THE

# ONTARIO WEEKLY REPORTER.

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MEREDITH, C. J. MARCH 2ND, 1903.

CHAMBERS.

## VALENTINE v. JACOB.

*Administration—Distribution of Fund in Court—Period for Ascertainment of Class — Vesting Order — Costs— Unnecessary Litigation.*

Motion on behalf of plaintiff and defendants Hesson and McGregor in an action to remove trustees and for administration, for an order dispensing with payment into Court of $595.84 and for distribution pursuant to the report of the local Master at St. Thomas dated 6th December, 1902.

W. J. Tremeear, for applicants.

W. E. Middleton, for other defendants.

MEREDITH, C.J.—The order must be refused. The report is wrong in finding that such of the brothers and sisters of defendant Madeline Valentine named in paragraph 3 as survive her are the only persons who are entitled to share in the corpus of the trust fund. As much as $6,000 not having been realized from the sale of the trust property, defendant Madeline Valentine is entitled to the whole income of the fund for her life, and the trust as to the corpus is, if at her death there are surviving brothers and sisters, to divide it equally between them, but if all the brothers and sisters be then dead, the corpus is to go to their respective heirs. The class that is to share in the corpus is, therefore, not ascertainable until the death of Madeline, and there should be no order for distribution until that event has happened and the class has been ascertained.

A vesting order was improperly granted, the purchase money not having been paid into Court.

The costs of the litigation have been very great. Apart from the contest as to the alleged misappropriation by two of the trustees of part of the trust fund, which was abandoned at the trial, it is difficult to understand why any suit was necessary, as all that has been obtained might have been gotten by the appointment of a new trustee in the place of the one who had become a lunatic, and a sale by the trustees out of Court.

Order made referring report back to Master for amendment, and application may be renewed in Chambers when the amended report is made. Parties to consider whether unascertained class should not be represented.

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MEREDITH, C. J. MARCH 2ND, 1903.

WEEKLY COURT.

## STEWART v. GUIBORD.

*Equitable Execution—Declaration of Right to Apply Amount Due to Plaintiff by one Defendant upon Judgment against Co-defendant — Appearance—Attornment to Jurisdiction.*

Appeal by defendants from report of local Master at Ottawa.

J. A. Ritchie, Ottawa, for defendants.

Glyn Osler, Ottawa, for plaintiff.

MEREDITH, C. J.—The appeal, so far as it affects defendant Lallemand, fails. Whether or not he was before appearance subject to the jurisdiction of the Court, he has by appearing unconditionally submitted to and cannot now question the jurisdiction.

The appeal of defendant Guibord must be allowed. Plaintiff asks that Guibord may be declared a trustee of a fund for the judgment debtor Lallemand, in order that plaintiff may in some way apply what he owes to Guibord upon the judgment against Lallemand. There is no ground for such an action. Plaintiff must be left, if he can do so, to set off his judgment against Lallemand in any action which Guibord may bring for the recovery of what plaintiff covenanted to pay to him.

Lallemand's appeal dismissed with costs. Guibord's appeal allowed without costs. Is counsel desire that judgment should go upon the Master's report as varied upon the appeal,

the action is to be dismissed as against Guibord without costs, and without prejudice to any right of set-off which plaintiff may have in respect of the judgment against Lallemand, and plaintiff is to have judgment against Lallemand for the amount found due by the report with subsequent interest and costs.

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WINCHESTER, MASTER. MARCH, 3RD, 1903.

CHAMBERS.

## RE WEBB.

*Life Insurance—Bequest of Proceeds to Infant—Right of Executors to Payment—Law of Domicil of Insured—Payment of Money into Court.*

Motion by the Grand Orange Lodge of British America for leave to pay into Court $1,000, being the amount of an insurance on the life of T. H. Webb, deceased. He insured in favour of his wife while living in Ontario, but subsequently removed his family to Manitoba, where his wife died. In his will he made several specific devices, and added : "And I give, devise, and bequeath all other my messuages, lands, tenements, and hereditaments, and all other my household furniture, ready money, security for money, my life insurance in the Orange Mutual and Confederation Life Insurance Companies, my crops, horses, stock, machinery, goods and chattels, and all other my real and personal estate whatsoever and wheresoever unto my . . . son Thomas William McEwan Webb, to be held by my executors in trust for him until he is 21." The executors applied to the applicants for payment of the $1,000 insurance moneys, but, upon being requested to execute, as trustees, a release in respect of the sum to be paid, they refused to do so, asserting that they were entitled to payment as executors either for the benefit of the infant or of the estate of the deceased as might be determined by the law of Manitoba.

W. D. Gwynne, for applicants.

Shirley Denison, for executors.

THE MASTER referred to Scott v. Scott, 20 O. R. 313, and National Trust Co. v. Hughes, 14 Man. L. R. 41, and said that if the executors desired to raise similar objections to those raised in the latter case, such objections could be best disposed of on motion for payment of the fund out of Court. Upon filing an affidavit as to the infant's age, as required by Rules 411 and 418, and order would be made as asked.

BOYD, C. MARCH 3RD, 1903.

CHAMBERS.

## BALDWIN IRON AND STEEL WORKS (LIMITED) v. DOMINION CARBIDE CO.

*Costs—Scale of—Jurisdiction of County Court—Recovery of $550—Ascertainment of Amount—Promissory Note—Consideration—Necessity for Extrinsic Proof.*

Appeal by defendants from taxation of plaintiffs' costs by the Local Master at Ottawa. The action was brought to recover $1,100, being the balance alleged to be due on two promissory notes made by defendants to plaintiffs; and $162.75 for work done and machinery and supplies sold. The action was tried before MEREDITH, C. J., who gave judgment for plaintiffs for $550 with interest and costs (ante 6). The Master taxed the costs upon the High Court scale.

J. F. Smellie, Ottawa, for defendants, contended that the amount recovered was within the jurisdiction of a County Court.

R. G. Code, Ottawa, for plaintiffs.

BOYD, C.—The note for $863 dated 28th March, 1900, was that in respect of which the plaintiffs recovered judgment to the extent of $550 with interest from 31st December, 1901. The note was for supplies of material prior to its date and running from the end of July, 1899, to the end of February, 1900. While the company defendant existed ostensibly prior to its actual incorporation, still it had no legal status till December, 1899, and it was not an organized company till February, 1900. This note was taken up by the note of McRae (by whom the ostensible company had been carried on prior to the incorporation), and it was at last represented by a note of McRae for $1,100, which was the total amount sued for by plaintiffs, as being really a company debt, with McRae intervening as surety merely.

The plaintiffs could not recover in this case on the mere proof of the note for $863; that had gone out of currency, and was represented by the $1,100 note of McRae, on which proof had been made in McRae's estate. One contention was that this discharged the company.

Again the mere proof of the note did not ascertain the amount, because the consideration therefor was rendered in great part before the company existed, and proof had to be made extrinsic to the note, to give good ground for recovery against the company.

I have spoken to the Chief Justice (the trial Judge), and he has no doubt of plaintiffs' right to recover full costs of suit in the High Court, and had his attention been directed to it, he would have certified accordingly. This he is willing now to do, nunc pro tunc.

Altogether I see no reason to disturb the scale of taxation, and the appeal is dismissed with costs.

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BRITTON, J. MARCH 3RD, 1903.

TRIAL.

## SMITH v. HARKNESS.

*Bankruptcy and Insolvency—Assignment for Creditors—Claim to Rank on Estate—Action for Declaration.*

Action by H. G. Smith and the firm of Smith & McLennan, of which firm H. G. Smith was senior member, against defendant as assignee for benefit of creditors of J. B. Coulthart, upon an account for services, timber supplied in 1901 and 1902, for payments, indorsations, etc.

D. B. Maclennan, K.C., for plaintiffs.

J. Leitch, K.C., for defendant.

BRITTON, J., gave judgment for plaintiffs for $3,836.89 and a declaration that plaintiff Smith is entitled to rank upon the estate of J. B. Coulthart for that sum and be paid a dividend thereon, and a declaration that defendant as assignee is entitled to be paid $1,265.69, and interest. As this was a case in which there was not before action any admission of any specific amount in favour of plaintiffs, and as they were by the notice disputing their claim compelled to bring an action, plaintiffs should get costs, less any costs specially incurred by defendant, if any, in proving the claim for sawing and in resisting the claim for set-off. Plaintiffs to get general costs of action.

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STREET, J. MARCH 3RD, 1903.

TRIAL.

## CITY OF TORONTO v. CONSUMERS' GAS CO. OF TORONTO.

*Gas Company—Breach of Statutory Duty—Action by Consumers—Accounts—Book-keeping Methods—Reserve Fund—Profit and Loss—Plant and Buildings Renewal Fund.*

Action by the corporation of the city of Toronto, suing on their own behalf as well as on behalf of all other consumers of gas furnished by defendants, and by Joseph A. Black,

a holder of defendants' shares, suing on behalf of himself and all other shareholders, against the company, alleging certain breaches by defendants of their duties under 50 Vict. ch. 85 (O.), and praying that they may be ordered to perform them, and that accounts may be taken of their assets and the manner in which they have dealt with them since the passing of the Act, and that certain alleged improper dealings of defendants with their assets and certain alleged improper entries in their books may be corrected, and that their accounts may be retaken so as to comply with the Act; also alleging that by reason of the breaches of duty aforesaid, and by their improper method of dealing with their assets, and keeping their accounts, the price of gas supplied to plaintiffs and other consumers has been kept at a higher figure than it should have been in accordance with the Act, and asking for an account of the sums so overcharged to plaintiffs and for repayment and for other relief.

