is no ground, on principle or authority, for the proposition that his payment had a retroactive effect. The result is that until the payment the buildings were the defendant's.

During the time for which "use and occupation" is claimed here, the defendant occupied his own buildings and the plaintiff's land. For the occupation of the plaintiff's land the plaintiff is entitled to be paid.

It is claimed for the defendant that the amount to be paid was to be fixed by arbitration—if so, the amount has been fixed and paid.

If not, the amount is to be "a reasonable satisfaction for the use and occupation of the lands:" Woodfall on Landlord and Tenant, 19th ed., p. 646.

On the evidence here, the amount paid is at least equivalent to such a sum, if not more than it. And the amount bears no necessary relation to the advantage derived by the tenant from such use: Attwood v. Taylor (1840), 1 M. & G. 279, at p. 312.

The judgment being right, we do not concern ourselves with certain alleged errors in the terminology of the learned trial Judge.

The appeal should be dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J. APRIL 19TH, 1915.

SWAYZE v. GROBB.

Company—Directors—Issue of New Shares—Invalidity—Previous Agreement to Allot Shares in Consideration of Financial Aid—Agreement with Director not Binding on Company—Control of Company—Election of Directors.

Action by certain holders of shares in the London Foundry Company against the other shareholders and the company for a declaration that the issue of certain shares to Messrs. Cowan and Garrett was void, to set aside the election of the individual defendants as directors, to restrain them from acting as directors, and for a declaration that the plaintiffs were duly elected directors.

The action was tried without a jury at London.

T. G. Meredith, K.C., for the plaintiffs.

Sir George Gibbons, K.C., and C. G. Jarvis, for the defendants.

MIDDLETON, J.:—The plaintiffs and defendants other than the London Foundry Company are all the shareholders in that company. . . . The subscribed capital of the company is $42,800, and it was so apportioned between the shareholders that the plaintiff Chapman held the key of the situation by the 50 shares of stock which he held.

The defendant Grobb and his associates had for some time been in power, Chapman siding with them. At the annual meeting of the company held early in February, 1915, it was found that Chapman had changed his affiliations, and the then directors found themselves in a minority. The meeting was adjourned until the 15th February, and Mr. Grobb and his associates, honestly thinking that "wisdom would die with them," set themselves to remedy the awkwardness of the then existing situation. They allotted $2,000 of stock to Mr. Garrett and $5,000 of stock to Mr. Cowan. If this stock was validly issued, Chapman's defection was neutralised, and the company was saved. The plaintiffs bring this action attacking the issue of this stock to Cowan and Garrett.

The pleadings are not well framed for the purpose of getting at the real controversy. If the plaintiffs desire to amend, I think leave should be given, so that the real matter in dispute may be determined.

It appears that the company had borrowed money from the bank, and that Cowan and Garrett came to the financial assistance of the company long before the matters which have given rise to this litigation. It is practically conceded by Sir George Gibbons that, if the stock transaction had its initiation at the time the stock was issued and allotted, the issue could not stand. The directors, facing defeat at the shareholders' meeting, could not continue themselves in power against the will of the majority by the device of converting a minority into a majority by this process of simple addition; but he contends that the case is taken out of this general principle because at the time of the making of the advances it was understood that Cowan and Garrett should be entitled to take stock in the company if they so desired. The stock was issued in pursuance of a letter dated the 4th February, 1915, reminding the defendant Grobb of an agreement made on the 31st December, 1913, which gave Cowan and Garrett the option to have shares or a mortgage, and in which they stated their desire to take the shares.

If this agreement had been validly made in such a way as to bind the company, I should have been with Sir George Gibbons; for, although the demand for shares was clearly made for the purpose of retaining Grobb and his associates in power, I am not concerned with the motives. If the right existed, it could be asserted for any purpose which seemed good to the party asserting it. The stock may not be worth 10 cents in the dollar; but, if these gentlemen had the right to pay 100 cents for it and chose

to do so, that is their concern, not mine. But the alleged agreement was not one made by the company, but only with the defendant Grobb. The directors under the statute must allot the stock, and I do not think that this agreement, made with one director only, can have any effect. . . .

