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APPELLATE DIVISION.

APRIL 5TH, 1912.

*ZOCK v. CLAYTON.

Crown Lands—Patent — Misdescription — Application for same Lands—Dispute—Finding of Minister of Lands Forests and Mines—Patent for same Lands Issued to Second Applicant—Certificate of Title—Action by First Patentee to Establish Title—Parties—Attorney-General—Status of Assignee of First Patentee—Land Titles Act—Effect of Registration—Public Lands Act—Pleading—Amendment—Rectification of Register.

Appeal by the plaintiff from the judgment of a Divisional Court, 3 O.W.N. 1611, reversing the judgment of LATCHFORD, J., at the trial, and dismissing the action with costs.

The appeal was heard by MULOCK, C.J.Ex., MACLAREN, J.A., CLUTE, SUTHERLAND, and LEITCH, JJ.

C. A. Masten, K.C., for the plaintiff.

E. D. Armour, K.C., and A. C. Craig, for the defendants.

The judgment of the Court was delivered by CLUTE, J.:— The plaintiff claims the land in question through one Walter Duncan, who obtained a grant thereof from the Crown, dated the 21st November, 1907, in which the island is called "Duncan's Island." Duncan subsequently registered the same, and received a certificate of ownership, under the Land Titles Act, on the 11th December, 1907, as parcel 1024. Subsequently, by transfer dated the 3rd November, 1908, and registered on the 26th December, 1908, as No. 4752, Duncan transferred the island to the plaintiff. Afterwards, in 1909, the defendants obtained a

*To be reported in the Ontario Law Reports.

patent for an island (called therein "Claytonwood Island") which, the plaintiff alleges, is the identical island patented to Duncan.

The plaintiff brings this action for a declaration that he is the owner of the island in question, and for an injunction restraining the defendants from interfering with his title, and for further and other relief.

The defendants assert that the island for which they obtained a patent is not shewn on the Government plan, and is to the west of the island granted to Duncan; and contend that the Minister of Lands having adjudicated upon the objection of the plaintiff to the defendants' title, the validity of the defendants' title is res judicata, and that it is not open to the plaintiff to impeach the same; and that in any action to impeach it the Crown is a necessary party.

The question of identity, therefore, becomes all-important; and I shall have to trace the transaction at some length. . . .

The trial Judge, who heard the witnesses, has made a very strong finding in favour of the plaintiff. . . . There is ample evidence, in my opinion, to support the finding of the trial Judge. I should, I think, upon the evidence, have reached the same conclusion. I entertain no doubt that the most northerly of the two islands in Bulger lake, shewn on the original plan, was intended to represent the largest island in the lake. It is incredible to me that a surveyor making an original survey, should have entered upon his plan the smallest island—a third of an acre—and have taken no notice of an island twenty times its size, when the line run by him was within a few rods of it.

I think the evidence conclusive that the island shewn on the original plan was the largest island in the lake, and was the one conveyed to Duncan.

The defendants deliberately, in my judgment, misrepresented facts to the Department, concealing the fact that they knew that the largest island, which they applied for, had already been patented to Duncan, and was known as "Duncan Island," and falsely suggesting that there was an island to the west, not shewn on the map, and not patented to Duncan.

After a careful perusal of the evidence, I entertain no doubt whatever that the island covered by the second patent is the same island that was applied for and for which a patent had previously been granted to Duncan. The description as "Duncan Island" in the patent, having been identified and recognised as such, was sufficient in itself. Those familiar with the island knew it by that name after it was applied for by Duncan; and

the error in stating that it lay in front of lots 20 and 21, instead of lot 21 only, was falsa demonstratio. . . .

The plaintiff's title was not impugned; it still stands; it was not a case of recalling the patent issued to the plaintiff by mistake or otherwise. The decision of the Minister went upon the assumption that the island in question was not upon the original plan, and was not intended to be patented to the plaintiff, and was not in fact patented to him. None of these assumptions are, in my opinion, well-founded, the Minister having been led to this false conclusion owing to the false statement made by the defendants.

I agree with the judgment of Riddell, J., who took a different view from that of the majority of the Court below. . . .

A long line of decisions has settled that an action to declare void a patent, on the ground that it was issued through fraud, error, or improvidence, may be maintained, and that the Attorney-General, representing the Crown, is not a necessary party.

But, in my view, this jurisdiction does not rest solely on the decided cases, but upon the statute-law and on the Judicature Act. . . .

[Reference to 4 & 5 Vict. ch. 100, sec. 29; Halsbury's Laws of England, vol. 10, sec. 76, p. 35; Chitty's Prerogative of the Crown, p. 331; 16 Vict. ch. 159, sec. 21; C.S.C. ch. 22, sec. 23; 28 Vict. ch. 2, sec. 25; R.S.O. 1877 ch. 23, sec. 29; 50 Vict. ch. 8; Farah v. Glen Lake Mining Co., 17 O.L.R. 1; Con. Rule 241; Ontario Judicature Act, 1881, sec. 9; 9 Edw. VII. ch. 28, sec. 6; Boulton v. Jeffrey, 1 E. & A. 111; Barnes v. Boomer, 10 Gr. 532; Kennedy v. Lawlor, 14 Gr. 224.]

As was pointed out by my brother Riddell in the Court below, in none of these cases was there a prior patent issued to the plaintiff; on the strength of which an attack was made on the defendants' patent. In my opinion, the Court has jurisdiction wherever, upon the facts, the case is brought within sec. 29 of 4 & 5 Vict. ch. 100. . . .

[Reference to Martyn v. Kennedy, 4 Gr. 61; Proctor v. Grant, 9 Gr. 26; Laurence v. Pomeroy, 9 Gr. 474; Stevens v. Cook, 10 Gr. 410; Mutchmore v. Davis, 14 Gr. 346; Chisholm v. Robinson, 24 S.C.R. 704; The King v. Adams, 31 S.C.R. 220; Ontario Public Lands Act, R.S.O. 1897 ch. 28.]

It is quite obvious that the Crown did not act under sec. 24 of the Public Lands Act in issuing the second patent. There was no pretence of any fraud or violation of any conditions on the part of the plaintiff, nor did the Crown assume in any way to

cancel or deal with the grant to Duncan; nor was the sale made or patent issued in error or mistake. Duncan applied for the largest island in Bulger lake, and it was intended to be and was in fact granted to him under the name "Duncan Island." It was the only island near the north shore that could feed the grant. It is absurd to suppose that the bit of rock—sometimes almost submerged—could have been intended to represent an island at least twenty times its size.

The Crown could not and did not assume to cancel the grant to Duncan, and had no title upon which the subsequent grant to the defendants could operate.

The plaintiff is, therefore, entitled to have it declared that the grant to the defendants is null and void, unless (1) the plaintiff, as assignee of Duncan, is not entitled to stand in the position of Duncan, or (2) unless the plaintiff is excluded by the registration of the defendants' title under the Land Titles Act.

As to the first point, Mr. Armour relied upon Prosser v. Edmunds, 1 Y. & C. Ex. 481. A consideration of that case shews the facts of it to be very different from the present. . . . See Mutchmore v. Davis, 14 Gr. at pp. 351, 352.

In the present case, it was not a bare right which was assigned to the plaintiff, but land definitely described in the patent and known as "Duncan's Island." It cannot, I think, be open to doubt that whatever right Duncan had to have the defendants' patent declared void passed to the plaintiff.

Then, as to the effect of the Land Titles Act and the registration thereunder, it operated in favour of the plaintiff's title rather than against it. . . . The plaintiff's title is registered under that Act, and a certificate in due form was granted to him prior to the defendants' patent and certificate. . . .

[Reference to secs. 13, 119, and 121 of the Land Titles Act.]

I am of opinion that secs. 119 and 121 are applicable to this case, and that the register may be rectified. . . .

[Reference to secs. 30 and 124 of the Public Lands Act, R.S.O. 1897 ch. 28.]

The action taken before the Local Master of Titles at Bracebridge on behalf of the plaintiff, and afterwards abandoned, creates no difficulty . . . as the Master clearly had no authority to deal with the question here involved. The Minister of Lands having granted his certificate that the claim of Walter Duncan to the island was considered by him and disposed of by disallowance before the issue of the patent to the defendants, the Master was thereupon bound to discontinue further con-

sideration of the plaintiff's claim and disallow any objection raised by him: see sec. 169, sub-sec. 3, and secs. 140 and 141 of the Land Titles Act; so that the suggestion . . . that another forum had disposed of the question here involved is untenable.

. . .

The judgment of the Divisional Court should be set aside, and the judgment of the trial Judge should be restored and varied by declaring that the patent granted to the defendants of the island in question, called therein "Claytonwood Island," dated the 2nd August, 1909, is void and should be delivered up to be cancelled, and that a copy of such judgment be registered in the Provincial Secretary's office, and with the Local Master of Titles at Bracebridge, and the register in the Land Titles office there corrected. This relief may be granted under the prayer for further and other relief; yet, as all the facts were fully brought out at the trial, and the defendants cannot be prejudiced, the record may be amended. . . .

The plaintiff is entitled to the costs of this appeal and of the appeal to the Divisional Court.

APRIL 7TH, 1913.

*RE STRATFORD FUEL ICE AND CONSTRUCTION CO.

COUGHLIN AND IRWIN'S CLAIM.

Company—Winding-up—Claim on Assets—Guaranty—Compromise of Action—Double Ranking—Winding-up Act, secs. 36, 37, 76, 77, 78, 82, 83—*Proof under Act—Affidavit of Claim—Compounding.*

Appeal by Coughlin and Irwin, the claimants, from the order of MIDDLETON, J., ante 414, allowing the liquidator's appeal from an order of the Local Master at Stratford by which the claimants were permitted to rank upon the assets of the above-named company, in a winding-up proceeding, for the sum of $4,800 paid by them to the Traders Bank of Canada in discharge of their liability upon a guaranty of the indebtedness of the company to the bank.

*To be reported in the Ontario Law Reports.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and R. S. Robertson, for the appellants.

Sir George C. Gibbons, K.C., and R. T. Harding, for the liquidator, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The argument for the respondent that the filing of the affidavit of its local manager by the Traders Bank of Canada with the liquidator, enabled the latter to deal with the bank as the only claimant in respect of the debt set out in that affidavit, and that, in consequence, the settlement made between the bank and the liquidator, on the basis of such claim, prevents the appellants from ranking on the estate, leads to one of two results, each equally inconsistent with the terms of the arrangement as expressed in the consent minutes. One is, that the bank in fact released the sureties, although in form reserving its right against them; the other, that, if it did not release them, the bank's consent not to rank must be read as covering and including the sureties, and thereby leaving them liable to the bank, but unable to come on the estate of their debtor.

The memorandum of settlement is as follows (Brown being assignee for the benefit of creditors and the liquidator of the company and suing as such):—

"H.C.J.

"Brown v. Traders Bank.

"1. The defendants to be entitled to the proceeds of the real estate and ice franchise, $25,000, referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

"2. The defendants to pay to the plaintiff the sum of $1,000.

"3. Each party to pay own costs of suit.

"4. The other securities held by the defendants to be declared valid.