E. F. B. Johnston, K.C., and A. F. Lobb, for plaintiffs.

S. H. Blake, K.C., and A. B. Aylesworth, K.C., for defendants.

STREET, J., held that plaintiffs were not only in error in their contention that the reserve fund had not been properly maintained, but had entirely failed to shew that they had been injured by the manner in which it had in fact been kept.

The second complaint was, that certain sums written off the company's assets had been charged to profit and loss or reserve fund, instead of to the plant and buildings renewal fund. The defendants were justified in writing these sums off the value at which their plant stood in their books, and it was a matter of no moment whether they were charged to profit and loss account or to the reserve fund, for the latter could only be increased from the former. The defendants were not bound under sec. 6 of the Act to charge these sums to the plant and buildings renewal fund, a charge for depreciation and loss not coming within the words "all usual and ordinary renewals and repairs." Even if it were held that the amounts written off the profit and loss account for depreciation, which amount in all to $321,431.38, should have been written off the plant and buildings renewal fund instead, the reserve fund would still be larger by the difference between these two sums, that is, by $44,491.85, than it would have been had defendants exercised the full rights given them by the Act.

The third objection was, that defendants were not at liberty to continue to the plant and buildings renewal fund the five per cent. authorized by sec. 6, because it did not appear to be necessary to do so for the purposes for which the fund was to be used under the statute. It would be impossible to give effect to this objection without disregarding the plain and unambiguous language of the Act.

Action dismissed with costs.

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OSLER, J. A. MARCH 3RD, 1903.

CHAMBERS.

## RANDALL v. OTTAWA ELECTRIC CO.

*Leave to Appeal—Order of Divisional Court Refusing Nonsuit after Disagreement of Jury—Case Ripe for New Trial—Refusal of Leave Except on Terms.*

Motion by defendants Ahearn & Soper (Limited) for leave to appeal from order of a Divisional Court (ante 146) dismissing a motion made by the applicants for a nonsuit after a disagreement of the jury.

W. Nesbitt, K. C., for applicants.

H. M. Mowat, K. C., for plaintiff.

OSLER, J. A.—The case being now ripe for a new trial, it is a fortiori not to permit a second appeal. When the case is tried again, the point which the applicants now rely on will be open to them, if not at that trial, yet on appeal to this Court if they should fail there. If they were allowed to appeal now, and this Court should be of opinion with the Court below that the case should be tried again, the plaintiff will have been unreasonably delayed by the appeal, and if he is permitted to proceed to his second trial pending the appeal, we may see, as in Blackley v. Toronto Street R. W. Co. and other cases, the appeal now sought for and the appeal from the judgment on the second trial side by side in the same docket. Either way delay or expense is inevitable if defendants' appeal should not succeed, and their success is not so probable as to justify the giving of leave to appeal, especially as a refusal does not foreclose the substantial defence, and (if plaintiff should recover his intellect) further evidence may be given at the next trial. If, indeed, the applicants are prepared to consent to judgment being entered for plaintiff for the damages assessed by the jury, in case the appeal they now seek for should be unsuccessful, they have leave to appeal. But, unless leave is accepted on these terms, the motion is refused.

MARCH 3RD, 1903.

ELECTION COURT.

## RE SAULT STE. MARIE PROVINCIAL ELECTION.

## SMITH v. MISCAMPBELL.

*Parliamentary Elections—Corrupt Practices--Bribery—Proof of Offences—Proof of Agency—Hiring Vehicles—Election Avoided for Corrupt Acts of Agent—Saving Clause.*

A petition to avoid the election of the respondent for corrupt practices, tried at Sault Ste. Marie and Toronto.

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

E. Bristol, for respondent.

The judgment of the court (OSLER, J.A., and FALCONBRIDGE, C.J.) was delivered by

OSLER, J. A.—Sixty of the 91 charges in the particulars were disposed of at the hearing, and judgment was reserved on the remaining 31, which are, however, in substance reducible to 12. Of these 31 charges, numbers 16 to 20 refer to the bribery of Alexander Clouthier by one E. Morreault, an agent of the respondent, on 30th May, by the corrupt payment to him of the sum of $5, in pursuance of a previous corrupt promise, and charges No. 22 and No. 25 refer to the bribery by Morreault of one Albert Roy by payment to him on 30th May of the sum of $8, in pursuance of a previous corrupt promise.

The agency of Morreault was hardly contested. It was, at all events, if not admitted, abundantly proved. This gentleman was a member of the French Bar, and a resident of Montreal. At the request of some of the respondent's political friends there, he went to Sault Ste. Marie "to help in the election." There was a considerable French population in the riding, chiefly in and about the town, and it was thought desirable that some one familiar with that language should be sent up from the other Province, who could canvass his compatriots and address them at public meetings in their own tongue, the more so as it was said that an agent had been employed on the petitioner's side for a similar purpose. Mr. Morreault was to be paid his expenses and a honorarium, the amount of which was not very clearly defined—perhaps not at all—but he seems to have expected it would be at least $10 per day. He left Montreal on 17th May, and before he did so received the proceeds of a draft for $100, drawn upon the respondent by his friend in Montreal, which was duly charged in the respondent's bank account on 14th June, 1902, and before he left Sault Ste. Marie on 30th May he was paid by or received from agents of the respondent there, and with

his assent, further sums, amounting in all to $135. None of these payments appears in the detailed statement of election expenses dated 28th July, 1902, prepared by the respondent's financial agent, pursuant to sec. 201 of the Election Act.

Morreault arrived at Sault Ste. Marie on the evening of Sunday the 18th May, and some time during the week opened a room in a building known as the Chamberlain block, in the French quarter, where people could call and see him, where the voters' lists could be examined, and inquiries answered. He was present at and addressed two public meetings in the interest of the respondent.

As regards the Clouthier charges, it appears that at Morreault's request he drove him about through the town to see his friends and make him acquainted with the French people. That he did so on two or three days, that Morreault never asked him which side he favoured, but the day after the election gave him $5 for his services. This was simply a gratuity for services rendered, and not a corrupt payment. This group is, therefore, dismissed.

The Roy charges, or some of them, are of a much more serious character. Morreault met Roy in the afternoon of the 26th May, when, therefore, he had been a week at the Sault. One Honore Parent, an old acquaintance or friend of Morreault's, was with him. According to Parent's evidence, Morreault spoke to Roy first, and asked if he would work for him at his room, saying he would pay him $3 or $4 a day. Roy said he was a Liberal and would not sell his vote, to which Morreault replied that he did not want him to do so. Roy agreed to go there the next morning. He was there at Morreault's orders on the 27th, 28th and 29th May, checking the voters' list—not a very arduous piece of work—answering inquiries, and going where he was sent. He seems to have been the only person so employed there. On the 30th May he was paid by Morreault for these services—according to his own account $6 or $7; according to Morreault's account $7 or $8.

Morreault's evidence was that he offered to employ Roy. "Never mind the party; if you'll work for me without party I'll pay you." He might have promised him $3 or $4 per day, not $5.

Roy's evidence was that Morreault spoke to him, asked if he was a Canadian—meaning a French-Canadian—and what his politics were. Roy said he was a Liberal, to which Morreault replied, "You're just my man." Morreault asked him if he would not vote for them. He said he would not.

Asked if money would buy him, he answered no. Morreault asked if he would work for them, and witness said he would do so by day, but not at night, as he had a promise of work in the steel mills. He offered him $5 per day to do their work, not specifying what it was to be, and to vote as he pleased. I think it must be inferred from Parent's and Morreault's evidence that at some stage of the conversation they depose to, the latter asked Roy for his vote. Parent gave his evidence, apparently, without bias, and commended himself to me as a witness truthful to the best of his recollection.

Upon the evidence which I accept on charges Nos. 22 and 25, I feel that it would be most unsafe to regard the payment as other than a payment made in pursuance of a corrupt promise. I find that these two charges are proved.

The remaining charges of this group are dismissed.

Charges 30 to 33. Corrupt payments by Morreault to one Delargey. Nos. 34 and 35, similar payments to one Daigle. Delargey and Daigle appear to have been persons of low character, described by more than one witness as "bums," but they were voters. Roy says they came to him two days before the voting day, and he spoke to Morreault about them, saying, "These two parties want to be kept till after the election is over." Morreault said, "You'll have to go down to the other committee room," the principal one. Roy went there with them and saw one Kearns, who told him that whatever Morreault would do was all right—he had authority. Roy took them back, told Morreault it would be all right. Delargey asked Morreault "what it would be" and he said "they would be satisfied." They said they would vote for, would support, the respondent. The next day Morreault gave Delargey 50 cents. Roy saw Morreault give Delargey money again, $1. Delargey voted; Daigle did not. Roy further said that at the railway station, when Morreault was leaving, Delargey asked Morreault to keep his promise to "satisfy him." Morreault offered him $1, which he would not take, saying it was not enough. Morreault told Roy to take him to the committee room, which he did, and left him there.

Morreault said that Delargey had been about his room "bothering" him; that Delargey followed him up to the station, and there, to get rid of him, he gave him $1, intending to give only 50 cents. Interrogated very closely as to the payments of $1 and 50 cents, sworn to by Roy, he could only say that he did not recollect them. There was no satisfactory evidence of Kearns' agency but he was not called to deny Roy's account of his interview. He was a resident of the town, and no explanation was offered for not calling

him if his evidence would have assisted the respondent. Roy's evidence, therefore, remains unshaken upon two vital points on which it was open to contradiction, and I must hold that charges Nos. 30 and 32 (the latter as regards payment of money only) are proved. I attach no importance to the payment of $1 at the station. It was probably made merely to get rid of a pestering tramp. As to the Daigle charges, the first, as to the promise, is proved; the second, as to the payment, is not.