Of course, on the invalidity of the stock issue being declared, there must be the corresponding declaration that Messrs. Garrett and Cowan are restored to their position as creditors; and, if they desire to wind up the company, I cannot interfere.

As usual in all such cases, the costs must follow the result.

Judgment for the plaintiffs with costs.

MIDDLETON, J. APRIL 19TH, 1915.

RAY v. GETTAS.

Partnership—Holding out—Evidence of Holding out to Others than Plaintiff Seeking to Make Defendants Liable by Estoppel — Inadmissibility — Evidence Impeaching Defendants' Veracity—Failure to Establish Holding out to Plaintiff—Infant—Parties.

Action for a declaration that the defendants were liable to the plaintiff as partners with one James Athes in a business known as the "Sparta Restaurant," and to recover from the defendants money lent to Athes for the business.

The action was tried without a jury at Berlin.

M. A. Secord, for the plaintiff.

W. H. Gregory, for the defendants.

MIDDLETON, J.:—There is no pretence that there was in truth any partnership existing. The plaintiff's contention is, that there was a holding out by the defendants, and that on the strength of this he gave credit.

At the opening of the trial, evidence was tendered of holding out to others than the plaintiff. Mr. Secord undertook to shew that the plaintiff acted upon this, and on the strength of this the evidence was admitted. When the plaintiff gave evidence, it was plain that he in no way acted upon this evidence. Mr. Secord then sought to rely upon this evidence as impeaching the defend-

ants' veracity. I think he has no such right, and that, the undertaking upon the strength of which the evidence was admitted not having been complied with, this evidence must be treated as though it had not been given. If the defendants on cross-examination had been asked as to the representations, the plaintiff would have been concluded by their answers, and the evidence referred to would not have been admissible: If the issue had been as to the existence of a partnership, then the evidence would, of course, have been admissible, but where it is conceded that there was no partnership, holding out to others than the plaintiff was quite immaterial. This is determined, in a way that binds me, by Dominion Express Co. v. Maughan (1910), 21 O.L.R. 510. The plaintiff cannot shew that there was holding out to him by shewing that there was holding out to others. Where it is sought to shew fraudulent intent in criminal cases, and probably also in civil cases, similar transactions may be shewn for the purpose of establishing the intent, but for no other purpose.

Too little attention is generally paid to what is said in Tennant v. Hamilton (1839), 7 Cl. & F. 122, 134: "It is an acknowledged law of evidence that you cannot go into an irrelevant inquiry for the purpose of raising a collateral issue to discredit a witness produced on the other side." It must be borne in mind that this was said of cross-examination.

The case then narrows itself very much. When Athes first went to Galt, his two daughters, Anastasia and Lulu, went with him. These young ladies carried on the business, their father assisting them. It was carried on in their name, as "A. & L. Athes." The bank account was in this name; the bills of fare in the restaurant were headed "The Sparta Restaurant, A. & L. Athes, Proprietors." The advertisements were in the same way. The business was carried on by these young ladies for some years, and in November, 1912, one of the daughters, Lulu, having married, and the other daughter being about to marry, they sold out to the father for $3,000. He gave each daughter a series of notes for $1,500. This transaction took place in the office of Mr. Scellen, a well-known solicitor, and he prepared the documents. Anastasia has received payment of her $1,500, but the other daughter has received only $50 on account.

Something over a year after the father took the business, he desired the daughter Lulu and her husband, George Gettas, to come and take part in its management. The arrangement was that they should be paid wages. At first the daughter took no part, but later on she, as well as her husband, took part, and she

became entitled to wages. The daughter appears to have been reluctant to assume the position of hired help in the business where she had formerly been a proprietor, and no doubt the father said to her, "If any one asks you, say you are a partner;" but there never was any intention that there should be a partnership.