"5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of their debt.

"June 15th, 1909."

The trial Judge directed judgment to be entered in the action in accordance with the above consent; but no formal judgment is produced.

The affidavit filed by the bank is not such a claim as a secured creditor is entitled to file under sec. 76 of the Winding-up Act,

R.S.C. 1906 ch. 144. The liquidator, however, had notice from it that there were parties secondarily liable; and, when the settlement was made, he had express notice in the reservation made by the bank that there were guarantors liable for the debt. These guarantors had the right of proof under sec. 69, see also sec. 2 (j): In re Blackpool Motor Car Co., [1901] 1 Ch. 77; Wolmerhausen v. Gullick, [1893] 2 Ch. 514.

I do not see what there is in the mere filing of the affidavit of claim with the liquidator to give the bank the right to defeat the plain language of the Winding-up Act. . . .

[Reference to secs. 36, 37, 76, 77, 78, 82, 83 of the Act; In re Paine, [1897] 1 Q.B. 122; In re McMurdo, [1902] 2 Ch. at p. 699; Ex p. Good, 14 Ch. D. 82; Re Beatty, 6 A.R. 40; In re Deerhurst, 8 Mor. B.C. 258; In re Atree, [1907] 2 K.B. 868.]

It is not, as I understand it, double proof in the sense of asserting claims in different rights that is objectionable; but it is double ranking, or effective proof, so as to compel payment of two dividends in respect of the same debt: In re Oriental Commercial Bank, L.R. 7 Ch. 99.

Notice to the liquidator is beneficial to him in view of his duty under secs. 73, 77, and 82: see Argylls Limited v. Coxeter, 29 Times L.R. 355; as well as protective of the various classes of creditors; while the statutory procedure of contestation is aided and simplified by reading the Act as requiring proof by every claimant, and that in the form containing the information directed to be included by secs. 69 and 76.

Looking at it in another aspect, the settlement may be treated as an election by the liquidator, under secs. 76 and 82, to give up the securities. . . .

If it can be treated as an election, then the liquidator, unless he secures himself in the settlement, as he is required to do in certain cases (see secs. 80 and 81), must be taken to run the risk of claims arising out of the creditor dealing with his securities; and if, before distribution, a creditor proves either a contingent claim or becomes entitled to prove as a direct creditor, having paid upon his guaranty, it is a claim which comes in "when the business of a company is being wound up" (sec. 69); and the liquidator is bound to deal with it: secs. 74, 75, 79; In re Northern Counties Fire Insurance Co., 17 Ch. D. at p. 340; In re Blackpool Motor Car Co., [1901] 1 Ch. 77.

Even if there can be no double proof, the estate is not wound up; and, as the creditor has been paid in full, the sureties can prove for the amount of the debt paid by them. See remarks of North, J., in In re Binns, [1896] 2 Ch. at p. 588.

I cannot, therefore, see my way to treat the affidavit either as proper proof under the Winding-up Act or as shutting out other claims recognised by that Act.

The result of holding the sureties entitled to prove, works no injustice. The bond given by them allows compounding with any of the parties to the negotiable securities; and, if that includes the right to compound with the liquidator, the giving up of security of any kind is limited to that taken from the debtor and given up again. This does not include, it seems to me, such a right as that of ranking on the debtor's estate, which is not "taken from" the debtor, but arises by force of law in consequence of the winding-up order effecting a transfer of the debtor's assets to the liquidator: Unitt v. Prott, 23 O.R. 78.

The reservation of rights against the sureties leaves the debt alive, and the surety could sue the debtor: Kearsley v. Cole, 16 M. & W. 128; Green v. Wynn, L.R. 4 Ch. 204. . . .

[Reference to Nevill's Case, L.R. 4 Ch. 43; In re Whitehouse, 37 Ch. D. 683; Newton v. Chorlton, 10 Ha. at pp. 638, 639, 659; Ex p. Rushford, 10 Ves. 409.]

Nor would its valuing its securities too high and proving for too small an amount prevent the sureties, if they paid a larger amount, from having the benefit of the bank's proof, and their own as well, for the additional amount. . . . The guaranty is for the ultimate balance; and, on payment of this balance, the surety becomes entitled to an assignment of everything not realised or not pursued; and the non-receipt of dividends, because the bank agreed to abstain from putting itself in a position to claim them, cannot affect, as it seems to me, the right of the surety to assert his claim so to do. The bond is for the ultimate balance, though limited in amount; and the surety is entitled, in my view, to occupy the position of a creditor—a position of which the bank could not deprive him. See Ellis v. Emmanuel, 1 Ex. D. 157; In re Sass, [1896] 2 Q.B. 12; In re Sellers, 38 L.T.R. 395; In re Rees, 17 Ch. D. 98.

It was argued that the bank's action in agreeing not to rank might discharge the sureties, and that payment by them was voluntary. But this contention was not regarded with favour by Stirling, J., in Badgley v. Consolidated Bank, 34 Ch. D. at p. 557; where it was urged that the payment by the surety was, under the circumstances of that case, likewise a voluntary one.

But the real answer to this contention is, that the sureties agreed to allow the bank to deal or compound with any of the parties to the negotiable securities. If the receipt of part of

the debt and an agreement not to rank for the balance amounts to compounding, as I think it does (see per Pollock, C.B., in Union Bank of Manchester v. Beech, 3 H. & C. 672, at p. 676; Perry v. National Provincial Bank of England, [1910] 1 Ch. 464); then the sureties have agreed that the discharge of the principal debtor, if effected, shall not affect their liability on the guaranty.

I think that the judgment appealed from should be reversed, and that the order of the Local Master should be restored.

APRIL 7TH, 1913.

*REIFFENSTEIN v. DEY.

Trial—Jury—Unsatisfactory Findings—Negligence—Contributory Negligence—New Trial—Rule as to Setting aside Verdicts of Juries—Reversal of Direction to Dispense with Jury.

Appeal by the defendant from the order of a Divisional Court, ante 78, setting aside the judgment of RIDDELL, J., upon the findings of a jury at the trial at Ottawa, in favour of the defendant, and directing a new trial without a jury.

The action was brought to recover damages for injuries sustained by the plaintiffs by being run down by a horse and carriage driven by a son and agent of the defendant.

The jury found the issues as to negligence and contributory negligence in favour of the defendant.

The Divisional Court came to the conclusion that the answers of the jury to the questions put to them were so entirely against the evidence that it was apparent that for some reason the jury must have given effect to some improper consideration or have acted unreasonably, and that there had not been a fair and impartial trial.

The appeal from the order of the Divisional Court was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and BRITTON, J.

A. E. Fripp, K.C., for the defendant.

G. F. Henderson, K.C., for the plaintiffs.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . . A perusal of the notes of evidence has satisfied me that there was no evidence whatever to warrant the findings of the jury as to contributory negligence; and that the evidence upon the other issues preponderated in favour of the plaintiffs.

If it were not for the findings as to contributory negligence, I do not think that, according to the well-established rule as to setting aside verdicts of juries, the Divisional Court would have been warranted in setting aside the findings of the jury. . . . It is true that . . . their findings as to contributory negligence were not necessary to the success of the defendant. . . . If as to some of the issues the proper conclusion is that the jury did not discharge their judicial duty, but must have been influenced by some improper consideration, the defendant has no reason to complain if the conclusion is reached that the same vice affected the other findings. . . .

It is, in my opinion, of the utmost importance that the rule to which I have referred as to setting aside verdicts of juries should not be departed from. Departure from it results in adding more uncertainty to the proverbial uncertainty of litigation, generally results in loss rather than benefit to the party in whose favour the rule is relaxed, and always adds to the costs of the litigation.

I do not think that the direction that the new trial shall be had before a Judge without a jury ought to have been made. A jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties, and I cannot believe that a fair trial cannot be had by a county of Carleton petit jury; and it is to be borne in mind, also, that, if the plaintiffs do not desire to have the case again tried by a petit jury, it is open to them to have a special jury summoned.

I would, therefore, vary the order of the Divisional Court by striking out the direction as to the mode of trial, and would in other respects affirm it and dismiss the appeal, and would make no order as to the costs of the appeal.

APRIL 7TH, 1913.

*REX v. DUROCHER.

Criminal Law—Police Magistrate—Jurisdiction—Prohibition—Indictable Offence—Fraudulently Depositing Paper in Ballot Box at Municipal Election—Municipal Act, 1903, *sec.* 193, *sub-sec.* 1(*b*), *sub-sec.* 3—*Criminal Code, sec.* 164—*Act Prohibited by Statute—Specific Remedy—Remedy by Indictment.*

Appeal by the defendant from the order of KELLY, J., ante 867, dismissing a motion by the defendant to prohibit the Police Magistrate for the City of Ottawa from proceeding on an information laid under sec. 193, sub-sec. 1 (b), of the Municipal Act, 1903, against the defendant, for having fraudulently put into a ballot box used at a municipal election a ballot paper purporting to have been used by a person who did not vote at the election—in effect, for personation.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. F. Henderson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

MACLAREN, J.A.:—. . . There is no provision in the section in question or elsewhere in the Act as to what procedure is to be adopted or followed.

The law upon the subject is thus stated in Hawkins's Pleas of the Crown, book 2, ch. 25, sec. 4: "Wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."

This rule has been generally approved and followed in the modern cases and by the leading text-writers. See Regina v. Buchanan, 8 Q.B. 883; Regina v. Tyler and International Agency Co., [1891] 2 Q.B. 588, at p. 592; Regina v. Hall, [1891] 1 Q.B. 747; Rex v. Meehan, 3 O.L.R. 567; Russell on Crime, 7th ed., pp.

*To be reported in the Ontario Law Reports.

11,12; Archbold's Criminal Pleading, 24th ed., p. 3; Craies's Statute Law, 2nd ed., p. 224; Maxwell on Statutes, 5th ed., p. 651. . . .

The only difficulty arises where the statutory offence was an offence at common law; or where the statute lays down a different method of procedure or prescribes a different penalty or punishment.

The offence with which the accused is charged in this case was not an offence at common law: Regina v. Hogg, 25 U.C.R. 66; so that no difficulty arises on this point.

The punishment for violation of the statute is prescribed in sub-sec. 3 of sec. 193. That, however, is not now in question, as the whole question on this appeal is, whether the Police Magistrate should be prohibited from taking the preliminary examination upon the information laid.

As I have said, neither sec. 193 nor any other part of the Municipal Act provides what procedure is to be adopted for enforcing the punishment prescribed for a violation of the provision of the Act now in question. There is, consequently, nothing to prevent the adoption of the procedure laid down by the authorities above-cited; that is, by indictment, as "such method of proceeding does not manifestly appear to be excluded by it," to use the language of Hawkins; or, to use the language of Maxwell, "it omits to provide any procedure."

It was argued on behalf of the appellant that sec. 164 of the Criminal Code precluded proceeding by way of indictment. . .

The answer to this argument is, that the present proceeding is not being taken under this or any other section of the Criminal Code, but under the common law, which has not in this respect been superseded or repealed by the Code. The section of the Code does not go so far as the common law. It provides for the cases of disobedience where no penalty or other mode of punishment is expressly provided by law; but does not deal with or affect cases like the present where other punishment is expressly provided for.