Charges 54 to 57 inclusive. Charge 54, that on polling day one W. H. Plummer, an agent, gave Wm. Turpin two bottles of whisky, to be corruptly given by Turpin to voters. It was proved that Plummer gave Roy, on Turpin's order, two bottles of whisky some time during the afternoon of the polling day, one of which Roy handed to Turpin, but there was no evidence that the latter treated any elector with that whisky. This charge and charge 56, similar to charge 54, substituting Roy's name for Turpin's, are both dismissed.

Charge 55, that Plummer gave Turpin a sum of money to be expended (1) in bribing voters, and (2) for the purpose of corruptly providing meat, drink, and refreshment to voters on polling day. Plummer's evidence was that, some eight or ten days before the polling day, he, on his own account, employed Turpin to act as a sort of detective to spy upon and report the conduct of the petitioner's party. That he was to pay him for his services $24. Plummer's blotter contained two entries, one for $6 paid "Turpin," and later "Turpin in full $10." The remaining $8 were not accounted for. That any of the money received by Turpin from Plummer was actually expended in bribery, there is no evidence, and, therefore, however, little confidence we may have that there was no unlawful expenditure of that kind, we cannot infer that the money given to Turpin was given for such purpose. The note or order (if Clapperton's evidence of its contents is true, and it was not denied by Plummer) contains a very damaging suggestion, and had there been any evidence of actual bribery by Turpin, it would, I think, have been difficult not to find the charge proved, apart from the question of agency, as an offence under sec. 159 (c) of the Election Act.

On the second branch of this item of the particulars, viz., the giving of meat, drink, or refreshment to a voter on account of his being about to vote, or having voted, etc., it was proved by Clapperton that he was a clerk in the grocery shop, or store, of one Gandreau, and that of the $5 taken in by the witness on polling day for whisky or beer supplied

by way of treats to various persons, about $3 was received from Turpin for that purpose. This would mean, as the witness said, a treat of 30 persons, unless some were treated twice. Probably the money thus expended by Turpin was part of the money he had received from Plummer, and, assuming that the persons so treated were voters, it would be a corrupt practice on the part of Turpin. But I do not find any section of the Act which enables me to fasten it upon Plummer as the person who supplied the money thus unlawfully expended by Turpin, as in the case of a person who advances money to be expended in bribery (sec. 59 (c) ), or for the purpose of betting (sec. 164 (2) ). Indeed, this form of stating a corrupt practice is, to me, quite novel. But even if the evidence can be regarded as sufficient to establish what sec. 162 (2) calls "extensive or general or miscellaneous" treating, or the corrupt practice struck at by sec. 163 (1), I think that agency has not been made out on the part of either Plummer or Turpin. The former was present as a delegate at the nominating convention, though how or when he was appointed did not appear. Then he spoke on behalf of the respondent at one or two meetings, and looked in at some of the smaller meetings,—the committee meetings; but is not shewn to have taken any part in them. He appears, in short, to have been a sort of free lance.

Charges 78 to 81, inclusive, and charge 90, are, except charge 90, personal charges in respect of the $235 paid to Morreault, of which $100 was paid by the respondent himself; $110 by one Hand, an agent of the respondent, and $25 by one Thompson, another agent; and both of the latter were paid with the respondent's assent or knowledge. I find that none of these sums were paid with any corrupt intention or for any corrupt purpose, or with intent that Morreault should expend them or any part of them corruptly. Morreault was not a volunteer nor a voter. He was a professional man, and the sum received by him was not an extravagant payment for his time and expenses. But, although it was not a corrupt payment, it was, I think, an illegal one. I find no authority to include a payment for the purposes Morreault was employed for (taking them as a whole) in the personal expenses of the candidate or his other election expenses. It was, at all events, illegal as not having been made through the respondent's financial agent, as required by sec. 197, and there was, moreover, in respect of it, a distinct infraction of sec. 201 of the Election Act in the omission to include it in the detailed statement of the candidate's election expenses. The transaction was a blameworthy one, well calculated to

excite suspicion, and, while the charges founded upon it must be dismissed, it will remain to be considered in another aspect of the case.

Charge 89, that one Penharwood, an agent of the respondent, committed the corrupt practice of voting, knowing that he had no right to vote, having been employed by the respondent as his paid agent and secretary in the conduct of the election, is dismissed. Penharwood's employment ceased at the end of April.

The remaining charges were of hiring rigs to convey voters to the poll. These should be dismissed, on the ground that no payment and no promise to pay had been proved.

I desire to record my opinion, that the law on this subject requires amendment. So long as carriages can be procured from liverymen for use on polling day, there is a constant temptation to evade the law and resort to all sorts of devices to do so. These people are not in politics, but in business, and in the long run they make sure that they shall not lose by nominally giving, as they do, to both political parties the use of their teams and carriages or other vehicles on polling day. Some such provision as is contained in the Imperial Act 46 and 47 Vict. ch. 51, sec. 14, sub-secs. 1, 2, and 3, prohibiting the letting, lending, or employing by any person of public conveyances or of any carriage or horse or other animal kept or used for the purpose of letting out to hire would probably be found more effective than sec. 165 of our Act has been hitherto found to be.

In the result, the election ought, in my opinion, to be set aside. The case is not one in which the saving clause, sec. 172, of the Election Act, can properly be acted on. The acts of bribery proved, and the illegal practices connected with the employment of Morreault, ought, I think, to override any majority. Nor can it be overlooked that drinking was undoubtedly indulged in to a most reprehensible extent, though the evidence may fall short of proving the commission of corrupt practices in that respect. The Liquor License Act, indeed, would seem to be almost a dead letter in the town of Sault Ste. Marie.

Morreault, Roy, Delargey, and Daigle will be reported.

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MEREDITH, C.J. MARCH 4TH, 1903.

CHAMBERS.

## CUSACK v. SOUTHERN LOAN AND SAVINGS CO.

*Lost Document—Debenture—Action on—Indemnity—Costs—Tenders.*

Application by plaintiff for order approving of bond of indemnity tendered by her to defendants as sufficient security

for payment out of Court to her of moneys paid in by defendants, and disposing of the costs of the action, which was brought to obtain payment of a debenture for $1,000 and interest issued by defendants to plaintiff, payable to her order, which she alleged was burned by mistake. Before action plaintiff tendered to defendants her own statutory declaration that the debenture had been inadvertently destroyed by her under circumstances which she detailed, and that she had never indorsed it, and she also tendered a bond to indemnify them for paying to her the amount of the debenture with interest. She demanded payment, but it was not made. Upon being served with the writ of summons, defendants paid into Court the amount of the principal money and the interest upon it, but conditionally on the money not being paid out until a sufficient bond had been furnished. Plaintiff then made this motion.

J. B. Davidson, St. Thomas, for plaintiff.

J. Farley, K. C., for defendants.

Counsel agreed that the Chief Justice should dispose of the whole matter in dispute upon this motion.

MEREDITH, C.J., held that, as plaintiff conceded defendants were entitled to indemnity, both parties were somewhat to blame for the litigation; and, under all the circumstances, the proper order to be made was that the bond of indemnity executed be delivered to defendants, and upon that being done the money in Court be paid out to plaintiff, and the action be discontinued, and that there be no costs to either party of the action or motion.

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MEREDITH, C.J. MARCH, 4TH, 1903.

CHAMBERS.

## SMERLING v. KENNEDY.

*Security for Costs—Right to Praecipe Order—Waiver by Delivery of Defence—Practice.*

Appeal by plaintiff from order of Holt, Local Judge at Goderich, dismissing motion to discharge a præcipe order for security for costs issued by defendant Violet Kennedy. Plaintiff resided in the United States of America, as appeared by the indorsement on the writ of summons, and was not possessed of such property within the jurisdiction as relieved her from the obligation of giving security for costs.

W. Proudfoot, K.C., for plaintiff, contended that defendant had, by delivering her statement of defence before issuing the præcipe order, waived her right to it.

J. H. Moss, for defendant Violet Kennedy.

MEREDITH, C.J., held that the old practice is not superseded as to præcipe orders, and the common law practice is the more convenient practice, and the one which should be followed. Bank of Nova Scotia v. Laroche, 9 P.R. 503, Caswell v. Murray, 9 P. R. 192, and Small v. Henderson, 18 P. R. 314, referred to. Following that practice, the delivery of the defence was not a waiver of the right of defendant to a præcipe order, and the order was obtained in due time, as it was issued before issue joined. But in any aspect in which the question is looked at, the order in appeal was not open to the objection made to it.

Appeal dismissed with costs.

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STREET, J. MARCH 4TH, 1903.

TRIAL.

## REX v. MULLEN.

*Criminal Law—Application for Reserved Case after Conviction and Sentence—Statements of Jurors as to Manner of Arriving at Verdict.*

The defendants were tried before STREET, J., at Ottawa, on 21st January, 1903, and convicted of an assault occasioning actual bodily harm. They were represented by counsel, who was present when the jury returned their verdict, and who addressed the Judge on 24th January, 1903, for the purpose of obtaining a lenient sentence. The defendants were then sentenced.

On 27th February, 1903, G. S. Henderson, Ottawa, on behalf of defendant Murphy, asked the Judge to state a reserved case under sec. 743, sub-sec. 2, of the Criminal Code, upon an affidavit by the counsel for the defendants to the effect that one of the jurors was not in favour of the verdict of guilty, and so informed the deponent, but that he and another juror, who was also for an acquittal, were led to believe by other jurors and the constable in charge that ten were sufficient to convict.

STREET, J.—There is no ground upon which to state a reserved case. No question of law arose in the course of the trial. It would be contrary to principle to allow the statements of jurors even under oath to be used for a purpose such as was here proposed: Jackson v. Williamson, 2 T. R. 281. It would be an extremely dangerous practice to permit the verdict of a jury to be disturbed in the manner or for the reasons suggested. Application refused.