Ray endorsed paper for the father. He says he did this on the strength of the partnership, and that he would not have lent the money if he had not understood that the daughter and her husband were members of the firm. I find it quite impossible to accept his story. . . . He took the signature to the note of the father only, and did not ask either the daughter or her husband, who were upon the premises at the time, to become parties to it. The daughter and her husband were both young people without means, and it is hard to suppose that at the time of the transaction their liability would have been regarded as affording any basis for credit.

The case, so far as the son-in-law is concerned, is somewhat different from that against the daughter, for there is no proof that he was in any way a party to the statement, acquiesced in by the daughter, that she might hold herself out as a partner if she desired. . . .

The plaintiff is confronted with another difficulty. Mrs. Gettas at the time of the transaction was an infant. As an infant she could not have contracted; and, as the plaintiff is seeking to impose a quasi-contractual liability upon her by estoppel, her infancy affords a defence. The infancy has not been pleaded, but I think it is proper to grant the application made to permit it to be now set up.

The action is probably defective for want of parties, Athes not being joined. . . .

Action dismissed with costs.

MIDDLETON, J. APRIL 19TH, 1915.

*COVENEY v. GLENDENNING.

Company—Unsatisfied Judgment against—Action against Directors by Assignee of Claims for Wages of Servants—Companies Act, R.S.O. 1914 ch. 178, sec. 98—Agreement between Assignee and Company—Novation—Costs.

Action by the assignee of wages claims against the directors of a company to recover the amount of the claims, under sec. 98 of the Companies Act, R.S.O. 1914 ch. 178.

The action was tried without a jury at Toronto.

T. H. Peine, for the plaintiff.

D. Inglis Grant, for the defendants Glendenning and Mackie, and for Clarkson, added as a defendant at the trial.

Judgment for default was signed against the other defendants.

MIDDLETON, J.:—The action was brought by a storekeeper carrying on business at St. Anthony Mine, who claims to recover against the defendants, as directors of the Northern Gold Reef Limited, the sum of $2,088.49 alleged to be due for debts for wages to labourers, servants, and apprentices, for services performed for the company, of which the plaintiff is the assignee. . .

The mine was originally the property of the Sturgeon Lake Development Company, and the plaintiff's original transactions were with that company. The new company was incorporated and organised in January, 1913, and the course of business continued with the new company in precisely the same way that it had been carried on with the old company.

By an arrangment made on the 1st April, 1912, between the plaintiff and the Sturgeon Lake Development Company, the plaintiff agreed to move his store, then some distance from the mines, to the mines, and he was given the exclusive right to operate a store and pool-room there in a building owned by the company, for a nominal rent. The company also agreed to supply him with electric light at a nominal charge.

Although not reduced to writing, it was agreed that the store should be run for the accommodation of the men working at the mines, and that the goods sold to the men should be charged up against their wages, and the amount so charged up should be paid to the plaintiff, the plaintiff being in this way secured as to payment for all the goods sold. The way this was carried into effect was that the purchasers were required to initial the vouchers, and the vouchers were then sent to the company; and, when the pay cheques were drawn, a separate cheque was drawn for the amount of the store bill, payable to the workman; the men then endorsed these cheques, and they were retained by the company. An adjustment was made monthly between the plaintiff and the company; he was given credit for the amount of these cheques so held and for any goods he had sold to the company; he was charged with the amount due for rent and for electric light, and for anything else which he owed the company, and was then given a cheque for his net balance.

The bulk of the plaintiff's claim consists of cheques for balances due him, ascertained in this way. The remainder of his claim consists of wages cheques given to the servants of the company and cashed by the plaintiff; as to these, the claim is admitted.

The plaintiff has sued the company, judgment has been recovered, and execution has been returned nulla bona. The suit against the company was not upon the cheques the plaintiff holds, but was made up of the balances due for wages represented by the original cheques in favour of the men, which had never been in fact handed over to the plaintiff.