An examination of the various cases shews that the difficulties have arisen with those statutes which have prescribed either a particular procedure or punishment or both. In such cases a question often arises whether the particular procedure or punishment prescribed in the statute supersedes the common law procedure and punishment, or whether the prosecutor can proceed under the one or the other at his option; or, in other words, whether the statutory remedy is in lieu of or in addition to the common law remedy.

In the present case no such conflict arises as to the remedy. The statute itself provides none, so that the common law remedy of indictment remains intact. If the appellant should be found guilty, the question of the punishment will be a proper one for consideration. Meanwhile it does not arise and does not in any way affect the present appeal or the proceedings before the Police Magistrate.

In my opinion, the appeal should be dismissed.

MEREDITH, C.J.O., agreed with the conclusion of MACLAREN, J.A., and with the reasoning on which it was based; and thought that the judgment of KELLY, J., might also be supported upon the ground upon which he proceeded; and referred, in addition to the cases cited by KELLY, J., to the judgment of Bowen, L.J., in Regina v. Taylor and International Agency Co., [1891] 2 Q.B. 588, 594-5.

MAGEE and HODGINS, JJ.A., also concurred.

Appeal dismissed.

APRIL 7TH, 1913.

*MAITLAND v. MACKENZIE.

Motor Vehicles Act—Injury to Pedestrian "by Reason of a Motor Vehicle on a Highway"—Construction of sec. 6—Onus of Proof—Proof as to Person at Fault—Evidence for Jury—Statutory Presumption—Failure to Give Warning Required by sec. 5 of Act.

Appeal by the defendants the Toronto Railway Company from the refusal of MIDDLETON, J., at the trial, to direct judgment to be entered dismissing the action as against the appellants, the jury having disagreed and having been discharged.

The action was brought to recover damages for injuries sustained by the plaintiff owing to his having been struck, as he alleged, by a motor vehicle owned and operated by the appellants or by the defendant Mackenzie.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

*To be reported in the Ontario Law Reports.

D. L. McCarthy, K.C., for the appellants.
W. A. Henderson, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—According to the testimony of the respondent, he was proceeding on foot northward on the west side of Yonge street, in Toronto, and, while crossing Adelaide street, which intersects Yonge street, he was struck in the back by something and knocked down and injured, but by what he was unable to say. He also testified that, before proceeding to cross Adelaide street, he had looked to the right and to the left, but saw no vehicle on Adelaide street except a dray drawn by two horses standing on the north side of that street and facing Yonge street. He also testified that there was but little traffic on the streets.

The only other witness called by the respondent as to the accident was a Mr. Bain, who testified that he too was proceeding on foot along the west side of Yonge street, and had reached the kerb on the south side of Adelaide street, when his attention was attracted to a crowd standing about a fallen man, who, he afterwards recognised, was the respondent. He also stated that, as he crossed to where the respondent was, he passed in rear of a motor vehicle, which was the only vehicle he saw in the vicinity, and that it was crossing Yonge street.

At the conclusion of the case for the respondent, a nonsuit was moved for by counsel for the appellants, but the motion was refused.

The defendant Mackenzie, as against whom the action had been dismissed at the close of the respondent's case, and his son-in-law, Arthur M. Grantham, were examined as witnesses for the defence. It appeared from their evidence that the motor which, according to the allegations of the respondent, had knocked him down, belonged to the appellants and was in charge of a chauffeur, and that the defendant Mackenzie and Grantham were passengers in it; and that the motor was being driven eastward on Adelaide street. According to the testimony of Mackenzie, when it came to Young street the motor was stopped, and just as it was stopped "an oldish man" (evidently the respondent) "came out between three vehicles or at the head of them" and "right up" to the motor, and when he saw it jumped back and "either hit himself against the horse"—meaning a horse attached to one of these vehicles, or was hit by the horse and fell, but was not struck by the motor. . . .

[Summary of the testimony of Grantham.]

In his charge to the jury, the learned Judge correctly stated the law applicable to the case in these words: "If the plaintiff has proved to your satisfaction that the accident happened by reason of a motor vehicle upon a highway, then the owner of the motor vehicle is, by our law, obliged to shew that the accident did not happen by reason of his negligence or improper conduct."

In my opinion, the learned Judge rightly refused to direct judgment to be entered for the appellants.

The evidence for the defence, in my opinion, materially strengthened that adduced by the respondent on the issue as to whether the accident happened by reason of the appellants' motor vehicle on a highway; and there was, when all the evidence was in, sufficient to warrant that issue being found in favour of the respondent.

Section 18 of the Act to regulate the speed and operation of Motor Vehicles on Highways, 6 Edw. VII. ch. 46, as amended by 8 Edw. VII. ch. 53, sec. 7, provides: "When any loss or damage is incurred or sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of such motor vehicle."

While, under the section, it is undoubted that the question whether the loss or damage was incurred or sustained by reason of a motor vehicle on a highway must be determined in favour of the person claiming damages before the latter part of the section comes into play, I do not understand that any question as to the person at fault is involved in the determination of it. The fact that the loss or damage was incurred or sustained by reason of a motor vehicle on a highway is all that must be established to cast upon the owner or driver of the motor vehicle the onus of proving that it was not by his fault that the loss or damage happened. . .

[Reference to Marshall v. Gowans, 24 O.L.R. 522, at pp. 532-3, per Magee, J.A.]

Applying the illustration of my brother Magee to the facts of this case as they were stated by the appellants' witnesses, it was the appellants' motor that caused the respondent to be frightened and to step back and come in contact with the "rig" or with the horses by which it was drawn; and, therefore, a jury might properly find that the loss or damage to the respondent was "incurred or sustained by reason of a motor vehicle on a highway."

The next question is as to the effect of the latter part of the section. In my opinion, when it is shewn that the loss or damage

was incurred or sustained by reason of a motor vehicle on a highway, a statutory presumption arises that it arose from the negligence or improper conduct of the owner or driver of the motor vehicle; and that, where evidence is adduced to rebut that presumption, the case must go to the jury.

The statutory presumption, as it appears to me, is at least equal to oral testimony tending to prove negligence on the part of the owner or driver of the motor vehicle; and, when there is evidence both ways, the case must, of course, go to the jury; and there is no power in the Court, in such a case, to dismiss the action, even though the evidence should greatly preponderate in favour of the defendant.

It may also be observed that it was open to the jury to accept part of the testimony of the defendant Mackenzie and of Grantham and to reject the rest of it, and to have accepted that evidence as establishing the identity of the motor vehicle which, as the respondent contends, caused his injury, and not to have accepted it as to the condition of the traffic (as to which the evidence was contradictory), or as to the way in which the accident happened.

It was also, I think, open to the jury to have found that, if the chauffeur had sounded his alarm bell, gong, or horn, as required by sec. 5 of the Act of 1906, the accident would not have happened.

In my opinion, the appeal fails and should be dismissed.

APRIL 7TH, 1913.

STRONG v. LONDON MACHINE TOOL CO.

Principal and Agent—Agent's Commission on Sale of Assets of Company—Employment of Agent—Introduction of Purchaser—Dependent Commission Agreement—Termination—Quantum Meruit.

Appeal by the defendants from the judgment of MIDDLETON, J., ante 593.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and LATCHFORD, J.

M. K. Cowan, K.C., and T. Hobson, K.C., for the defendants.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—If, as contended by counsel for the appellants, the proper conclusion of fact is, that the measure of the respondent's rights is to be found in the agreement of the 14th July, 1911, the action fails, because in that case the right to payment for his services was contingent on an agreement, in the terms of the writing of the 29th July, 1911, being concluded between the appellant and the Canada Machinery Corporation Limited; and such an agreement was not made.

In my view, the agreement of the 29th July, 1911, is not the measure of the respondent's rights.

Before the making of that agreement, the respondent, who was a land agent or broker, had been retained by the appellants to endeavour to bring about a sale to the Canada Machinery Corporation Limited of the business and property of the appellants, or, as it was called, a merger between that company and the appellants; and the proper conclusion upon the evidence is, I think, that the respondent was instrumental in bringing the two companies together after a suggestion rather than negotiations for the sale had been, if not abandoned, at least suspended.

The evidence satisfies me, and the learned Judge must have thought, that it was not part of the arrangement between the parties that commission should be paid only in the event of the sale resulting in a surplus to the appellants. The evidence of the respondent on this point is clear, and that of Mr. Yeates, the managing director of the appellant company, is not satisfactory. When examined in chief as to the arrangement, he says nothing about any such limitation; and it was not until his cross-examination that he stated that the commission was not to be paid unless there was a surplus.

When the agreement of the 14th July, 1911, was entered into, it was supposed that an agreement for sale in the terms of the writing of the 29th July, 1911, had been reached; and the purpose of the former agreement was to settle the remuneration which the respondent was to receive for his services, the amount of it not having been previously arranged.

It turned out, however, that the writing of the 29th July, 1911, though purporting to be executed by the Canada Machinery Corporation, was not binding on it, and the company refused to purchase on the terms mentioned in it.

Notwithstanding its refusal to purchase on those terms, negotiations were carried on with a view to arranging terms, and these negotiations resulted in a sale being effected, but upon

terms much less beneficial than those which it was supposed had been come to.

To adopt the view contended for by the appellants would give to the agreement of the 14th July, 1911, a meaning different from that which, in my opinion, the parties to it intended that it should bear, and different from that which the language used in its imports.

Its object was plainly, as I think, merely to fix the commission which the respondent was to receive if the sale that it was supposed had been arranged for was made; and its effect is to leave open for arrangement between the parties the amount of the commission if a sale should be made on different terms.

It is not as if the respondent had been employed to bring about a sale on the terms of the writing of the 29th July, 1911. Had that been the character of his employment, the cases cited by the learned counsel for the appellants might and probably would have applied, and the respondent would not be entitled to recover; but that was not its character. His employment was, I have said, to endeavour to bring about a sale, not a sale upon the terms of the writing or upon any terms except those which are to be implied from the nature of the transaction—that the person to whom the appellants desired to sell should be willing to purchase on terms to which the appellants would be willing to agree.

The case is, in my opinion, to be dealt with on the footing of the employment being that the respondent should bring the suggested purchaser and the appellants together; and, he having done that, and a sale having been eventually made to the suggested purchaser, the respondent is, in my opinion, and as the trial Judge held, entitled to recover as upon a quantum meruit; and I see no reason for differing from the conclusion of my learned brother as to the amount to which the respondent is entitled.

I would dismiss the appeal with costs.

APRIL 7TH, 1913.

CURRY v. PENNOCK.

Landlord and Tenant—Lease of or License to Use Premises—Covenant not to Sublet—"Interest in or Use of any Part of the Premises"—Agreement between Licensees and Stranger—Construction of—Breach of Covenant—Right of Landlord to Possession.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., ante 712.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. Cooper, for the appellants.

T. J. W. O'Connor, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent is the assignee of a lease dated the 23rd February, 1909, from the owners of the land in question and other land, to Maurice Wolff, by which these lands were demised to Wolff for the term of ten years from the 1st May, 1909; and the action is brought to recover possession of the land in question.