MARCH 4TH, 1903.

DIVISIONAL COURT.

## BURNETT v. BOCK.

*Fraudulent Conveyance—Status of Judgment Creditor Attacking—Execution not in Hands of Proper Sheriff—Nature of Transactions between Husband and Wife—Evidence—New Trial.*

Appeal by defendants (husband and wife) from the judgment of the District Court of Manitoulin in favour of plaintiff, a judgment creditor of the husband, but not having an execution against lands in the hands of the proper sheriff, in an action brought for the purpose of reaching for the satisfaction of plaintiff's debt a house and lot in Gore Bay which plaintiff alleged was purchased by and with the moneys of the husband, and was procured by him to be conveyed to his wife without consideration and for the purpose of defrauding his creditors.

A. G. Murray, Gore Bay, for defendants.

W. N. Tilley, for plaintiff.

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

MEREDITH, C.J.—As the respondent had not an execution against lands in the hands of the proper sheriff, his only right of action was, on behalf of himself and all other creditors of his debtor, to have the declaration necessary to enable the creditors to reach the property pronounced by the Court, and possibly to have a judgment for the sale of the property; and the judgment appealed against was erroneous in providing for payment of plaintiff's claim only.

Upon the main question, the alleged fraudulent character of the transaction by which the property was conveyed to the wife, the trial Judge has not given sufficient weight to independent and unimpeached testimony in favour of defendants. Order made directing a new trial. Costs of the last trial and of this appeal to be costs in the cause unless the Judge at the new trial otherwise directs. The Court expresses a hope that the parties will adjust their disputes and render a new trial unnecessary.

MARCH 4TH, 1903.

DIVISIONAL COURT.

## METALLIC ROOFING CO. OF CANADA v. LOCAL UNION No. 30, AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSN.

*Writ of Summons—Service—Unincorporated Foreign Voluntary Association—Service upon Person in Ontario—Incapacity of Association—Proper Time to Raise Question.*

Appeal by the Amalgamated Sheet Metal Workers' International Association from an order of MEREDITH, J., dismissing an appeal by them from an order of the Master in Chambers dismissing their motion to set aside the service of the writ of summons on them by serving one J. H. Kennedy. The appellants were added as defendants by an order not appealed against.

J. G. O'Donoghue, for appellants.

W. N. Tilley, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A.) was delivered by

MEREDITH, C.J.—The appellants, who are not sued as individuals, are neither a corporation nor a partnership nor an individual carrying on business in a name or style other than his own name, and it has not been made to appear that they have been given by the Legislature the capacity for owning property and acting by agents such as in Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 429, it was held the Legislature had conferred upon the defendants in that case. . . . In a case such as this, where it appears clearly that the association sued is not an entity which may be sued by the name which it bears, it is a more convenient course to put an end to the litigation at the threshold than to permit it to proceed, with the certainty that the ultimate result will be the dismissal of the action as against the body improperly sued. Sloman v. Governor of New Zealand, 1 C. P. D. 563, and Snow's Annual Practice, 1903, p. 56, referred to. It is not necessary to go so far as to strike out the name of appellants as defendants; they have a right to complain that service has not been properly effected upon them: Grossman v. Granville Club, 28 Sol. Jour. 513. The Rules do not provide for the case of a voluntary association made a defendant, being neither a corporation, individual, partnership, nor a quasi-corporate

body such as defendants in the Taff Vale case. If an actionable wrong has been done to plaintiffs by the appellants, relief may be obtained in the manner pointed out by Lords Macnaghten and Lindley in the Taff Vale case, and as it was obtained in Linaker v. Pilcher, 84 L. T. 421.

Appeal allowed and order made setting aside service. No costs here or below to either party.

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FALCONBRIDGE, C.J. MARCH 5TH, 1903.

CHAMBERS.

## SCHEEMAN v. DUNDAS.

*Malicious Prosecution—Action—Dismissal for Want of Prosecution—Excuse for Delay—Leave to Proceed—Terms.*

Appeal by plaintiff from order of a local Judge at Goderich dismissing, for delay in proceeding to trial, an action for malicious prosecution.

W. Proudfoot, K. C., for plaintiff.

R. McKay, for defendant.

FALCONBRIDGE, C.J.—The local Judge was not wrong in making the order appealed against. But there was some excuse for plaintiff's delay in bringing the action on for trial, viz., the result of the question which was being settled in Rex v. Scully, 4 O. L. R. 394, 1 O. W. R. 452, and the disinclination which existed in the Attorney-General's department to deal with applications for fiats, pending that litigation. Order varied by directing that on payment of the costs of the motion before the local Judge and of this appeal, and on payment of $40 into Court to answer pro tanto defendant's costs of the action, if he should become entitled thereto, all within three weeks after taxation of the costs, plaintiff may proceed to trial at the then next ensuing jury sittings; otherwise, appeal dismissed with costs.

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MARCH, 5TH, 1903.

DIVISIONAL COURT.

## TAGGART v. BENNETT.

*Costs—Scale of—Jurisdiction of Divisional Court—Action for Balance of Account—Ascertainment—Settled Account—Appeal to Divisional Court from County Court—Time—Extension of.*

Appeal by plaintiff from judgment of Judge of County Court of Middlesex. The action was brought to recover $41, the balance of an account which amounted to $406.

Judgment was given for plaintiff's claim, but he was allowed only Division Court costs, on the ground that the action was within the jurisdiction of a Division Court. The defendant was not allowed a set-off of his excess of costs.

W. H. Bartram, London, for appellant.

W. H. Blake, K. C., for defendant.

BOYD, C.—There was ample evidence before the Judge that the account sued for was settled before action, and nothing was in dispute as to the amount due on the footing of the account. The defendant did not dispute that the amount was owing, but by way of counterclaim for inferior work it was sought to escape payment. The correspondence put in was sufficient evidence of a settled account, and the Judge inclined to take that view during the argument, and gave judgment on the footing that the claim sued for was the balance of a settled account and within the jurisdiction of a Division Court. He had also a discretion whether to award a set-off of costs or not, and he has exercised his discretion by leaving the matter with Division Court costs to plaintiff and no set-off. See Re Lott v. Cameron, 29 O. R. 73; Division Courts Act, sec. 72, (c) and sec. 79.

MEREDITH, J.—The judgment appealed from having been given on the 9th December, 1902, the appeal should have been set down for the sittings of a Divisional Court beginning 12th January, 1903 (Rules 352, 795), such sittings not being merely a postponed sittings, and the appeal having been set down for a later sittings was out of time, but the Court had power under Rule 353 to enlarge the time, and, as the appellant was misled by the change of date, the case was one for the granting of that indulgence. Reekie v. O'Neil, 31 O. R. 444, distinguished.

Upon the merits of the appeal MEREDITH, J., agreed with the conclusion of the Chancellor.

Judgment affirmed with costs.

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MARCH 5th, 1903

DIVISIONAL COURT.

## DAVIDSON v. GRAND TRUNK R. W. CO.

*Railway—Animal Killed on Track—Liability—Proximate Cause—Fencing—Switch—Main Line—Intervening Lands.*

Appeal by defendants from judgment of Judge of District Court of Muskoka, awarding to plaintiff $75 damages. The

action was brought to recover the value of a cow, the property of the plaintiff, which was killed on the defendants' railway track. The plaintiff alleged that the death of the cow was caused by the negligence of the defendants in neglecting to repair a fence, through a breach in which the animal strayed on to the track.

D. L. McCarthy, for the appellants.

T. E. Godson, Bracebridge, for plaintiff.

The judgment of the Court (MEREDITH, C.J., STREET, J.) was delivered by

MEREDITH, C.J.—The facts being undisputed, the real question is whether, on these facts, the liability of defendants for the loss has been made out; and, upon a review of the facts, it appears that there was evidence sufficient to warrant the verdict for plaintiff, unless the effect of Grand Trunk R. W. Co. v. James, 31 S. C. R. 420, is to determine that upon the true construction of sec. 194 of the Dominion Railway Act as amended by 53 Vict. ch. 28, sec. 2, the defendants are not liable because plaintiff's cow was killed not upon the switch on to which she escaped from the adjoining land of plaintiff, but upon the main line, on to which she did not escape directly from that land, but which she reached by crossing intervening lands. That case did not decide that where the statutory duty as to fencing is not performed, and in consequence of the breach of duty cattle of the landowner escape directly from his land on to the line of the railway, the railway company are liable only when the cattle are killed on the part of the line on to which they have escaped directly, and not where they are killed on another part of the line, to which they have strayed, after passing over intervening lands; and there is nothing in the Railway Act which renders it necessary to so decide. The breach of duty by the defendants was the proximate cause of killing the cow. The costs were in the discretion of the Judge, and he had not exercised it on a wrong principle or on a misapprehension of the facts.

Appeal dismissed with costs.

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MARCH 5TH, 1903.

DIVISIONAL COURT.

## ANDERSON v. CHANDLER.

*Contract—Performance of Work—Discharge of Contractor—Certificate of Architect—Absence of Fraud.*

Appeal by plaintiff and cross-appeal by defendants Walter and Annie Chandler from judgment of BOYD, C., in favour

of plaintiff against these defendants for $650 without costs, ordering that $400 deposited by plaintiff in the hands of defendant Gibson should be forfeited to defendants the Chandlers, and dismissing the action against Gibson with costs.