One object of dealing with the cheques in the way indicated was to avoid bank commission on the cheques, which had to be sent to Toronto to be cashed. Manifestly this was not the only object, for on each occasion there had to be an adjustment to ascertain the true amount due to the plaintiff.

[Reference to Lee v. Friedman (1909), 20 O.L.R. 49, and Olson v. Machin (1912), 4 O.W.N. 287, 23 O.W.R. 531.]

Neither of these cases is identical with that in hand, but I think the money became payable to the plaintiff by virtue of his direct contract with the company when the adjustment took place and he accepted the cheque. There was then a novation, and under this new contract the plaintiff became a creditor of the company in respect of the cheques given to him, and the demands ceased to be demands for wages within the meaning of the statute.

This reduces the plaintiff's claim to the amount of the men's cheques held by him, which is $736.21, plus some small sum for interest which the parties can, no doubt, adjust.

The question of costs is not easy, because the plaintiff has failed on most of his claim, and the amount recovered is well within the County Court jurisdiction. I think the fairest solution is to allow him $75 costs as against the defendants Glendenning and Mackie, and to declare his right against the estate in the assignee's hands, for these sums. There will be no costs as far as the defendant Clarkson is concerned.

MIDDLETON, J. APRIL 19TH, 1915.

RE BILTON.

Will—Construction—Bequests to Individuals—Succession Duty to be Paid by "Estate"—Insufficiency of Estate—Bequest of Rentals of Real Estate—Payment of Debts, Testamentary Expenses, and Costs of Administration—Charge on Realty and Personalty pro Rata—Payment of Succession Duty by Legatee.

Motion by the executors of Naomi Bilton, deceased, upon originating notice, for an order determining certain questions arising upon the terms of her will, dated the 6th February, 1912. She died on the 26th March, 1914.

The motion was heard in the Weekly Court at Toronto.

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

John A. Paterson, K.C., for the University of Toronto.

John T. Small, K.C., for the Red Cross Society.

F. C. L. Jones, for Mrs. Curran.

W. J. Elliott, for Mrs. Northey and N. E. Wilmott.

R. N. McCormick, for the Salvation Army.

F. W. Harcourt, K.C., for Dorothy Hester McLeary, Mrs. Lynch, and Mr. Tuke.

No one appeared for the Muskoka Free Hospital.

MIDDLETON, J.:—The real difficulty is occasioned by the fact that Miss Bilton did not leave as large an estate as evidently contemplated in the preparation of her will. Her estate consisted of lands known as 188 Yonge street, Toronto, which are very valuable. The value is not stated, but they yield an income, as I understand it, of $8,500, so that they must be worth upwards of $150,000. Apart from this, her assets consist of moneys on deposit amounting to almost exactly $10,000. In addition to this, as I understand the affidavit, $400 of rent accrued at the time of her death, if the current gale was apportioned. She had also chattel property mentioned in clause 5 of her will, which is valued at a little over $500.

The will is simple. All the property is given to the executors in trust, and they are directed to pay the debts. The land is to be leased; the rent is to be divided into four equal parts, one part being paid to Mrs. Curran, one part to be divided equally

between the Misses Bennett, and upon the death of either to go to the survivor; the remaining two parts to be paid to the University of Toronto. Upon the death of Mrs. Curran and upon the death of the two Misses Bennett, their right to the income ceases, and the property is to be conveyed to the University. Then follow certain conditions upon breach of which the property is to go to the Red Cross Society; and, if the Red Cross Society is guilty of breach of these conditions, the property is to become part of the residuary estate.