Wolff, on the 24th May, 1909, and before the assignment of his lease to the respondent, executed an agreement under seal by which he granted to the appellants, who are described as licensees, "a license to maintain and carry on a restaurant in the roughcast house in Wolff's Park (except a room on the second floor) for ten years from the 1st day of May, A.D. 1909, less the last ten days thereof, upon and subject to the terms and conditions hereinafter expressed."

Wolff's Park is the land demised to him by the lessee, and the roughcast house comprises the premises possession of which is claimed by the respondent.

Among the terms and conditions expressed in the agreement are the following: "The licensees . . . shall have no right or power to sell, mortgage, pledge, sublet, or assign this agreement or license or any interest therein, nor shall he (sic) permit any person to have any interest in or use any part of the premises, building, erection, or space covered by this license, for any purpose whatever, without the consent in writing of the owner."

The agreement also contains the following provisions:—

"The right to occupy the building and space covered by this license and to maintain and operate a restaurant or other concession, feature, or privilege, shall continue only so long as the licensees shall strictly observe, comply with, and perform the undertakings, provisions, agreements, and stipulations agreed and entered into by them in this agreement."

"If the licensees shall make default in the strict observance and performance of the undertakings, provisions, agreements, and stipulations agreed and entered into by them, the owner may, immediately or at any time after such default, close up and take possession of the space covered by this license, and this license shall thereby be and become forfeited, and all erections, structures, and articles belonging to the licensees on said premises shall forthwith be removed, and all privileges of the licensees to occupy or use said premises shall cease, and, in default of such removal, the owner may remove the same at the cost and expense of the licensees."

The agreement also contains a provision that the licensees "shall pay the owner annually in advance each year on the 1st day of May as compensation for this license the sum of $400."

On the 1st October, 1911, the appellants entered into an agreement with Olive Brooker, by which, as the respondent contends, they assigned to her an interest "in the agreement or license," contrary to the provisions of the agreement of the 24th May, 1909, and by which, and by the subsequent carrying on of the restaurant by Mrs. Brooker, as the respondent also contends, they permitted her to have an interest in and to use the demised premises without the prescribed consent and contrary to their covenant that they would not do so.

The agreement with Mrs. Brooker is peculiarly worded, and was, as it appears to me, worded as it is in order to enable the appellants to contend that what has been done does not constitute a breach of their agreement.

The agreement, after reciting that the appellants "are engaged in business . . . under the name of Pennock Brothers' Restaurant Parlor," and reciting that they "are desirous of being relieved from the oversight and care of the said business, and have arranged with the party of the second part (Mrs. Brooker) to manage the same for them for a year from the date hereof, and that the party of the second part shall receive as compensation for her services the profits from the operation of the said business over and above the sum of $1,500," witnesses that, in consideration of $1,500 to be paid, $700 on the execution of the

agreement and $800 on the 1st May next, the appellants "covenant and agree to allow the party of the second part to carry on said business for the said period and to enjoy and collect the full profits and benefits derived from the operation and carrying on of the said business for the said period."

By a subsequent clause of the agreement, Mrs. Brooker agreed to pay the $800 "on the said 1st day of April (sic), 1912."

The trial Judge held that the effect of this agreement was, at all events when considered in the light of the way in which it was carried out and the business of the restaurant was afterwards carried on, to permit Mrs. Brooker to have an interest in or use of the property within the meaning of the covenant, and was substantially a subletting of the property. With that conclusion I agree, and I also agree with the reasons given for it, to which may be added another and I think a very cogent reason—the fact that, although the agreement recites that the $1,500 are to be paid out of the profits of the business, $700 were paid in cash on the execution of the agreement, and Mrs. Brooker covenanted to pay the remaining $800 on the 1st day of April, 1912, not out of the profits of the business, but absolutely.

That conclusion having been reached, the respondent's right to recover possession seems to me beyond question, and the matters relied on by the appellants' counsel as obstacles to his obtaining relief have no bearing on the question which is to be determined.

Assuming that the agreement of the 1st October, 1911, was not a mere license to use the premises, but constituted a demise of them to the appellants, which is probably its legal effect, the answer to the argument of the appellants' counsel is, that ex vi termini the lease to the appellants came to an end when, in breach of its provisions, they permitted Mrs. Brooker to have an interest in the premises and to use them.

Although the demise to the appellants is in the earlier part of the lease for ten years from the 1st May, 1909, the later provision is, that her right to occupy and carry on the restaurant "shall continue only so long as the licensees shall strictly observe, comply with, and perform the undertakings, provisions, agreements, and stipulations agreed and entered into by them in this agreement;" and, in my opinion, upon breach of these undertakings, etc., as I have said, the term ex vi termini came to an end.

If authority for this proposition be needed, Doe dem. Lockwood v. Clarke (1807), 8 East 185, 9 R.R. 402, may be referred to. . . .

The appeal fails and should be dismissed with costs.

APRIL 7TH, 1913.

J. J. GIBBONS LIMITED v. BERLINER GRAMAPHONE CO. LIMITED.

Appeal to Appellate Division—Order of Judge in Chambers—Necessity for Leave to Appeal—Con. Rule 777 (1278)—Order "which Finally Disposed of the Action."

An appeal by the plaintiffs from the order of MIDDLETON, J., ante 381, 27 O.L.R. 402, came on to be heard before MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., on the 17th January, 1913.

R. C. H. Cassels, for the defendants, took the preliminary objection that the order appealed against was not one "which finally disposed of the action," within the meaning of Con. Rule 777 (1278); and, therefore, leave to appeal was necessary. Leave had not been obtained. The order stayed proceedings in the action until after the conclusion of any action which the plaintiff might bring in the Province of Quebec. He cited Gibson v. Hawes, 24 O.L.R. 543.

J. F. Boland, for the plaintiffs.

THE COURT, after consideration, overruled the objection and decided to hear the appeal.

APRIL 8TH, 1913.

RE CORR.

Distribution of Estate of Intestate—Ascertainment of Next of Kin—Identity of Deceased with Father of Claimant—Evidence—Finding of Master—Appeals.

Appeal by Mary Elizabeth Donnelly from the order of KELLY, J., ante 824, dismissing her appeal from the report of the Master in Ordinary finding that the appellant was not entitled as next of kin to share in the distribution of the estate of Felix Corr, deceased.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. S. Hodgson, for the appellant.

J. R. Cartwright, K.C., for the Crown.

THE COURT dismissed the appeal without costs.

APRIL 11TH, 1913.

ROSE v. TORONTO R.W. CO.

Negligence—Street Railway—Collision—Injury to Passenger—Evidence of Injury—Conduct of Injured Person—Finding of Fact—Damages—Appeal.

Appeal by the defendants from the judgment of BRITTON, J., ante 833.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

T. Herbert Lennox, K.C., for the defendants.

J. W. McCullough, for the plaintiff.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. APRIL 7TH, 1913.

*RE AURORA SCRUTINY.

Municipal Corporations—Local Option By-law—Scrutiny of Ballots—Scope of—Jurisdiction of County Court Judge—Inquiry into Validity of Votes—Illegal Votes—Persons Non-resident at Time of Voting—Finality of Voters' List—Exception—1 Geo. V. ch. 64, sec. 23—Town Divided into Wards—Qualified Voter Voting Twice—Voting in Wrong Ward—Invalid Exercise of Legal Right to Vote—Certificate of County Court Judge—Declaration of Votes against By-law—Ministerial or Judicial Act—Prohibition.

Application by Thomas A. Manning for an order prohibiting one of the Junior Judges of the County Court of the County of York from finding, upon a scrutiny of the ballots cast at the voting upon the local option by-law of the town of Aurora, that five or any number of illegal votes were cast in favour of the by-law; and from issuing to the town council a declaration that the majority of the votes was against the by-law; and from imposing costs upon the municipality.

*To be reported in the Ontario Law Reports.

H. E. Irwin, K.C., and T. Urquhart, for the applicant.

James Haverson, K.C., and Eric N. Armour, for Alfred A. Snowdon, the applicant for the scrutiny, respondent upon this application.

LENNOX, J.:—I think the costs can properly be left out of the consideration of this motion. Costs are in the discretion of the Judge; the question does not concern the applicant; and the municipality has not moved.

I have had the advantage of perusing the findings of the learned County Court Judge and the certificate he proposes to issue, and there is no finding that "the illegal votes were cast in favour of the by-law."

It is of some importance to keep in mind that counsel for the applicant were emphatic in declaring that the six votes decided upon the scrutiny to be illegal, were all clearly illegal; but not perhaps vitally important; as the question in the end is, not whether the learned Judge reached a correct conclusion in law, but had he the right—that is, the jurisdiction—to inquire into the validity of the votes in question? Error in law is only a basis for prohibition when the Judge thereby creates for himself a fictitious jurisdiction. See cases collected in In re Long Point Co. v. Anderson, 18 A.R. 401.

As a preliminary objection Mr. Armour submitted that the application is too late; that the County Court Judge has done everything except "certify the result to the council," as provided for by sec. 371 of the Municipal Act; and, this being, as he argued, a purely ministerial act, there is nothing to prohibit.

He referred me to Regina v. Coursey, 27 O.R. 181, and Davidson v. Taylor, 14 P.R. 78. These cases are clearly distinguishable.

I was also referred to Hancock v. Somes, 28 L.J.M.C. 196; and, in the absence of a direct decision, this case would afford some ground for the argument that certifying to the council is a ministerial act.

Mr. Armour, however, overlooked the circumstance that in the Saltfleet case, 16 O.L.R. 293, it is distinctly held that certifying the result is a judicial and not a ministerial act. . . .

I am, therefore, of opinion that I have power to prohibit the learned Junior Judge . . . if, in what he proposes to do, he is exceeding, or if his proposed action results from exceeding, his jurisdiction.

Then, has he gone beyond or is he proposing to go beyond his jurisdiction? He inspected the ballot papers, heard evidence,

inquired as to the right of six persons to vote, and determined that the votes given by these six persons were illegal. These persons are not all in the same class, and they must be considered in classes; as, although it is now clearly established that the County Court Judge has jurisdiction to prosecute a scrutiny vastly broader than a mere recount, he yet has not jurisdiction to make an unlimited range of inquiry.

Two of the persons complained of, A. E. Jacks and Aaron Love, were residents of Aurora when the lists were finally revised, but afterwards abandoned their residence, and were not residents at the time of the voting. This class of disqualification the Judge had jurisdiction to inquire into, without going further for authority than the Saltfleet case.

Two other persons, Jennie Smith and Hannah Schriener, were, I infer, non-resident at the time of the revision of the voters' lists, were improperly put upon the list, and continued to be non-residents at the time of the voting. As to the votes of these two persons, the Judge had not jurisdiction to inquire, by reason of the finality of the list, under the decision in the Saltfleet case, as the statute then was; but he had such jurisdiction upon the authority of the majority judgment of the Court of Appeal in the West Lorne case, 26 O.L.R. 339, recently affirmed in the Supreme Court of Canada. This distinction, however, became unimportant before the votes were cast in the present case, as sec. 23 of 1 Geo. V. ch. 64 provides: "Notwithstanding the provisions of section 24 of the Ontario Voters' Lists Act, the certified list mentioned in that section shall not be final and conclusive, as therein mentioned, as to persons who were not, at the date of taking the vote, on such by-law, or have not been for three months before that date, bonâ fide residents of the municipality to which the by-law relates."