W. R. Riddell, K. C., G. Grant and F. W. Halliday, for plaintiff.

D. E. Thompson, K. C., for defendants the Chandlers.

H. L. Drayton, for defendant Gibson.

THE COURT (FALCONBRIDGE, C.J., STREET, J.) held, affirming the judgment, that the charges of fraud and wrongdoing against defendant Gibson, as architect, were unsupported by the evidence; but, reversing the judgment, that plaintiff was properly discharged by defendant Walter Chandler from the work under the provisions of the contract in question, for the building of a mausoleum. It was plain by the terms of the contract that the architect was the person appointed by the parties to determine whether the work was being satisfactorily proceeded with at the end of 72 hours or not, and that, in the absence of fraud (which was expressly negatived here), his certificate of 4th December, 1899, to Chandler was binding on plaintiff, and a sufficient and complete protection to Chandler in the action he took upon it of discharging plaintiff from the work. Appeal of plaintiff dismissed with costs. Cross-appeal of defendants the Chandlers allowed with costs. Judgment for plaintiff set aside, and action dismissed as against all the defendants with costs.

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BOYD, C. MARCH, 6TH 1903.

CRERAR v. CANADIAN PACIFIC R. W. CO.

*Mechanics' Liens—Action to Enforce—Statement of Claim—Affidavit of Verification made by Solicitor as Agent — Indorsement of Address of Plaintiffs—Necessity for—Construction of Rules of Court.*

An appeal by plaintiffs from an order of the Judge of the District Court of Rainy River in a mechanics' lien action directing an amendment of the statement of claim, and a cross-appeal by defendants Vigeon Brothers from the same order in so far as it refused to set aside the statement of claim because not verified by affidavit of plaintiffs, and upon another ground which was not pressed.

J. H. Spence, for plaintiffs.

H. L. Drayton, for defendants Vigeon Brothers.

BOYD, C.—Having regard to the canons of construction

laid down in Bikerton v. Dakin, 20 O. R. 192, 695, and seeing that the object of the legislation has been to simplify the procedure, I think the learned Judge rightly ruled that the affidavit of verification by the solicitor, as agent, was a sufficient compliance with the statute. . . . Forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been "substantial compliance," to use the phrase found in sec. 19 (1), with the scheme of the Act.

The learned Judge, however, has directed that plaintiff amend the statement of claim by indorsing therein "the particulars of the plaintiffs' residence as required by the Rules in that behalf." The ten plaintiffs are day labourers who did work for defendants on the railway in the district of Rainy River, and it is set forth in the statement of claim that they reside in that district. The plaintiffs' solicitor says in an affidavit that they move about from place to place as they obtain employment, and it is said that defendants were present during the carrying on of the work and have knowledge of who the plaintiffs are, and that the information given as to residence is as much as is practically possible. It is evident that these plaintiffs had no fixed place of abode, to which reference could be made in order to bind them. . . . It is not desirable nor is it needful that all the niceties of practice in due sequence should attach to the summary procedure provided for the realization of workmen's liens. .

In the case of a writ of summons, where the plaintiff sues by solicitor, the writ is to be indorsed with the solicitor's name and place of business: Rule 134. True it is that by the practice in the High Court and by the incorporation of the form of writ, which is not a part of the Rule, the address of plaintiff himself is also to be given (i.e., his place of residence). But the Rules themselves only require that to be given when plaintiff sues in person: Rule 135. The Rule which applies to this case is Rule 136: "Indorsements similar to those mentioned in the two next preceding Rules shall also be made upon every writ issued and upon every document by which proceedings are commenced in cases where proceedings are commenced otherwise than by writ of summons." This statement of claim under R. S. O. ch. 153, sec. 31, contains the name and address of the solicitor by whom it is issued and filed, and that meets the legitimate requirements of Rule 136. It was suggested that the address of plaintiffs should be set forth in order to facilitate the obtaining security for costs in a proper case (see Rule 1199), and that is probably the reason why the practice in the High Court has settled into

this form, even when the solicitor acts for the litigant. But, according to the scheme of the Rules, it is from the solicitor whose name is indorsed in the process that the information is to be derived as to the occupation, place of abode (and even street and house number) of the plaintiff in cases where the defendant is at a loss to know his opponent or suspects his absence from the country: see Rule 143. . . . The plaintiffs have a shifting residence, and, as it appears that all are within the limits of the district, I do not think the action should be stayed till more precise local information is given.

I allow the appeal with costs in cause to plaintiffs.

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MARCH 6TH, 1903.

DIVISIONAL COURT.

## LAWRENCE v. TOWN OF OWEN SOUND.

*Water and Watercourses — Municipal Corporation — Damming Stream without By-law—Finding of Liability—Reference as to Damages—Costs up to Hearing—Trespass to land.*

Appeal by defendants from judgment of FERGUSON, J. (1 O. W. R. 559) on the question of costs.

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

J. H. Moss, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The action is for damming a stream and thereby diverting its waters upon plaintiff's land and causing him damage. The fact of the diversion of the stream and of damage to plaintiff is shewn, and, by consent, the trial Judge having found that plaintiff was entitled to proceed by action and not for compensation under the Municipal Act, the question of damages was referred to a County Judge. The defendants had paid $50 into Court by way of amends, and plaintiff had refused to accept the amount in satisfaction of his claim. Defendants contended that the trial Judge, under sec. 470 of the Municipal Act, was bound to reserve the question of costs until the result of the reference should be known, instead of giving plaintiff costs of the action to trial at once. The case does not fall within sec. 470. That section applies only to actions brought to recover damages for alleged negligence on the part of the municipality. Here the municipality acted without a by-law. They had, therefore, no right to do the act complained of, and it was a trespass. It is not for doing a rightful act negligently that the action is brought, but for doing a wrongful act. Appeal dismissed with costs.

MARCH 6TH, 1903.

C.A.

## RE LENNOX PROVINCIAL ELECTION.

## PERRY v. CARSCALLAN.

*Parliamentary Elections—Corrupt Practices—Dismissal of Charges against Respondent and others—Concurrent Findings of Both Trial Judges—Disagreement of Trial Judges—Right of Appeal to Court of Appeal—Construction of Ontario Election Act and Ontario Controverted Elections Act.*

Appeal by petitioners under the Ontario Controverted Elections Act from the judgments of the trial Judges, OSLER and MACLENNAN, JJ.A. (1 O. W. R. 810).

The trial Judges certified that in the result of the trial the petition was dismissed with costs; that they disagreed as to whether the respondent was duly returned or elected, in that they did not agree in a finding upon the charge that the respondent was personally guilty of a corrupt practice in paying money to one F. B. Whisken to induce him to vote for the respondent.

The appellants limited the subject of their appeal to 5 charges, Nos. 22, 52, 43, 29, and 30.

No. 22 was the charge upon which the Judges disagreed.

No. 52 charged the respondent, his financial agent, and other persons with hiring and paying or promising to pay for vehicles to convey voters to and from the polls on election day. The judges agreed in dismissing it.

No. 43 charged that on the day of the election one James Wilson, an agent of the respondent, paid $1 to one F. W. Parkinson in order to induce him to vote for the respondent. The Judges agreed in dismissing the charge, but differed as to the grounds.

No. 29 charged that on the day of the election the respondent, his financial agent, and another person, paid a sum of money or other consideration to one R. T. Jones in order to induce him to vote for the respondent. The Judges agreed in dismissing it.

No. 30 charged that on the day of the election the respondent, his financial agent, and another person, paid a sum of money to one John Smith in order to induce him to vote for the respondent. The Judges agreed in dismissing the charge.

The appeal came on for hearing before MOSS, C.J.O., GARROW and MACLAREN, JJ.A., MACMAHON and MEREDITH, JJ.

G. H. Watson, K.C., and Grayson Smith, for petitioners.

W. Cassels, K.C., and E. Bristol, for respondent, objected to the jurisdiction of the Court to entertain the appeal in respect of any of the charges.

Argument was heard on the whole case subject to the objection.

Moss, C.J.O.—The point is taken that the establishment of the charges forming the subject of the appeal involves the disqualification of the respondent and of other persons, and subjects them to disabilities and penalties for corrupt practices, and that a candidate or other person who has not been found guilty of a corrupt practice by the two trial Judges has at least two shields against an appeal to this Court.

By sec. 57 (6) of the Controverted Elections Act it is enacted that there shall be no appeal from a decision of the Judges finding that a candidate or other person has not been guilty of corrupt practices. By the other it is enacted that no candidate or other person is to be disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice without the concurrent judgment to that effect of the two Judges by whom the election petition is tried.

The appellants scarcely contended that if the trial Judges had agreed in their finding in respect of all the charges an appeal could nevertheless be entertained. . . . But the argument is, that the trial Judges having disagreed is respect of at least one charge, there is no decision as regards it, and an appeal in such cases is expressly provided for by sec. 56 of the Controverted Elections Act, so that there is certainly jurisdiction to entertain an appeal on that charge, and, there being jurisdiction to that extent, the whole case is open under secs. 66, 67, 68 and 69 of the Controverted Elections Act, unless the appellants choose to limit the appeal as provided in sec. 67. . .

Assuming that a disagreement is not to be considered a decision of the Judges, their concurrent judgment is most certainly a decision; and when there is such a decision finding a candidate or other person not guilty of corrupt practices, there is nothing in the legislation to enable the Court of Appeal to sit in judgment upon that decision in the face of sec. 57 (6) of the Controverted Elections Act.

Section 66, enabling a party who is dissatisfied with the decision of the Judges on any question of law or fact to appeal against the same, must be read in connection with sec. 57 (6), which it was not contended to override. In fact, as appears from the history of legislation, sec. 57 (6) is the

later enactment, and was added to the law while sec. 66 was in force, and if there is an inconsistency the latter must give way: Dean of Ely v. Bliss, 5 Beav. 574, 584. Sections 66 and 67 prescribe the procedure to be adopted where a right of appeal exists; they do not touch the right itself. And so with the next succeeding sections. They deal with the power of the Court in a case properly before it. I think it is clear that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges in which otherwise there is no appeal.