Out of the money on hand and on deposit a sum not exceeding $10,000 is to go to Mrs. Northey, and one-half to Mr. Wilmott. If there be any of these moneys over, it is to be divided among certain named persons. The specific chattels already mentioned are then given to specific persons. These chattels consist of a piano, articles of clothing, jewellery, and the like. The residue is to be divided between the Muskoka Free Hospital and the Salvation Army. Then follows a provision that all bequests to individuals are to go to them free from succession duty, such duty as may be payable thereon to be paid by the estate; but in the case of any corporation or aggregate of persons not incorporated the succession is to be borne and paid by the devisee or legatee.

There are some debts, and there are testamentary expenses and expenses of administration to be provided for. In addition to that, succession duty will undoubtedly be payable upon the share of the rent given to the individuals named, and upon the $10,000. In all, I am told, some $2,500 must be provided. The gift to the University, although expressed to be subject to succession duty, will not be liable to pay succession duty, as it is exempt.

The questions asked are: out of what part or parts of the estate the trustees are to pay the debts of the testatrix and the testamentary expenses and the costs of administration; secondly, having regard to the provisions of the will, how should the succession duty be paid?

The direction in the eighth clause that the bequests to individuals are to be free from succession duty, and that such duty is to be paid by the testator's "estate," fails because there is no estate out of which it can be paid. The "estate" referred to is evidently something other than that which has been specifically given and which is to be exonerated. It is in effect an additional gift which there are no funds to answer. Those taking shares in the rents and the $10,000 must bear the succession duty

on what they respectively take: In re Turnbull, [1905] 1 Ch. 726.

The testamentary expenses and debts must be borne by the realty and the $10,000 pro rata. All parties have agreed not to ask anything from the personal property specifically given.

The cases cited in Theobald, 6th ed., p. 795, support the statement that real estate (not charged with debts) and specifically bequeathed personalty share pro rata; so that, as far as possible, the testator's intention may not be frustrated and any particular devisee or legatee be disappointed.

Here, both realty and personalty are charged, and the same reasoning leads to the like result.

As between the University and those taking shares of rental, the present value of the share of the rental, having regard to expectation of life, after deducting succession duty, is the proper basis for the apportionment of the share to be charged to the realty.

The costs of this motion will form part of the testamentary expenses and be raised in the same way.

MULOCK, C.J.Ex., IN CHAMBERS. APRIL 22ND, 1915.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO.

Parties—Addition of Co-plaintiff—Class Suit—Company—Alleged Estoppel of Original Plaintiff—Rule 134.

Appeal by the defendants from an order of the Master in Chambers adding one T. A. Eaton as a party plaintiff.

The action was brought by J. P. Crawford, on behalf of himself and all other shareholders of the defendant company, except the individual defendants, alleging that the individual defendants had been illegally elected directors of the company, had fraudulently appropriated to their own use $11,601.75 of the company's money, and had illegally paid dividends to shareholders out of capital, and claiming to have the election set aside, and the individual defendants ordered to pay to the company the $11,601.75 and the amounts illegally paid as dividends.

The individual defendants denied the charges, and set up that the plaintiff Crawford was fully aware of all the trans-

actions impeached, and by his conduct had estopped himself from complaining. The original plaintiff moved, after the defence was filed, for an order adding Eaton as a co-plaintiff, and the order appealed against was made upon that motion.

H. J. Macdonald, for the defendants.
J. H. Fraser, for the original plaintiff.
Erichsen Brown, for Eaton.

MULOCK, C.J.Ex. (after stating the facts):—The plaintiff Crawford in support of the order invokes Rule 134. That Rule is substantially a consolidation of the former Con. Rule 313 and of clause 2 of Con. Rule 206, and is to the same effect as the English (1883) Order XVI., Rules 2 and 11. . . .

One of the questions involved in this action is, whether the individual defendants have been guilty of any breach of trust of which the plaintiff Crawford has the right to complain. Is Eaton's presence necessary in order to enable the Court to adjudicate upon that question? I think not. . . .