For practical purposes I need go no further, because, if the loss of six votes would determine the issue adversely to the by-law, the loss of one vote is equally prejudicial; for the by-law, with the vote undisturbed as originally counted, has only the bare requisite majority. But, as the learned Judge may be prohibited from giving effect to any part of his inquiry as to which he exceeded his jurisdiction, I should, I think, consider and determine whether he had jurisdiction to continue his scrutiny as to the two other persons whose votes he declares illegal.

One of these persons, Thomas Sisman, voted twice. Concerning the other man, Samuel George, as I understand the state-

ment, he appeared on the voters' list as a resident freeholder in two wards. Subsequent to the revision of the list, he sold the property he was living upon, and took up his residence on the other. He was, therefore, still a resident in the municipality. It is contended that he should have voted in the ward in which he resided. He voted, however, in the other ward.

Now, these two men constitute a class by themselves, distinct from either of those I have already referred to; and the jurisdiction for scrutiny as to these has not, so far as I can see, been determined in any case. Indeed, there are expressions in some of the cases which might be taken to mean that the lists, under 7 Edw. VII ch. 4, are final to all intents save as to the specific exceptions provided for by sec. 24; and, further, that there could be no inquiry other than within the limits of these exceptions. The latter part of this proposition, at least, has not been actually decided and has not been involved in any of the cases referred to, as the finality of the lists is not attacked.

This is not a question of the existence of a legal vote, but is a question of the valid exercise of a legal right to vote; and this was evidently the attitude of the County Court Judge. . . .

The Courts having declared that a scrutiny under sec. 371 of the Consolidated Municipal Act includes the jurisdiction to investigate as to the voter's qualification, so long as it does not conflict with the finality of the lists . . . it follows that the Judge has jurisdiction also to investigate whether or not, in a given case, the right to vote, finally and absolutely certified by the lists, was subsequently so exercised as to constitute the ballot paper deposited in the ballot box a legal vote.

I have, therefore, come to the conclusion that the Judge had also jurisdiction to inquire into the validity of the votes of these two men.

Acting, then, within his jurisdiction, and coming to the conclusion that six of the votes were illegal, the County Court Judge proposes to "certify and declare to the council of the municipality of the town of Aurora that the majority of the votes given upon the voting upon the by-law . . . was against the said by-law;" and the applicant contends that the Judge should not be allowed to do this.

I think he should be allowed to do it; and, even without cases to aid me, I think it is clearly his duty to do so under the statute.

Counsel for the applicant argues that the County Court Judge should only report the facts, as was suggested, but not

decided, in Re Orangeville Local Option By-law, 20 O.L.R. 476. Section 371, after providing for the inspection of the ballot papers and hearing of evidence and arguments, says that the Judge "shall determine whether the majority of the votes given is for or against the by-law, and shall forthwith certify the result to the council."

Counsel for the applicant strenuously argued that this point is not yet covered by authority. I have already said that, even in the absence of authority, I should feel bound to say, though with great deference to the opinion of eminent Judges to the contrary, that what the County Court Judge proposes to do is within his jurisdiction and duty under the Act. But I think there is clear authority. . . .

[References to and quotations from the judgments in Re West Lorne Scrutiny, 25 O.L.R. 267, 26 O.L.R. 339.]

Upon the whole, it can hardly be said, in view of the decision of the Supreme Court of Canada in the West Lorne case, that the law was so unsettled as to invite this application.

The motion will be dismissed with costs.

MIDDLETON, J. APRIL 8TH, 1913.

LUCIANI v. TORONTO CONSTRUCTION CO.

Fatal Accidents Act—Action Brought in Name of Infant by Next Friend on Behalf of Parents of Deceased—Power of Attorney—Status of Plaintiff—Assignee of Claim—Letters of Administration not Granted—Time-limit for Bringing Action—Unfounded and Vexatious Action—Motion to Dismiss—Con. Rule 261.

Motion by the defendants for an order, under Con. Rule 261, dismissing the action, upon the ground that, on the statement of claim, the action appeared to be unfounded and vexatious. See ante 1025.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

Grayson Smith, for the defendants.

D. C. Ross, for the plaintiff.

MIDDLETON, J.:—The plaintiff, an infant suing by his next friend, alleges that he sues on behalf of his father and mother

for damages by reason of the death of his brother, a labourer, said to have been killed by an explosion of dynamite—which he was thawing—owing to negligence and an improper and defective system in use by the company.

The accident is alleged to have taken place on the 3rd December, 1911. The action was not begun until shortly before the expiry of the year; that is, on the 22nd November, 1912. The writ of summons is endorsed laconically with a statement that the plaintiff's claim is for damages for negligence. The statement of claim, not delivered until the 10th December—after the expiry of the year—is the first intimation that the claim is for anything other than personal injury to the plaintiff himself.

On the 2nd November, 1912, the father and mother, in consideration of one dollar, assigned to the plaintiff, as his absolute property, all damages they are entitled to receive by reason of the death of the brother. It is conceded that this assignment is inoperative; and it is not referred to in the statement of claim. On the same day, the father and mother constituted the plaintiff their attorney to sue to recover the damages in question. It is said that the existence of this document makes this a suit by the father and mother. In the alternative, it is said that the plaintiff will, if the action is delayed until he is of age, apply for letters of administration to the estate of his deceased brother, and that his title as administrator will relate back to the death.

I do not think that either of these contentions is entitled to prevail. The person in whom the cause of action is vested, and not his attorney or agent, must be the plaintiff.

Dini v. Fauquier, 8 O.L.R. 712, undoubtedly determines that, where the plaintiff brings his action as administrator, it is sufficient to support the action if he can produce letters of administration issued at any time before the trial—the administration relating back to the death; but it is clear from all the cases cited that it is essential that the action should have been brought by the plaintiff as administrator—the production of the letters of administration being merely proof that at the hearing the plaintiff fills the representative character alleged. There is no case which goes to shew that a plaintiff, suing in his own right, can succeed upon a cause of action vested in the administrator of another, merely because he produces at the hearing letters of administration constituting him the administrator of that other.

The plaintiff is an infant suing by next friend; and, as I understand the practice, such form of suit is only authorised with respect to an action where the right is vested in the infant

personally. This plaintiff has no right, as he is not within the provisions of the statute.

The plaintiff urges that the action should be allowed to proceed, being stayed, if necessary, until he attains his majority, when he will take out letters of administration. I would have no hesitation in allowing any necessary delay if I thought it would help the plaintiff. The difficulty is, that the defendants are liable to an action by an administrator only. They have been sued by one who is not and who does not claim to be an administrator, and who is not the person primâ facie entitled to the grant.

In Chard v. Rae, 18 O.R. 371, the Chancellor apparently takes the view that the benevolent fiction by which the administration is related back has no application as against a statutory limitation, even when the plaintiff purports to sue as administrator. A fortiori, I cannot here allow the plaintiff to clothe himself with a title he does not now possess, and then permit an amendment in assertion of a title which he does not now assert, so as to deprive the defendants of the protection which the statutory limitation has afforded them.

The same reasoning answers the suggestion made by the plaintiff that he should now be at liberty to remodel his action by substituting his parents for himself as plaintiff. This could only be done on terms that the action should be deemed to be brought as of the date of the amendment; so that the plaintiff would not be helped.

Costs will probably not be asked.

MIDDLETON, J. APRIL 8TH, 1913.

CITY OF TORONTO v. HILL.

Statutes—City and Suburbs Plans Act, 2 Geo. V. ch. 43—Non-retroactivity—Subdivision of Tract of Land—Registration of Plan—Approval of Railway and Municipal Board.

Motion by the plaintiffs for an interim injunction in an action to restrain the defendant, the Registrar of Deeds for the County of York, from registering certain plans.

The motion came before MIDDLETON, J., in the Weekly Court at Toronto, and, by consent of counsel, was turned into a motion for judgment.

Irving S. Fairty, for the plaintiffs.

W. E. Raney, K.C., for the defendant.

H. E. Rose, K.C., for the British and Colonial Land and Securities Company.

MIDDLETON, J.:—The British and Colonial Land and Securities Company, though not parties to the action, appeared by counsel and desired to be heard. I allowed this, as they are the parties really concerned; and Con. Rule 1086, relating to mandamus, appeared to me to afford a proper analogy for my guidance, as directed by Con. Rule 3.

The question arises under the City and Suburbs Plans Act, 2 Geo. V. ch. 43. By that Act, assented to on the 16th April, 1912, and coming into operation by proclamation on the 14th May, 1912, it is provided: "Where any person is desirous of surveying and subdividing into lots, with a view to a registration of a plan of the survey and subdivision, any tract of land lying within five miles of a city . . . he shall submit a plan of the proposed survey and subdivision to the Ontario Railway and Municipal Board for its approval," And, by sec. 5, that "no plan of any such land shall be registered unless it has been approved by the Board . . . and no lot laid down on a plan not so approved shall be sold or conveyed by description containing any reference to the lot as so laid down on such plan."

The company, holding a large tract of land intended to be subdivided and sold in small lots, long prior to the passage of the Act in question had the same surveyed and subdivided, and a plan submitted to the Council of the Township of York for its approval. One general survey and plan was prepared, covering

the entire parcel. This was the plan submitted and approved by the council. Part of the land being registered under the Land Titles Act and part under the Registry Act, it was found necessary to prepare separate plans of different sections for registration. These plans were merely copies of separate portions of the original survey. The survey and the subdivision were complete before the Act came into force; but the plans were not actually tendered for registration until after that time.

The Act does not profess to have any retroactive effect; and, apart from the general principle to be found in such cases as Gardener v. Lucas, 3 App. Cas. 601, "unless there is some declared intention of the Legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we are to take the other view, we are to presume that an Act is prospective and not retrospective." Apart from that principle, it is clear from the Act itself that it is prospective. It does not purport to affect any subdivision already made or to invalidate any plans or transactions made before it came into force.

The extreme inconvenience of any other finding is evidenced by the provisions of sec. 5, which invalidates a sale according to the plan.

The action, therefore, fails; and I think that the plaintiffs should pay the costs, not only of the defendant, but of the company.

MEREDITH, C.J.C.P. APRIL 8TH, 1913.

RE NATIONAL HUSKER CO.

WORTHINGTON'S CASE.

Company—Winding-up—Contributory—Subscription for Shares—Failure to Prove Fraud—Approbation of Contract—Election—Patented Article—Character of—Finding of Master—Appeal—Costs.

Appeal by Worthington from an order of the Master in Ordinary, in a proceeding for the winding-up of the company under the Dominion Winding-up Act, placing the appellant on the list of contributories for $3,760, the balance due upon a subscription for $5,000 worth of shares.