The question remains whether in respect of a charge of corrupt practices as to which the Judges have disagreed there is a right of appeal.

The legislation bearing on this question is in a state of confusion owing largely, if not entirely, to the changes introduced by 47 Vict. ch. 4, and to the manner in which some of its provisions were dealt with in the subsequent revisions of the statutes.

There are portions of the Ontario Controverted Elections Act (e.g., secs. 56 and 57 (2) ) which, standing alone, would seem to confer a general right of appeal in cases of disagreement between Judges. But they must be read not only with the other provisions of the same Act, but also with the provisions of the Election Act which are in pari materia.

The language of sub-sec. (5) of sec. 57 is very wide. It provides that if the Judges differ as to any matter on which under secs. 172 and 174 of the Ontario Election Act *or otherwise* any disqualification, disability, or liability to a penalty, depends, they shall certify such difference, and the candidate shall not be disqualified or subject to a disability or penalty. In this sub-section the words "subject to appeal," which are found in sub-secs. (2) and (3), do not occur—a plain intimation that, in the cases therein provided for, there is to be no appeal. What are the cases? Sections 172 and 174 are the provisions of the Election Act which under certain circumstances operate the one to save the election and the other to relieve the candidate from disqualification, disability, or penalty.

As to cases within these sections, there is no appeal from a disagreement. Then what is the force of the words "or otherwise" if not to extend the same effect to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice?

This sub-section covers the case of a candidate, but does not extend to others. But sub-sec. (6) deals with the cases of both candidates and others.

Sec. 171 (2) is still wider and more comprehensive. While it does not in terms exclude an appeal, it is apparent that in the case of a disagreement between the trial Judges a judgment in appeal finding a candidate or other person guilty of corrupt practices must subject him to disqualification or other disability or penalty without the concurrent judgment to that effect to the two trial Judges.

It is argued that the finding of the Court of Appeal does not necessarily lead to disqualification, disability, or penalty; that the finding is merely a judgment upon the charge of corrupt practices, involving, it may be, the avoidance of the election, but not the infliction of the punishment upon the guilty parties; in other words, that the finding of the Court may avoid the election under sec. 171 (1), but not disqualify under sec. 173. This apparently anomalous result may happen where sec. 174 can be applied. But there is nothing on which to base a like result where the circumstances do not warrant the application of that section. And it must be borne in mind that the provisions of sec. 171 (2) are expressly made to apply to 171 (1) and to the conditions and circumstances therein mentioned as well as to other matters on which corrupt practices or the consequences thereof in any way depend. So that the concurrent judgment of the two trial Judges must be present, not only for the purposes of disqualification, disability, or penalty, but for the purposes of avoiding the election for corrupt practices.

It is not unlikely that . . . sub-sec. (2) of sec. 171 was misplaced in the revision of the statutes, but we must now take it where it is found and apply it as directed.

Section 57 of the Controverted Elections Act, and sec. 172 (2) of the Ontario Election Act had their origin in 47 Vict. ch. 4, known as the Election Law Amendment Act, 1884. As the law stood when it was passed, allegations of corrupt practices against a candidate or his agents were required to be tried by two of the Judges of the rota sitting together, and no candidate was to be unseated for corrupt practices, nor was any person to be declared guilty of a corrupt practice, except upon the decision of the two Judges jointly or of the Court of Appeal: R. S. O. 1877 ch. 11, sec. 38. So that the Legislature at that time contemplated an appeal even in the case of a concurrent judgment.

The effect of 47 Vict. ch. 4 is now to be considered. In sec. 10 the provisions which are now sec. 57 of the Controverted Elections Act were for the first time enacted, and thereby appeals were limited to a considerable extent. By sec. 33, sec. 38 of R. S. O. 1877 ch. 11 was amended so as

to provide that no person should be declared guilty of a corrupt practice *or disqualified* except upon the decision of the two Judges jointly or by the Court of Appeal. Having regard to sub-sec. (6) of sec. 10, the last six words must have been retained through inadvertence, for sub-sec. (6) declared that there should be no appeal from a decision of the Judges finding a candidate or other person not guilty of corrupt practices.

Then came sec. 48, enacting amongst other things that "to remove doubts it is declared that it has been and is the policy of the election law and the intention and meaning of the several statutes in that behalf that . . . no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice or an alleged corrupt practice without the concurrent judgment to that effect of the two Judges by whom the election petition is tried." (See South Renfrew Case, 1 Ont. Elec. Cas. 70, 85, 372.)

Section 48 further declared that "this applies to sec. 162 of the Election Act and the conditions and circumstances therein mentioned as well as to other matters on which corrupt practices or the consequences thereof depend." Section 162 was at that date the exculpatory clause . . . .

And lastly, sec. 48 further declared that in case of an election being set aside and a new one had to the same Legislative Assembly or otherwise, the new election could not be avoided by setting up corrupt acts or practices by the candidate in or during the former election, or affecting the same, which were not set up and proved at the former trial, and so adjudged by the two Judges at the former trial or by the Court of Appeal before the subsequent election as by law to involve such disqualification, disability, or penalty. . . .

These inconsistent and conflicting provisions were made no plainer by the declarations in sec. 18 of 48 Vict. ch. 2, passed in 1885, but omitted, along with sll the succeeding sections of that Act, from the Revised Statutes of 1887, and never since re-elected.

Section 48 of 47 Vict. ch. 4 was also omitted from the revision of 1887. It is not necessary to consider in what condition its omission left the law, for in 1895 it was restored to the statute book by sec. 18 of 58 Vict. ch. 4, which in part enacted that "notwithstanding the omission of section 48 of chapter 4. . from the Revised Statutes of Ontario 1887, such section is now and has been in force from the time of the passing thereof." This enactment was passed without noticing apparently that in the meantime sec. 162 of the Election Act, to which sec. 48 referred, had become sec. 165, and sec. 158

had become sec. 162, of R. S. O. 1887 ch. 9. In the revision of 1897 sec. 162 became sec. 171 (1), and sec. 165 became sec. 174, and, properly speaking, the part of the revived sec. 48 which referred to sec. 162, ought to have been attached to sec. 174, but, instead, it was made sec. 171 (2), and was made to refer to sec. 171 (1). The effect is, as before pointed out, that its provisions are expressly made to apply not only to cases of disqualification, disability, and penalty, but also to cases of avoidance of the election for corrupt practices, and it follows that a judgment of the Court of Appeal in a case of disagreement of the Judges on a question of corrupt practice, holding the corrupt practice proven, would bring about a result which the Election Act says shall not be without the concurrent judgment of the two trial Judges.

It may be conjectured that the provisions of sec. 171 (2) were intended to apply only to the trial, and were not intended to touch the proceedings in appeal. But the intention is not so clearly expressed as to enable us to give it that effect, or to hold, in face of the plain language of that sub-section and of sub-secs. (5) and (6) of sec. 57 of the Controverted Elections Act, that the Court has jurisdiction, upon an appeal against a candidate or other person charged with corrupt practices, to render a decision not arrived at by the joint judgment of the trial Judges.

Although there are to be found in various sections of the legislation references pointing to an appeal in case of disagreement in charges of corrupt practices, they are not sufficiently clear or definite to overcome the distinct declarations of the other sections. Therefore, from the cases of disagreement in which an appeal is provided for there must be excepted the cases involving charges of corrupt practices.

The result is, that in this case the appeal does not lie in respect of any of the charges, and it must be dismissed. The costs will follow the result.

Garrow, J.A., gave reasons in writing for the same conclusion, in which MacMahon, J., concurred.

Meredith, J., also gave reasons in writing for the same conclusion.

Maclaren, J.A., gave reasons in writing for agreeing in the conclusion as to cases of corrupt practices which the trial Judges agreed in dismissing; but dissented as regards cases in which the trial Judges disagreed.

MARCH 6TH, 1903.

C.A.

## RE SOUTH OXFORD PROVINCIAL ELECTION.

## PATIENCE v. SUTHERLAND.

*Parliamentary Elections—Corrupt Practices—Disagreement of Trial Judges as to Charges against Respondent and Another—Right of Appeal to Court of Appeal—Construction of Ontario Election Act and Ontario Controverted Elections Act—Hiring Vehicles—Evidence.*

Appeal by petitioners and cross-appeal by the respondent, under the Ontario Controverted Elections Act, from the judgments of the trial Judges, STREET and BRITTON, JJ. (1 O. W. R. 795).

The appeal of the petitioners was in respect of two charges of corrupt practices upon which the trial Judges disagreed and certified their disagreement. One charge was a personal one against the respondent, the other a charge against an agent.

The respondent's cross-appeal was from the finding of the trial Judges that two charges of hiring vehicles for the purpose of conveying voters on election day were proved, viz., hiring from one Skinner and hiring from one Walker.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

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

S. H. Blake, K.C., and E. Bristol, for the respondent.

The same objection to the jurisdiction of the Court to hear the petitioners' appeal was urged as in the Lennox case, ante.

MOSS, C.J.O.—For the reasons which I have endeavoured to state in the Lennox case (ante), I think there is no jurisdiction to entertain the petitioners' appeal and it must be dismissed without costs.