[Reference to Walcott v. Lyons (1885), 29 Ch. D. 584, 587; Ayscough v. Bullar (1889), 41 Ch. D. 341; Attorney-General v. Pontypridd Waterworks Co., [1908] 1 Ch. 388, 399; Dillon v. Township of Raleigh (1886), 13 A.R. 53; Burt v. British Nation Life Assurance Association (1859), 4 De G. & J. 158; Colville v. Small (1910), 22 O.L.R. 426, 429.]

According to the pleadings, this is not the case where one who has a cause of action brings a suit in which another person who is a necessary co-plaintiff has not been so joined. In such case the suit is merely defective, and the Court may, under proper circumstances, add as plaintiff the one who should have been originally so joined, but here, if the plaintiff has a cause of action, he is entitled to maintain it without the presence of Eaton as co-plaintiff. If the defence is bad, Eaton's presence as a co-plaintiff is not necessary; if it is good, then the plaintiff has no cause of action. Thus it cannot be said that Eaton ought to have been joined as a co-plaintiff when the action was commenced or that his presence is necessary in order to enable the Court effectually to deal with all the questions involved in the action. Thus the order cannot be upheld under the first parts of the Rule. Nor can the order be upheld on the ground that the action has "through a bonâ fide mistake been commenced in the name of the wrong person as plaintiff," or that "it is doubtful whether it has been commenced in the name of the right plaintiff." . . .

[Reference to Tinning v. Bingham (1894), 16 P.R. 110.]

There is no evidence of any . . . bonâ fide mistake; and, if the plaintiff has a cause of action, it is not doubtful that the action was commenced in the name of the right plaintiff.

For these reasons, I think that the appeal should be allowed with costs and the order set aside with costs.

SUTHERLAND, J., IN CHAMBERS. APRIL 24TH, 1915.

HIND v. GIDLOW.

Mortgage—Action for Foreclosure Begun before Passing of Mortgagors and Purchasers Relief Act, 1915 — *Principal and Interest in Arrear—Rights of Mortgagees Undisturbed by Act—Sec.* 4, *sub-sec.* 3, *of Act—Leave to Proceed Unnecessary—Costs of Motion.*

An application by the plaintiffs, mortgagees, under the Mortgagors and Purchasers Relief Act, 1915, for leave to proceed with the action.

W. Proudfoot, K.C., for the plaintiffs.

No one appeared for the defendants.

SUTHERLAND, J.:—The writ of summons in the action was issued on the 4th September, 1914, before the Act was passed. The action is for the foreclosure in respect of mortgages which, I assume, though the material does not expressly shew it, were made or executed prior to the 4th August, 1914. When the action was commenced, the amount of the principal unpaid on the mortgages was $1,325, of which certain instalments were in arrear, together with interest which amounted to $123. In view of the exception contained in sec. 4, sub-sec. 3, of the Act to the following effect, namely—"(3) Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative, shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same, as if this Act had not been passed, but where such interest, rent, taxes or other disbursements are paid into Court or tendered to the mortgagee, vendor,

assignee, or personal representative, he shall not continue any proceedings already commenced by him without the order required by section 2 or by section 3, as the case may be''—I am unable to see that this is a case in which an application was necessary to be made on the part of the mortgagees. Interest being in arrear at the time the writ was issued, the rights of the mortgagees were undisturbed by the Act.

The mortgagees in the proceedings thus far carried on were apparently unable to effect personal service on the defendants, and obtained an order for substitutional service. As I understood, no notice of this motion, of any kind, was given to the defendants, and no one therefore appeared for them thereon.

There will be no order as to costs, except that the applicants will not be permitted to add the costs of the motion to any costs incurred in the action.

HODGINS, J.A., IN CHAMBERS. APRIL 24TH, 1915.

TORONTO GENERAL TRUSTS CORPORATION v. RITCHIE.

Mortgage—Sale Proceedings Taken to Realise Principal and Interest in Arrear—Mortgagors and Purchasers Relief Act, 1915, *secs.* 2(*a*), 4(3)—*Leave to Continue Proceedings Unnecessary—Costs of Motion.*

Motion by the plaintiffs for leave to continue mortgage sale proceedings commenced under a mortgage dated the 28th May, 1909, in which proceedings it was sought to realise the principal, as well as the interest in arrear.