W. E. Raney, K.C., for the appellant.
J. M. Ferguson, for the liquidator.

MEREDITH, C.J.C.P.:—The outstanding features of the litigation involved in this appeal seem to me to be inconsistent and unsatisfactory. I find it difficult to account satisfactorily for the shareholder in the former litigation being taken out of liability and the shareholder in this litigation left to bear the brunt. I am also unable to understand why the roundabout, costly, and needless process of winding up the company should have been resorted to and authorised, if the truth be, as it was asserted in the argument of this appeal, that there are no ordinary creditors of the company unpaid, and that these proceedings are being carried on for the one purpose of enabling the shareholder who got relief from his subscription to recover, from the shareholder who did not, the amount of the former's payment upon his stock for which he has judgment against the company; why he was not left to the more usual and direct method of doing so.

But there is no power to deal with the latter question upon this appeal; the winding-up order must be treated as a valid, subsisting one, which it is: if it should not have been made, objection should have been raised before it was granted. So, too, as to the relieved shareholder who is prosecuting the winding-up proceedings; the judgment upon which his rights are based is a valid and binding judgment now, and must be given full effect to as such—however much one might think that, if his case were to be decided now, upon the whole evidence available upon this appeal, he might very well fail.

Nor can the appellant succeed merely to make the conclusion of each case alike: nor even because one may think he has a better right to succeed than, or at least as good a right to succeed as, the other shareholder seems now to have had. The single question is, whether the learned Master was right or wrong in his conclusion that the appellant is not entitled to be relieved from liability for his shares.

I am quite sure that there never was any intention on the part of any one connected with the company to cheat, at any time; sincere belief in the future of the patented process was the mainspring of all that was said and done by the patentee. The high-sounding descriptions of the process and machine set forth in the paper called—perhaps erroneously—the prospectus of the company, emanated from the professor of modern languages who was the secretary, as well as a shareholder, of the company; and were to some extent but visions, sincere ones, of

the future, stated as facts of the present; but visions which have not yet come to pass.

That the process and machine were things of great promise is obvious. A pea-sheller had been invented and had proved to be a very successful, useful, and profitable contrivance and labour-saver. A corn-husker was and is much needed; the patentee's invention did its work admirably, but only with small quantities, becoming soon clogged, and so being of no value for practical purposes. But, the difficult task of producing a machine that would husk well having been accomplished, it was but natural that it would be expected by all that the trouble of clogging could soon be overcome. The professor of modern languages, with mistaken foresight, described that which was to be as that which was; and to that mistake added the very prevalent mistake of the misuse of superlative adjectives and exaggerated language generally; but there was always on the part of the patentee, and for a good while on the part of the secretary, a firm belief that all that was said would surely come to pass; and the hyperbolic prospectus—if prospectus it can truly be called—admittedly had no part in inducing the appellant to subscribe, as his letters to McGaffanay plainly state.

The appellant came into the company with a knowledge that these things had not come to pass, and that a machine doing continuous good work had not then been made, but imbued with the faith that the patentee still had, but which the professor of modern languages had lost or was fast losing: a faith which, I think, he, as well as the patentee, still has, and one which it may well be is not wholly unwarranted. He came in with the very object of enabling the development of the process to the looked-for successful and profitable end.

There was no deceit practised on the appellant by the patentee, or by any one acting for the company; though to some extent, and of a passive character, there was, I think, by the professor of modern languages and his friend McGaffanay; they abstained from repudiation of their subscriptions in the hope of new shareholders coming in, who, and whose money, would either make the thing a success, with much profit to them all, or else would be contributing to losses with them, lightening their burdens.

The McGaffanay successful litigation made a final end to further efforts to make a success of the process, with all the gain that that meant to those who had speculated in it: and then there was the usual rush for cover, as was to be expected.

I cannot find that the appellant's subscription was procured by fraud; and, if I could, I could not but find also that his conduct proves an election, after discovery of it, not to avoid the contract—approbation not reprobation.

Much reliance was placed, for the appellant, in argument, upon the character of the patent which the patentee had, but which the company by inaction lost; but I cannot believe that the character of the patent was in any way a substantial factor in the transaction by which the appellant acquired his shares, or indeed weighed at all as an inducement to any subscriber. This is merely a defensive plank picked up out of the wreckage caused by the McGaffanay litigation. If the machine would only do continuously that which it does so well for a short time, the rush of all these subscribers would be not to get out of, but to get more into, the company.

And so I am unable to say that the learned Master was wrong on either point; on the contrary, I agree with him.

The appeal must be dismissed; but, exercising my discretion in that respect, I make no order as to the costs of it.

MIDDLETON, J. APRIL 9TH, 1913.

WYERS v. WINLOW & IRVING CO.

Master and Servant—Injury to Servant—Negligence—Findings of Jury—Absence of Evidence to Support—Nonsuit.

Action for damages for injuries sustained by the plaintiff, while in the employment of the defendants, by a saw with which he was cutting firewood taking off his fingers.

The action was tried before MIDDLETON, J., with a jury, at Hamilton, on the 31st March, 1913.

C. W. Bell, for the plaintiff.

A. M. Lewis, for the defendants.

MIDDLETON, J.:—The plaintiff was employed by the defendants since the 1st April, 1912, as a teamster and general labourer. He occasionally worked at the saw hereinafter mentioned.

On the 9th April, 1912, the day was wet and cold. Well on in the afternoon, the plaintiff put his horses in the stable and went to the company's office before quitting work for the day.

Mr. Turner, a young man employed as bookkeeper, then said to the plaintiff: "It is very cold; please get some firewood." The plaintiff thereupon went to the lumber yard, and, not seeing any small pieces of waste wood convenient, procured some ends of boards and took them to the saw in question for the purpose of cutting them up into pieces that could be used in the office stove. The saw was not intended for use as a cross-cut saw, but was designed and equipped for ripping boards. It had an efficient guard, placed so that lumber to be sawn would be guided and held both before reaching the saw and after passing it.

Instead of standing in front of the saw and passing the board through in the ordinary way, the plaintiff went to the side of the machine, and, after setting it in motion by turning the electric switch controlling the motor, cut short lengths off the ends of the pieces of board, using the saw as a cross-cut saw. These pieces of board accumulated behind the saw, something caught, and the guard was thrown up at an angle of 45 degrees. Instead of then stopping the saw, the plaintiff used a short piece of board, some sixteen inches in length, remaining in his hands, and endeavoured to poke away from behind the saw the accumulated pieces of wood that held up the guard. While he was doing so, the guard fell, and brought his hand down upon the unprotected saw, severing the fingers.

The guard used on this machine had in front of the saw a toothed wheel, driven by power, to feed to the saw the board being ripped; and two rollers were behind the saw to take care of the severed strips passing from it. Between these was a cover, supposed to come down and protect the revolving saw-blade. This cover was adjustable, so that it might be made to afford protection when either a large or a small saw was used, and when the saw projected a considerable distance or only a short distance from the table.

There was some evidence that the nuts for adjusting this were not tight. This would permit the guard to fall down by its own weight, over the saw-blade. I cannot conceive that this, if a defect at all, had anything to do with the accident. In the picture of the machine, exhibit 1, this cover is shewn lifted higher than it would be when the machine was in actual operation, and the picture is to that extent misleading.

On the matter being submitted to the jury, in addition to finding that the machine was out of repair by reason of these nuts being loose, the jury found that the defendants were negli-

gent in "not having a notice posted warning unskilled employees in the proper use of the saw;" that the plaintiff was bound to conform to the order of Turner "because of his position as bookkeeper;" and that the plaintiff was justified in using the saw because "it had been customary."

There was no evidence, I think, to justify these findings; and it appears to me that I ought to grant the motion for a nonsuit.

The answer to the question whether the plaintiff had himself been negligent is: "No, for being unskilled in the use of saw." The plaintiff himself said that he knew how to use the saw, and did not need any instruction. The only evidence that the saw had been used for the same purpose before was the plaintiff's own evidence. He said that he had cut wood in this way three or four times before; but it was not shewn that any one knew that he had done so.

When he found that the guard had been lifted as the result of his experiment, there was nothing to prevent his turning the switch and stopping the saw, so that the guard could be replaced without danger.

With every sympathy for the unfortunate plaintiff, I think that, notwithstanding the finding of the jury, I must dismiss the action.

Costs will probably not be asked.

MIDDLETON, J. APRIL 9TH, 1913.

SIMMERSON v. GRAND TRUNK R.W. CO.

Master and Servant—Injury to Servant—Negligence of Fellow-servant in same Grade of Employment—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Railway—"Person in Charge or Control of Engine"—Evidence—Findings of Jury.

Action for damages for injuries sustained by the plaintiff while in the defendants' service as a brakesman upon a train, owing, as the plaintiff alleged, to the negligence of another brakesman, who at the time was in charge of the engine.

The action was tried before MIDDLETON, J., and a jury, at Hamilton, on the 2nd April, 1913.

W. S. McBrayne, for the plaintiff.

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

MIDDLETON, J.:—The plaintiff was employed as a brakesman upon the Grand Trunk Railway. A car situated upon a transfer siding had to be removed for the purpose of placing it upon an industrial siding. This car was the second car upon the transfer siding; and, in order that it might be removed, it was necessary that the two cars should be drawn from the transfer on to the main line, and that they should then be backed so that the second car would be free of the switch leading to the transfer. The first car would then be pulled forward and backed into the transfer, and the engine could pick up the car desired and take it to its destination.

The train crew consisted of an engine-driver, fireman, and two brakesmen—the plaintiff and one Bryant. When the cars were drawn from the transfer on to the main line, the brakes were not entirely free, and the plaintiff, who was upon the cars, went to the forward end for the purpose of releasing the brakes. When the car was backed upon the main line, it was necessary for the brake to be applied, so that the car would not be carried too far after it was freed from the train.

As soon as the engine started to back, the coupling was released. The plaintiff, having released the brakes on the forward car, was passing to the rear; and, just as the signal to the engine-driver to reverse and go forward was given by Bryant, the brakesman standing upon the ground—whose duty it was to signal—the plaintiff was about to step from the forward car to the rear car. At this instant Bryant spoke to him, saying "Jump on the end car." Not clearly distinguishing what was said, the plaintiff, instead of immediately stepping across the space between the cars, hesitated for a moment, and then stepped. It was too late, as the momentary delay was sufficient to cause the end car to separate from the engine and the front car; and the plaintiff fell to the ground; fortunately being able to throw himself clear of the rails. Both feet were seriously injured, and this action is brought.

In giving his evidence, the plaintiff did not state his case clearly, although he told the facts accurately. He stated that there was no fault in anything done by the engine-driver or fireman; there was no jolt which threw him off the car. The accident would not have happened had it not been for his momentary hesitation by reason of his failure to grasp what was said by Bryant.

The jury found that there was "negligence on the part of the defendants through the defendants' employee not seeing plain-

tiff was on the other car before the cars parted;" which means that, in the view of the jury, it was incumbent upon Bryant, the brakesman upon the ground—whose duty it was to give the signals for the motion of the engine—to have seen that the plaintiff reached the rear car before the signal was given which caused the engine to stop and permitted the cars to part.