The cross-appeal remains to be disposed of. . . . As to the Skinner charge, there was a conflict of testimony between Skinner and the respondent's agent J. W. Patterson. The former deposed that in the conversation between Patterson and him with reference to furnishing the vehicles he told Patterson that the charge would be $5 each for the double rigs and $2.50 for the single, and that the latter said nothing—"he made no kick." On the other hand, Patterson deposed that he told Skinner that there was no pay in this,

and that this was agreed to. Neither of the trial Judges accepts this statement. Street, J., said that he did not either credit the statement that $5 was promised to Skinner or that there was any arrangement that he should not be paid at all. . . . Although there be no payment or no express promise to pay, there may yet be a hiring, and whether or not there was such hiring depends upon the circumstances and what took place between the parties. Skinner being a liveryman, whose business it is to hire vehicles for reward, the fact of his furnishing vehicles at Patterson's request would raise an inference, in the absence of anything to displace it, that they were to be paid for. And, in my opinion, the evidence fails to raise the contrary inference. Skinner's acts and conduct at the time and afterwards were consistent with his testimony. He charged the vehicles in his pass-book, at the prices he said he spoke of, against Mr. J. L. Patterson, whom he knew to be the respondent's financial agent, and he afterwards rendered him an account for them. He furnished vehicles for the same purpose to the agent of Dr. McKay, the opposing candidate, and charged and was paid for them. He was subjected to a searching cross-examination, but on the whole he adhered to his account of what had occurred between him and J. W. Patterson, and on the crucial point of his being told there was to be no pay, the trial Judges have accepted his statement and have rejected Patterson's. I am unable to say that they were wrong, and I think their conclusion should be upheld.

But as regards the Walker charge, I think upon the evidence that the inference of hiring was rebutted. There was no substantial conflict of testimony between Walker and J. W. Patterson as to what occurred between them. It is true that in one place Walker says he expected to get paid some time, but that was only his own expectation. The question is whether, in view of what actually took place, he could recover pay for them. The result of the evidence appears to me to be that he was willing to let the vehicles go without pay, that he in effect volunteered them, and that they were furnished on these terms; and I think this charge ought to have been dismissed.

The result is that the cross-appeal fails as to one charge and succeeds as to the other. Success being divided, there will be no costs of the cross-appeal.

OSLER, J. A., gave reasons in writing for coming to the conclusion that the petitioners' appeal did not lie. He expressed the opinion, however, that the disposition which Street, J., would have made of both the charges as to which

the trial Judges disagreed was that which commended itself as the proper one in a case of this kind.

On the Skinner and Walker charges OSLER, J. A., agreed with the views expressed by MOSS, C.J.O.

MACLENNAN and GARROW, JJ.A., orally concurred.

MACLAREN, J.A., dissented to the same extent as in the Lennox case, ante.

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MARCH 6TH, 1903.

C.A.

## RE TOWNSHIP OF ELMA AND TOWNSHIP OF WALLACE.

*Municipal Corporations—Drainage—Assessment of Lands in Adjoining Township—Outlet or Injuring Liability.*

An appeal by the corporation of the township of Elma from the judgment or decision of the Referee under the Drainage Act upon an appeal to him by the corporation of the township of Wallace from the report of John Roger, an engineer appointed by Elma to make an examination and report in respect of a scheme of drainage petitioned for by certain land-owners in the township.

The engineer by his report fixed the entire cost of the whole work at $21,117.42, and assessed roads and lands in Wallace for $2, 717.92.

On appeal by Wallace to the Referee he determined that the roads and lands in that township were not liable to contribute to the drainage works in question, and ordered that the assessments made of such roads and lands be set aside, and that the drainage work proposed and provided for in the report be not proceeded with by Elma at the expense of Wallace.

The grounds taken by Wallace were, that the scheme of drainage work in question was unnecessary so far as Wallace was concerned, and was not a benefit, that to be effectual it should provide for a better outlet by improving the north branch of the Maitland river, flowing south-west from Listowel; that it did not provide a sufficient outlet; that the proportion assessed against Wallace was unjust, unequal, and excessive; and that the petition and preliminary proceedings were insufficient to warrant the action taken by Elma and to warrant the report.

At the hearing before the Referee it was agreed that the inquiry should be restricted for the present to the question

of the engineering feasibility of the drainage work, and the legality of the scheme, leaving the adjustment of the assessment and any other questions to be dealt with at a later date in case the report was upheld as against the principal objections.

The question of law for decision was, whether the roads and lands in Wallace were assessable either for outlet or injuring liability. There was no assessment for benefit, and it was not asserted that any benefit could be derived by Wallace.

The Referee held that the roads and lands in Wallace could not be legally assessed either for injuring or outlet liability.

A. B. Aylesworth, K.C., and H. B. Morphy, Listowel, for appellants.

D. Guthrie, K.C., and J. P. Mabee, K.C., for corporation of Wallace.

The judgment of the court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—I am of opinion that the Referee's conclusion is right and that his decision should be affirmed.

No part of the drainage work is in the township of Wallace. The nearest point of the work in question is nine miles from the boundary of Wallace, and there is a fall of 79 feet from Wallace to the nearest point of the work. The evidence shews that there is an extensive area between these points through which the flow of the north branch is to go on as before. This part of the stream is not touched by the drainage scheme. None of the proposed work is to be done upon it. It has not been the subject of improvement or change under any drainage scheme. It is a natural watercourse flowing through and from Wallace, and carrying with it in its ordinary flow the waters which it collects in its course through Wallace. Before these waters reach the boundary of Wallace they have been collected and gathered in the stream in consequence of the elevation and trend of the lands leading the surface flow to it.

Owners of lands have drained them by means of tile and other under drains, as well as by surface drains, and the waters thus collected find their way to the stream. This is a right which as land-owners they may lawfully exercise, and while they do so reasonably they are not subject to prevention or interference from others down the stream: Rawstron v. Taylor, 11 Ex 369-383; Angell on Watercourses, sec. 108 (a) to 108 (s); Waffle v. New York Central R. W. Co., 58 N. Y. 11; Foot v. Bronson, 4 Lans. 47.

There is no artificial work connecting these waters or the stream through which they flow with the proposed drainage works. Their flow from Wallace is not thereby facilitated or impeded. The township of Wallace needed no outlet superior to that which nature provided, and none is supplied by these works. And no artificial works having been introduced which have had the effect of bringing the flow upon the lands below, the claim for injuring liability cannot be sustained.

The appeal should be dismissed with costs.

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MARCH 6TH, 1903.

C.A.

## RE TOWNSHIP OF CAMDEN AND TOWN OF DRESDEN.

*Municipal Corporations—Drainage—Culvert in Highway of Town—Part of Existing Drain—Reconstruction—Cost of, how Borne.*

Appeal by the corporation of the township of Camden from the judgment or decision of the Drainage Referee dismissing an appeal from the report of an engineer under the Drainage Act.

M. Wilson, K.C., for appellants.

D. L. McCarthy, for respondents, the corporation of the town of Dresden.

The judgment of the Court (MOSS, C.J.O., OSLER and MACLAREN, J.A.) was delivered by

OSLER, J.A.—I am of opinion that the appeal should be dismissed.

The culvert across the street in the town of Dresden the renewal or reconstruction of which the report in question recommends was in fact a part of the existing drainage work known as the Stephens or Henson drain. It had been adopted as the outlet for that drain, which could not lawfully have been done on any other footing or for any other reason than as being part of Camden's drainage scheme as established by that work. Dresden was not obliged to receive or admit within its municipal boundaries the waters brought down out of Camden by the Henson drain, unless they were brought there under the authority of some lawful proceeding under the Drainage Act, as Camden had no right to discharge its waters into or upon the road of Dresden without providing an outlet therefore. The ultimate outlet was the Sydenham river, which these waters would not reach without making use of the culvert or of some other passage across

the road as part of the drainage scheme and work, and Camden adopted Dresden's culvert for that purpose.

I do not think it matters (even were it really the case) that none of the money raised for the construction of the original work was expended on the culvert. Used as it was, if it became out of repair by reason of the discharge of Camden's waters, or if it does not now act as a proper and sufficient outlet therefor to the river, it was within the jurisdiction of the engineer to report, as he has done, a scheme for its repair and improvement, the principal cost of which ought justly to be borne by Camden.

I agree, therefore, with the Drainage Referee that the culvert is a part of the entire drainage work, and that Camden cannot successfully contend that it is merely a part of Dresden's highway, the cost of the maintenance and repair of which should be borne by that municipality.

Appeal dismissed with costs.

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MARCH 6TH, 1903

C.A.

## BURNETT v. NOTT.

*Fraud and Misrepresentation—Sale of Shares—Action for Deceit—Knowledge of Defendant—Reliance of Plaintiff on Statements.*

This was an action of deceit in which the defendant was charged with making certain representations to the plaintiff in order to induce him to subscribe for shares in the capital stock of the Co-operative Cycle and Motor Company, Limited, and to pay therefor the sum of $1,000.

The defendant appealed from the judgment of MEREDITH, J., delivered after trial without a jury, finding the defendant liable and awarding the plaintiff $1,000 damages.

G. H. Watson, K.C., and S. C. Smoke, for appellant.

A. B. Aylesworth, K.C., and E. A. Lancaster, St. Catharines, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—The plaintiff charged that in order to induce him to subscribe and pay for the shares the defendant falsely and fraudulently represented to the plaintiff that the investment in such shares was a first-rate investment, and sure to pay good dividends, that a dividend of 7 per cent. at least was secured to the shareholders, that the company was sure to prosper and the shareholders were sure of good profits. and that the company's financial position was very strong

Plaintiff further charged that at the time of making these representations the defendant produced and delivered to the plaintiff a statement in writing which the defendant represented was a true and correct statement of the affairs of the company, and which stated that there was a surplus of assets over liabilities of $51,933.66, and shewed that the actual surplus, without taking into account as assets anything for moneys to be paid by shareholders for stock, was at least $56,500. Plaintiff further charged that these representations were false to defendant's knowledge, and that the plaintiff, relying upon them, was induced to subscribe for 20 shares of the company's stock and to pay therefor the sum of $1,000, that the company had soon thereafter gone into liquidation, and that the shares were worthless.