T. S. Elmore, for the plaintiffs.
N. D. Maclean, for the defendants.

HODGINS, J.A.:—The defendants object that the motion is unnecessary, as default was made in payment of interest, which continued until the proceedings were begun. The plaintiffs rely upon the language of sec. 2, sub-sec. (*a*), of the Mortgagors and Purchasers Relief Act, 1915, which provides that "no person shall take or continue proceedings by way of foreclosure, sale, or otherwise . . . for the recovery of principal money secured by any mortgage of land, or any interest therein, made or ex-

ecuted prior to the 4th August, 1914, except by leave of a Judge granted upon application as hereinafter provided."

In my opinion, that section of the Act contains the general rule, but it is subject to the exceptions found in the later sections of the statute. By sub-sec. 3 of sec. 4 thereof, it is provided that where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor has covenanted or undertaken to pay, the mortgagee shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same, as if this Act had not been passed.

This leaves the mortgagee untrammelled where such a default has occurred. The mortgagor, however, can pay into Court or tender to the mortgagee the interest, rent, taxes, or other disbursements in question; and, if he does this, the mortgagee's proceedings must cease until he obtains an order under sec. 2.

The Act seems to be intended to render an application unnecessary where a mortgagor fails to pay his interest, taxes, insurance, etc., and to permit realisation as before the Act of both principal and interest and other charges; but where he pays interest, etc., it is designed to protect him from proceedings to compel payment of principal, unless by leave of the Court.

In this case, in view of the fact that there was interest in arrear when the proceedings were taken, it was not incumbent on the mortgagees to make any motion under the Act, and the application will be dismissed.

As the point arises for the first time, as I understand, and on a new statute, there will be no costs of the application to either party.

LAUZON v. DOMINION STAMPING CO.—MIDDLETON, J.—APRIL 19.

Nuisance—Damages—Injunction—Reference—Costs.]—Appeal by the defendants from the report of the Local Master at Windsor in an action for an injunction and damages in respect of a nuisance. The plaintiff complained of noise, smoke, and noxious vapours from the defendants' factory, next door to the plaintiff's dwelling house. The judgment at the trial required the defendants to pay the plaintiff damages for the wrongs complained of, and directed a reference to the Master to ascertain the amount of such damages, "and in fixing such amount the Master shall assess the damages for the wrongs complained of

once for all, for future as well as for past and present inconvenience, loss, and damage." No injunction was granted. The reference proceeded, and evidence was given shewing serious injury to the value of the plaintiff's property as a dwelling if the nuisance complained of continued. After this evidence had been given, other actions were brought by other neighbours, and in these cases injunctions were obtained, to some extent restraining the defendants from operating their factory in such a way as to continue the nuisances—the operation of the injunctions being stayed until June, 1915, so as to permit of the defendants making arrangements without too seriously affecting their business. See Gagnon v. Dominion Stamping Co. (1914), 7 O.W.N. 530. The Master made his report in this action awarding the plaintiff $1,700 for depreciation in the value of the land, $96 for money expended, and $300 for discomfort and inconvenience —$2,096 in all. The Master assessed the damages on the basis of the price to be paid for the privilege of continuing the nuisances complained of for all time—disregarding the injunctions in the other actions and the effect if obeyed. MIDDLETON, J., read a judgment, in which he stated the facts, and said that he did not think that the Master should have assumed that the future damage and inconvenience would be as great in degree as the present. The Court had power, if the defendants submitted to an injunction in the same terms as in the Gagnon case, to grant an injunction, and should do so, in order to remove any uncertainty as to the future; and the case should be referred back to the Master to reconsider his award of damages on this head, having regard to the fact that, from and after a date to be named in the judgment, the nuisance will be to that extent reduced and moderated. Order made accordingly. Costs of the appeal and reference back reserved to be dealt with by the Judge after the Master has made his further report. W. G. Bartlet, for the defendants. J. H. Rodd, for the plaintiff.