Allan v. Grand Trunk R.W. Co., 4 O.W.N. 325, and Martin v. Grand Trunk R.W. Co., 4 O.W.N. 51, 27 O.L.R. 165, justify the finding that Bryant was in charge or control of the engine, within the meaning of sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act; and I think that the jury might well come to the conclusion at which they have arrived, that Bryant, who knew that it was the plaintiff's duty to go upon the rear car, ought to have seen that the plaintiff was safely there before giving the signal in question.

At the trial, counsel for the defendants did not desire the question of contributory negligence to be submitted to the jury; so that, in this view, the plaintiff is entitled to recover $1,500, the amount awarded by the jury.

MIDDLETON, J., IN CHAMBERS. APRIL 12TH, 1913.

RE JANNISON.

Life Insurance—Death of Beneficiary—Designation in Favour of New Beneficiary, by Will in General Language—Ineffectiveness—"Survivor"—"Surviving Children"—Ascertainment at Death of Insured—Preferred Beneficiaries—Insurance Act, R.S.O. 1897 *ch.* 203, *secs.* 151, 159—1 *Edw. VII. ch.* 21, *sec.* 2, *sub-sec.* 7—4 *Edw. VII. ch.* 15, *sec.* 7.

Motion by the widow of William Jannison, deceased, for payment out of Court of $1,000, the amount of an insurance upon his life, paid in by the insurance company.

F. D. Davis, for the widow.
J. R. Meredith, for the infant.

MIDDLETON, J.:—William Jannison was married three times. During the life of his second wife, Chattie, he had the insurance in question made payable to her. She died in 1902, childless.

On the 3rd October, 1904, the deceased married the present wife; and on the 1st April, 1905, he made his will, by which he gave all his property, "including all my insurance policies at present in force and that I may hereafter have," to the applicant.

On the 16th January, 1907, the infant was born. The testator died on the 29th February, 1912, leaving him surviving the applicant and the infant, his only child.

The insured having died before the Insurance Act of 1912 came into force, the rights of the parties must be determined on the earlier legislation. Under the Insurance Act, R.S.O. 1897 ch. 203, sec. 151, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 7, if all beneficiaries named in an insurance contract die during the life of the assured, "the insurance shall be for the benefit in equal shares of the surviving infant children of the assured, and if no surviving infant children, then the benefit of the contract and the insurance money shall form part of the estate of the assured." This section is general, and applies to all beneficiaries, whether within the preferred class or not.

Some confusion existed by reason of the failure to make a corresponding amendment in sec. 159, dealing with preferred beneficiaries; but the two sections would have to be read together, and this amendment would serve to supplement the provisions of sec. 159, sub-sec. 8, which did not cover the case of the death of all beneficiaries, but only the case of the death of some of the beneficiaries.

This was the position of the law when the second wife died; and, as there were then no children, the policy would form part of the estate of the assured, unless the expression "surviving infant children" refers to the death of the assured.

In 1904, before the marriage took place, the law was again amended, and sub-sec. 8 of sec. 159 was remodelled by 4 Edw. VII. ch. 15, sec. 7; a provision being added recognising the amendment of 1901 as applicable to preferred beneficiaries, and providing that, in default of any new apportionment, upon the death of the preferred beneficiary the benefit shall be for the survivors, and if "there is no such survivor the insurance shall be for the benefit, in equal shares, of the children of the assured, and if no surviving children of the assured then the assurance shall form part of the estate of the insured."

I have come to the conclusion that the whole context indicates that the words "survivor" and "surviving children" relate to the death of the insured, and not to the death of the bene-

ficiary. The destination of the insurance money upon the death of the insured is what is being dealt with by the Legislature. If the beneficiaries have then predeceased the testator, the insurance money, which has become a trust fund, is to be given to those named by the statute; the survivor of any beneficiaries named, or, if there is no survivor, then to the children.

All this is subject to the power conferred by the statute upon the insured. He may, by an instrument in writing attached to, endorsed on, or referring to and identifying the policy by number or otherwise, deal with the policy as he sees fit, so long as he does not transfer the benefit outside of the class of the preferred beneficiaries.

Re Cochrane, 16 O.L.R. 328, determines that the use of general language in a will, such as that here found, does not affect policies theretofore designated to beneficiaries.

Although the testator in this case may reasonably have thought that this policy would form part of his estate, its destination could not be ascertained until his death. It then appeared to belong to the infant children. Two courses were open to the testator if he desired it to go to his wife. He could have placed the matter beyond question by identifying the policy in the first instance, or he could have reconsidered the matter after the child was born.

I, therefore, think that the moneys in Court belong to the infant. In the outcome it will probably make little difference, as an order will, no doubt, be made for payment to the mother for the maintenance of the child.

LENNOX, J. APRIL 12TH, 1913.

CROFT v. MITCHELL.

Broker—Purchase of Shares for Customer on Margin—Failure to Deliver on Demand and Offer to Pay Balance Due—Liability of Broker—Employment of Agent—Purchase "for your Account"—Interest—Commission—Value of Shares at Time of Demand.

Action to compel the defendants to deliver to the plaintiff forty shares of paid-up stock in the Rock Island Railroad Company, or for repayment of a sum alleged to have been paid to

the defendants by the plaintiff on account of the price of the shares, with interest, and for damages for non-delivery.

G. H. Watson, K.C., for the plaintiff.
R. S. Cassels, K.C., for the defendants.

LENNOX, J.:—There is no ground for the contention that the plaintiff is entitled to recover back the money he paid to the defendants, with interest. That might be his right—if he so elected—if the defendants had failed to execute their contract to purchase Rock Island Railroad stock for him. The default here was failure to deliver to the plaintiff forty shares of this stock upon demand made therefor and upon the offer of the plaintiff to pay the balance owing to the defendants.

On the other hand, there is no ground for the pretence set up in the statement of defence that the defendants submitted to the plaintiff the names of three firms of brokers doing business on the New York Stock Exchange, employed by the defendants as correspondents, and the plaintiff thereupon "selected the said R. B. Lyman & Company as the firm through whom the purchase was to be made for him and by whom the shares were to be carried on his account." Not only would this statement have been grossly misleading as to the commercial status of Lyman & Co., if it were made—for they were not members of the New York Stock Exchange—but, more than this, the attempt to substitute a contract with Lyman & Co. for a contract with the defendants cannot in any way be reconciled with Mr. Lamont's examination for discovery or his examination or cross-examination in Court.

I leave out of account a half-hearted attempt to set up this contention on re-examination. It is inconsistent, too, with the terms upon which Lyman & Co. and the defendants dealt with each other; the bought note in each case notifying the defendants: "We have this day on your order and for *your account* and for your risk bought," etc. The meaning of the phrase "for your account" is put beyond controversy by Gadd v. Houghton, 1 Ex. D. 357.

I accept the plaintiff's evidence as furnishing a substantially accurate account of what took place between him and Mr. Lamont, representing the defendants, when this first order was placed; and the two subsequent orders were upon the same terms. It was the ordinary every-day arrangement with a broker to buy stock upon margin.

The law is clear enough in such a case. It is not necessary that the terms be discussed in detail. Certain incidents follow as to the rights and liabilities of the parties from simply placing the order. The purchaser may re-margin from time to time as called upon, if the value of the shares decline; and he must pay interest and commission. The broker agrees, whether specifically stated or not, to furnish the additional money required to purchase the shares outright, and is obliged to have on hand sufficient stock to enable him to hand over to his customer the stipulated number of shares immediately upon a demand being made for them, accompanied by an offer to pay the balance owing in respect of them: Conmee v. Securities Holding Co., 38 S.C.R. 601.

The obligation of the broker is to be ready to deliver the shares. The shares may have become enormously enhanced in value. Manifestly, to return the customer his money with interest would not, in such a case, be a discharge of the broker's obligation; and, conversely, the stock having declined in value in this case, and the defendants—as I find—having carried out their agreement to purchase, in a recognised way though not in a prudent way, it is equally manifest that what the plaintiff is entitled to have is, not the money back, but the forty shares bargained for or their value at the time they were demanded, less any balance owing upon them and less the stipulated, or a reasonable, charge for commission and interest.

I am satisfied that the plaintiff was not told that the defendants would employ an agent or correspondent, and that he did not know it as a matter of fact, but he is bound by what is usual and necessary in such a case. The brokers may determine their own method of executing the contract, but they are bound to execute it, and, above all, they are bound to be ready at all times to deliver the scrip or certificates upon payment. Here, as in the Conmee case, they never had it.

I am not satisfied that there was any agreement as to the commission. Mr. Mitchell says that "the consolidated rate is $\frac{1}{16}$ of one per cent. 'each way'"—that is, for buying and for selling. He probably means that the same is also paid the correspondent or agent. Mr. Morrow, of the firm of Æmilius Jarvis & Co., says that they buy through a regular accredited agent in New York, who is responsible to them, and their total commission charge to their client is $\frac{1}{4}$ per cent. for buying and the same for selling. There was no need of two firms of brokers if the defendants had told the plaintiff that Lyman & Co. were in the next

block, and if the plaintiff, knowing this, was willing to engage them.

The defendants claim a commission on sale, but are not entitled to it. They had no authority to sell. The plaintiff was entitled to the shares.

I am not sure that it should exceed $\frac{1}{8}$, but I will allow the defendants a total commission of $\frac{1}{4}$ of 1 per cent. This includes anything they have paid or may pay their agents. The plaintiff is liable to pay the defendants $\frac{1}{2}$ per cent. interest over and above the interest the defendants have to pay, but they get this for procuring the money; and, if they left it to their agents to procure the money, and they added a half per cent. in claims made upon the defendants and liquidated by the plaintiff, it must not be charged again.

I am of opinion that the plaintiff has paid the defendants the several sums of money he claims to have paid, amounting to $1,518.45; but, if the parties are still in dispute as to this, I will hear counsel upon this question.

At the time the defendants repudiated their liability and refused to deliver forty shares of the capital stock of the Rock Island Railroad Company to the plaintiff, the shares were worth $28 each, or a total sum of $1,120.

There will be judgment for the plaintiff for this sum, less such balance as may be owing to the defendants on the purchase-price of the three lots of shares in question, and for interest and commission on the basis aforesaid, after crediting all sums paid by the plaintiff; and there will be interest on the balance of $1,120 from the 14th October, 1912. The plaintiff will have costs.

In case differences arise as to the adjustment of the account, I may be spoken to, and will adjust the items in dispute or give directions as to how it is to be done.

Reference may be made to Clarke v. Baillie, 45 S.C.R. 50; Douglas v. Carpenter, 17 App. Div. N.Y. 329, at pp. 333-4; Rothschild v. Allen, 90 App. Div. N.Y. 233; Dos Passos on Stock Brokers, 2nd ed., pp. 260-7; Cox v. Sutherland, 24 Can. L.J. 55 (S.C. Can.); Carnegie v. Federal Bank, 5 O.R. 418; Gruman v. Smith, 81 N.Y. 25; Geen v. Johnson, 90 Pa. St. 38.

TUCKER v. BANK OF OTTAWA—MASTER IN CHAMBERS—APRIL 5.

Security for Costs—Action for Benefit of Plaintiff's Creditors—Assignment for Benefit of Creditors—10 Edw. VII. ch. 64, secs. 8, 9, 14 (O.)—Interest of Assignor—Con. Rule 440—Assignee Acting as Solicitor.]—Motion by the defendants to stay the plaintiff's action, or for security for costs, on the ground that the action was in reality for the benefit of the plaintiff's creditors. It was admitted that the plaintiff, on the 21st March, 1911, made an assignment for the benefit of his creditors, under R.S.O. 1897 ch. 124, of all his estate, real and personal. Any surplus after payment of debts and charges was to be repaid to the assignor. The affidavit of the defendants' solicitor was the only material filed in support of the motion. In it he stated that he had made careful inquiries and believed that the plaintiff had never obtained any release or discharge from his creditors, and that he was insolvent and without means or assets exigible under execution, and that up to the present time his creditors had only been paid a dividend of eleven cents on the dollar. This was answered by an affidavit of the plaintiff's solicitor, apparently the same person as the assignee under the assignment above-mentioned. He confined himself to a denial of the plaintiff's insolvency, and said that the plaintiff was carrying on his business of buying and selling live stock, and was able and willing to advance to the deponent the sum he asked as a deposit before commencing this action. He made the affidavit because the plaintiff was quarantined for small-pox, and was out of communication with his solicitor. The Master referred to Pritchard v. Pattison, 1 O.L.R. 37, where it was said that very clear proof must be given that the plaintiff has no substantial interest in the action before such an order can be made; and to Stow v. Currie, 14 O.W.R. 61, and cases cited there. Giving the widest scope possible to the effect of the assignment, as set out in 10 Edw. VII. ch. 64, secs. 8, 9, and 14 (O.), it was by no means clear that the plaintiff had no substantial interest. The contrary would seem to be the fact. In any case, that was a matter that could not be decided on the present material. It was clearly for the benefit of the plaintiff that he should recover anything possible, and so reduce or extinguish the claims against him. For all that appeared these claims might have now been paid or released or barred by the Statute of Limitations. The necessary inquiry to determine these questions would be foreign to such an application as the present. In any case, the motion must fail, under the principle of the decisions under Con. Rule 440. In the last of these, Garland v. Clarkson, 9 O.L.R. 281, a

Divisional Court decided that, in such a case as the present, the assignor was a person for whose immediate benefit the action was brought, approving Macdonald v. Norwich Union Insurance Co., 10 P.R. 462. See, too, Major v. Mackenzie, 17 P.R. 18. No point was raised at present as to the right of the plaintiff to bring the action. That could, however, be taken by way of defence, if tenable. As the assignee was apparently acting as the plaintiff's solicitor, he must be taken to have given his consent to the action in its present form, assuming that any consent was necessary, and have satisfied himself of the plaintiff being rectus in curiâ. Motion dismissed, but, upon the peculiar facts, the costs to be in the cause to the successful party. Grayson Smith, for the defendants. Featherston Aylesworth, for the plaintiff.

YORK PUBLISHING CO. v. COULTER—LENNOX, J.—APRIL 8.

Injunction—Interim Order—Trade Name—Infringement—Soliciting Customers—Information Obtained by Former Officer of Company—Grounds for Injunction—Relative Convenience or Inconvenience—Terms.]—Motion by the plaintiffs for an interim injunction restraining the defendant from in any way using the mailing list of subscribers to the plaintiffs' publication, from canvassing for subscribers or customers of the plaintiffs for any journal published by the defendant, from using any information which the defendant obtained as an officer or servant of the plaintiffs in regard to advertisers, and from printing any journal under the name of "The Journal of Health Administration and Sociology," or under any other name similar to that of the plaintiffs' journal. LENNOX, J., said that where there is serious doubt as to the rights of the plaintiff, and the inconvenience appears to be equally divided between the parties, the Court should not grant an injunction pending the trial: Sexton v. Brockenshire, 18 O.R. 640; Dwyre v. Ottawa, 25 A.R. 121. In this case he was satisfied that greater inconvenience would result from withholding an injunction than from granting it; and, although, of course, the rights of the parties could be determined only at the trial, enough had been shewn to enable him to form an opinion of the plaintiffs' title and rights, within the meaning of the cases. It was a case, too, in which damages would probably not prove to be an adequate remedy. He re-

ferred to Edge v. Nicolls, [1911] A.C. 693, to shew how astute the Courts are to prevent methods which are calculated to deceive or mislead customers or the public. As to what is covered by "goodwill," he referred to Mossop v. Mason, 18 Gr. 453; Curl v. Webster, [1904] 1 Ch. 685; and Trego v. Hunt, [1896] A.C. 7. The plaintiffs should be at liberty to amend so as to include the Wayside Publishers Limited as defendants; and the order to be issued would restrain these defendants as well. Injunction granted restraining the defendants to the extent and in the manner set out in the notice of motion; but the plaintiffs must proceed to trial promptly, must deliver the statement of claim within two days after notice of this order, join issue promptly, and proceed to trial without delay. The costs of and incidental to this application to be costs in the cause, unless the trial Judge should otherwise order. E. E. A. DuVernet, K.C., for the plaintiffs. Grayson Smith, for the defendants.

CLARK v. ROBINET—MIDDLETON, J., IN CHAMBERS—APRIL 9.

Discovery—Examination of Plaintiff—Refusal to Answer Questions—Irrelevancy—Notice of Motion to Dismiss Action—Failure to Specify Questions.]—Motion by the defendant to dismiss the action because of the refusal of the plaintiff to answer certain questions on examination for discovery. The learned Judge said that since the argument he had read the pleadings and examination; and could not see that the questions which the plaintiff refused to answer were relevant to any of the issues raised on the pleadings. The motion, therefore, failed, and must be dismissed, with costs to the plaintiff in any event. The learned Judge called attention to the extremely inconvenient practice followed in this case, of omitting to specify in the notice of motion the questions which the defendant sought to compel the plaintiff to answer. F. D. Davis, for the defendant. Frank McCarthy, for the plaintiff.

RE SOULLIÈRE AND MCCRACKEN—MIDDLETON, J., IN CHAMBERS—APRIL 9.

Will — Construction — Precatory Trust.] — An application by the vendor, under the Vendors and Purchasers Act, turned by consent into an application for the construction of the will of David Soullière, under Con. Rule 938. The testator gave all

his real and personal property to his wife, the vendor, adding this clause: "It is my desire that she takes good care of all my children as much as it is possible to do, and I also desire that at her death she will divide the estate that I now give her among our children in the most just manner possible." It was argued that this constituted a precatory trust, and that it operated to cut down the gift to a life estate, with a power of appointment among the children. The learned Judge said that at one time this would probably have been so; but the tendency of the more recent decisions was all the other way. In this will the gift to the wife was absolute, and the clause quoted recognised this and fell far short of what was now regarded as necessary to cut down the absolute estate given. In addition to the cases referred to by the Chancellor in Johnson v. Farney, ante 969, the learned Judge referred to In re Williams, [1897] 2 Ch. 12, and In re Oldfield, [1904] 1 Ch. 549. No costs between the vendor and purchaser. Costs of the Official Guardian to be paid by the vendor. F. D. Davis, for the vendor. Grayson Smith, for the purchaser. J. R. Meredith, for the Official Guardian.

McNAIR v. McNAIR—MASTER IN CHAMBERS—APRIL 11.

Husband and Wife—Alimony—Interim Order—Husband without Means.]—Motion by the plaintiff for interim alimony and disbursements. The plaintiff made affidavit that the defendant once said that he was worth $90,000; but no particulars were given, nor was any specific asset mentioned. The defendant, at the time of the application, was at Reno, in Nevada, where he was engaged in procuring a divorce. His affidavit stated that he was wholly without means and without employment and was living on loans from his friends; and that, though daily seeking employment, he was unable to obtain any. The Master said that, in these circumstances, the case did not differ from Pherrill v. Pherrill, 6 O.L.R. 642, where it was said: "It would be useless to make an order against a man who has no property on which it could operate, and where there is no evidence as to his earning power." Where, as here, the defendant is out of the jurisdiction, this principle seemed even more applicable. Motion dismissed, leaving the plaintiff to take the matter higher or proceed to trial as might be thought best. A. J. Russell Snow, K.C., for the plaintiff. R. McKay, K.C., for the defendant.

CINNAMON v. WOODMEN OF THE WORLD—MIDDLETON, J., IN CHAMBERS—APRIL 11.

Trial—Motion to Postpone—Affidavit—Con. Rule 518—Absence of Material Witness—Failure to Shew Nature of Expected Testimony—Refusal of Motion—Undertaking—Terms.]—Appeal by the plaintiff from the order of the Master in Chambers, ante 1042, refusing to postpone the trial. MIDDLETON, J., dismissed the appeal; costs in the cause. J. M. Ferguson, for the plaintiff. Featherston Aylesworth, for the defendants.

ROGERS v. NATIONAL PORTLAND CEMENT CO.—MASTER IN CHAMBERS—APRIL 7—MIDDLETON, J., IN CHAMBERS—APRIL 11.

Pleading—Statement of Claim—Amendment—Addition of Claim for Reformation of Agreement—Conformity of Amendment to Order Giving Leave to Amend—Sufficiency of Allegations.]—The plaintiff obtained an order for leave "to amend his statement of claim by adding thereto a claim that the agreement in question in this action be reformed." In pursuance of this leave, paragraph 4A was inserted, in the words following: "The defendants allege that they are justified in refusing to continue the plaintiff's agency, upon the ground that the plaintiff was unable to sell their cement at the price of $1.30 per barrel, as provided by clause 4 of the said agreement; and the plaintiff says that, under the proper construction of the said agreement, the defendants were bound to reduce their price to meet the ruling market-prices, or to hold their cement in stock until the same could be disposed of at not less than $1.30 per barrel; that, if the agreement does not bear this construction, the same was executed by the parties under a mutual mistake of the true intent and meaning thereof, and that the said agreement should be reformed to express the true intention of the parties." The defendants moved to strike this out as not being a compliance with the order, and also as not being properly pleaded. The Master said that the whole issue between the parties was as to the terms of the written agreement. It had been expressly pleaded by the amended statement of defence that the plaintiff was, under that agreement, obliged to sell at $1.30 per barrel. The amendment to the statement of claim now made met this

in a way that did not seem objectionable. It was suggested that the desired reformation should be more distinctly set out; but that would, no doubt, be done in the judgment, if the plaintiff's contention should prevail. At present, the plaintiff's view was indicated sufficiently to let the defendants know what case they had to meet, which is the main requisite in pleading. In Ontario and Minnesota Power Co. v. Rat Portage Lumber Co., 3 O.W.N. 1182, it was held permissible to introduce an allegation in the statement of defence by the statement "the plaintiffs claim." The same rule must apply to the present case. Motion be dismissed, with costs to the plaintiff in the cause. The defendants to have 8 days to amend, if desired. Grayson Smith, for the defendants. M. L. Gordon, for the plaintiff.—The Master's order was affirmed by MIDDLETON, J., on the 11th April, 1913.