RE MCBAIN—MIDDLETON, J.—APRIL 19.

Will—Construction—Devise of Farm to Daughters—Provision in Event of Marriage—Restraint of Marriage—Devise in Fee Subject to Conditions Subsequent—Trustees—Power to Sell and Convey Land.]—Motion by the executrices and trustees under the will of Mary Morrison McBain for an order determining certain questions in regard to the estate, involving the construc-

tion of the will. The motion was heard in the Weekly Court at Toronto. The main property of the testatrix consisted of a farm. She had five children: Mary, married and away from home; James, away from home and doing for himself; Clifford, on the farm but not determined whether he would stay; and Lily and Jessie, unmarried daughters, living with the testatrix. By the will all the property was given to Lily and Jessie, as executrices and trustees, and it was then provided: "Should my son Clifford desire the west side of" the farm "and stay and work it, I desire him to have it in his name, he to assume $1,500 of the present mortgage of $3,300 upon the whole property, and my daughters Jessie and Lily to have the east side" of the farm. "Should Clifford desire to leave the place and go into other business, then the whole property to become the property of Jessie and Lily, they to assume the entire mortgage of $3,300 now on the place and to give Clifford $1,000. . . . Should either Jessie or Lily marry, the other to become the possessor of the property of both. Should both marry and Clifford in other business as aforementioned, the property to be divided equally," among the five children. Clifford did not remain upon the property, but went into other business:—Held, that he had no further interest in the west side property, save his right to receive $1,000 from his sisters and his share in the event of the property being divided.—(2) That the marriage of Lily or Jessie referred to in the will did not mean marriage during the lifetime of the testatrix, but at any time.—(3) That the provisions of the will regarding marriage were not void as being in restraint of marriage.—(4) That the devise was to Jessie and Lily in fee, subject to the conditions subsequent that upon marriage of either one the other is to have the entire property, and that if both marry it is to become the property of the five. Reference to Halsbury's Laws of England, vol. 28, p. 774; Jarman on Wills, 6th ed., p. 1362; Re Branton (1910), 20 O.L.R. 642; In re Mason, [1910] 1 Ch. 695.—(5) The parties agreeing thereto, that the Title and Trust Company should be appointed trustees along with the two daughters, and the property vested in the three trustees, with a declaration that the trustees have power to sell and convey the real estate.—(6) That costs of all parties should be paid out of the estate. H. R. Frost, for the daughters Lily and Jessie. H. E. Rose, K.C., for the daughter Mary McKerrow. T. J. Agar, for the son Clifford. J. Gilchrist, for the son James.

PEPPIATT v. REEDER—HODGINS, J.A., IN CHAMBERS—APRIL 22.

Appeal—Order or Decision of Master—Appeal to Judge under Rule 504—Failure to Comply with Rules 502, 503—Powers of Master on Reference—Damages—Set-off.]—Appeal by the defendant from a ruling or order of the Master in Ordinary in the course of a reference. HODGINS, J.A., said that the decision of the Master could not be supported, and that it was ineffective to bind the parties. A direction to set off damages or moneys against that due or coming due under the instruments in question might have been made by the Court which ordered the reference. But this was not done. Under the judgment in its present form the Master could only ascertain and report the damages. He could not give a direction the effect of which was to disable the parties from enforcing their rights under the instruments upheld by the Court, or to embarrass their action. Notwithstanding this, the appeal must be dismissed, as the appellant had not complied with the practice in procuring and filing a certificate from the Master. Under Rule 504, no appeal lies from a decision except after observing the provisions of the two preceding Rules. The costs of the appeal to be set off against the payments due or accruing due. J. J. Gray, for the defendant. E. Meek, K.C., for the plaintiff.