The defence was a denial of the charges.

The learned trial Judge found that, before the plaintiff subscribed for the shares, and in order to induce him to do so, the defendant represented to him (1) that the company had received more orders for bicycles than they were able to fill, (2) that the plaintiff would have permanent employment in the company's business, (3) that the company had a surplus of $51,000 of assets over liabilities, and (4) that the plaintiff would have 7 per cent. interest secured to him upon the investment.

He further found that these representations were untrue, to the defendant's knowledge, and that the plaintiff acted upon them in subscribing and paying for the shares.

The statement of claim did not specify the first of these representations, but the plaintiff's evidence with regard to it was given without objection, and the defendant was examined with reference to it. The significance of its omission from the statement of claim was properly made the subject of comment as bearing upon the general truthfulness of the plaintiff's statements as to what occurred between him and the defendant on the occasion when the representations were alleged to have been made. But, judging between the testimony of the two parties and having regard to the circumstances disclosed in the other evidence, there is no reason for differing from the learned trial Judge's estimate of the plaintiff's testimony.

The evidence supports the learned Judge's findings of fact with regard to all the representations, but the plaintiff needs only to rely upon the representation that the company had a surplus of $51,000 assets over liabilities. This representation, which was made by the production to the plaintiff of a statement in writing purporting to shew a surplus of

$51,933.66, backed by the oral assurances of the defendant that the statement was correct and true, is sufficient in itself to sustain the judgment. That it was a statement of a material fact goes almost without saying. And, as the learned trial Judge observed, it is difficult to suppose that it could have been honestly made. The defendant's attempted explanation of the presence of $51,993.66 in the statement, where at most no more than $5,000 should have been shewn, is very unsatisfactory, and leads to the conviction that he knowingly used the larger sum in order to lead to the impression which the plaintiff gained that the business was so prosperous that the shareholders had assets of the value of $51,993.66 over and above all liabilities, in addition to their subscribed shares in the capital stock of the company.

The defendant admitted at the trial that the amount of surplus was wrongly stated, and that at most it should not have exceeded $6,000.

The item of "Bicycles shipped to date 1,200 at $35" was calculated to produce, and in fact did produce the impression on the plaintiff's mind that so many bicycles had been sold at that price, whereas in fact they had only been sent to various agencies and were in stock and unsold. The defendant endeavoured to justify by saying that he explained to the plaintiff the system on which this business was being done. But this is wholly inconsistent with his positive and reiterated assertion that on the occasion of the interview at which the plaintiff subscribed for the shares, the statement was not before them, and was not gone over, and that he never gave it to the plaintiff or explained it to him at any time, and is quite opposed to the other testimony.

The item of amount of notes on hand for stock subscribed in the statement, should not have appeared on the list of assets, or, if inserted, should have been offset by the shares represented by the notes, and the defendant was well aware of this. And his testimony shews that he knew quite well that there was no such surplus as the statement shewed.

The plaintiff was unversed in business affairs, and was not assisted by Mr. Varley, who did not assume to act as his solicitor or to advise him in the transaction. His testimony is that he went to the Co-operative Cycle and Motor Company's establishment only for the purpose of seeing about securing employment, that the matter of subscribing for shares had not been mentioned to him, and that it was first spoken of by the defendant. In this he is not contradicted, although it would uppear that before the interview Mr. Varley and the defendant had been in communication about the

plaintiff, and the statement in question had been prepared at the suggestion of Mr. Varley in anticipation of an interview.

The plaintiff relied upon the statement and the representations of the defendant in regard to it, and was induced thereby to subscribe and pay for the shares.

The judgment should be affirmed with costs.

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MARCH 6TH, 1903.

C.A.

## McCAUGHERTY v. GUTTA PERCHA AND RUBBER CO.

*Master and Servant—Injury to Servant—Dangerous Machinery — Findings of Jury — Want of Guard— Opinion Evidence—Withdrawal from Jury— Defect in Way— Unevenness of Floor— Workmen's Compensation Act.*

Appeal by defendants from judgment of STREET, J., upon the findings of the jury, in an action tried at Toronto, in favour of plaintiff for $2,000 damages.

The plaintiff, a lad of 16, was hired by defendants in April, 1900, as a workman in their rubber goods factory, to assist the other workmen in the mill room, a large room in which were placed a number of machines called calenders. These were heavy, fixed machines, made up of a series of rollers 42 inches long and 18 inches in diameter, revolving on each other in a heavy iron frame, and through and over these rollers the rubber passes in the process of manufacture. In part of the machine a workman is placed armed with a knife, whose duty it is to prick air bubbles and remove dirt or other foreign material as it appears on the face of the rollers as they revolve. Each roller makes about seven revolutions a minute. The frame or bed plate of one of these machines was about nine inches wide, and was elevated above the surface of the floor in front of the machine by from half to three-quarters of an inch. The distance out from the rollers themselves was 15 inches. It was customary in defendants' factory for the workmen to sit in front of the machine while engaged in watching the rollers, and this was to the knowledge of and without objection by defendants' foreman in charge. No fixed or permanent seats were supplied, but small wooden packing boxes of about 12 inches by 20 were used; and on such a box, resting on the iron bed plate of the machine described, plaintiff was sitting when he was injured. A fellow-workman, who had been engaged in watching the rollers, desired to leave a few minutes before closing time, and requested plaintiff to take his place, which plaintiff did. He sat down upon the box and commenced

operations, but within a few minutes he slipped forward, owing, as he said, to the box slipping on the smooth iron surface of the bed-plate, and his hands were caught between the rollers, which were exposed and unguarded, and he lost his left hand and all the fingers of his right hand.

He alleged a cause of action at common law, under the Factories Act, and under the Workmen's Compensation Act.

At the trial the only expert witness examined on behalf of plaintiff was one McLennan, a journeyman machinist, with no experience in the use or manufacture of calenders, who pronounced the machine dangerous and propounded a guard as a protection.

The defendants called seven experts who concurred in stating that the machine in question was of the usual kind, and that in no case had any of them ever seen a machine of the kind with a guard, and there was a practical concurrence among them that a guard was not necessary, and that it would seriously interfere with the ordinary use of the machine.

There was no evidence that any accident had ever before happened from the use of this form of machine which would have been prevented by the presence of a guard.

The following were the questions put to the jury and their answers:

1. Was plaintiff obeying the general orders given him by the foreman in working at this machine? Yes. 2. Was the machine a dangerous machine, assuming ordinary precaution on the part of the operator? Yes. 3. Were the rollers securely guarded so far as practicable, taking into consideration the use to which the machine was intended to be put? No. 4. Was the accident to plaintiff due to any defect in the condition or arrangement of the works of defendants? Yes. 5. If so, what was such defect? Ans.—Want of proper seat, lack of guard, unevenness of the floor. 6. Could plaintiff, by the exercise of ordinary care, have avoided the accident? No. 7. Did defendants use reasonable care to furnish proper means of working at the machine so as to protect their servants working upon it against unnecessary risks? No: in that they did not provide a seat for operator, and did not guard the roll. The damages were assessed at $2,000.

S. H. Blake, K.C., and R. H. Greer, for appellants.

W. Nesbitt, K.C., and R. McKay, for plaintiff.

The judgment of the Court (Moss, C.J.O., Osler, Garrow, and Maclaren, JJ.A.) was delivered by

Garrow, J.A.—Defendants urge that there was no evidence of negligence proper to submit to the jury, or that in

any event the verdict is contrary to the weight of evidence, and rely very strongly on the rule acted on in Jackson v. Grand Trunk R. W. Co., 2 O. L. R. 689, since affirmed by the Supreme Court—which, after all, was not new, but an application to the facts in that case of the old and well known rule that it is always for the Judge to determine at the close of the case, as matter of law, whether there are any facts proved or evidence given from which the jury, acting reasonably, can infer negligence. If, in his opinion, there is no such proof, his duty, as I understand it, is to withdraw the case from the jury and deal with it himself.

In so far as the question of a guard is concerned, this case seems to me to have been an eminently proper one for the application of the same rule. There were, I think, at the close of the case, no facts in evidence from which a jury, acting reasonably, could infer negligence by reason of defendants' failure to guard. Indeed, it is to me a matter of very considerable doubt whether the witness McLennan was examinable at all as an expert and entitled to give his opinion in that character. Opinion evidence in this connection is only admissible "whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance:" 1 Sm. L. C., 10th ed., p. 491. But this witness frankly admits his absolute ignorance of such machines as that in question, although he had some knowledge of machinery in a general way. But, whether strictly an expert or not, it is beyond question that the evidence given by defendants on this subject completely overwhelmed what little had been stated by McLennan. . . . The master is not an insurer, but is only bound to the exercise of reasonable care, and, in my opinion, he has acquitted himself of his duty in this respect by supplying machines of a common and usual type, such as factories in the same business generally use. . . .

There remains for consideration the serious question of what I regard as the real cause of the injury, the unevenness of the floor directly in front of the machine, at the very spot where the workman, whether he stands or sits, must always be to do his work. The machine itself may not be in itself necessarily what is known as a dangerous one. . . . It is obviously important that the ways and approaches to such a machine should be reasonably free from all unnecessary obstacles likely to cause slips or stumblings of any kind. There was no necessity for the unevenness of the floor, in the requirements of the machinery, or at least none was proved. . . . A fixed seat would not have been possible, as the

evidence shews, but a four-legged removable stool to rest on each side of the band, or, better still, the levelling of the floor up to the band, would have, I think, prevented this accident. . . .

I think the cause of action is established within the provisions of sub-sec. 1 of sec. 3 of the Workmen's Compensation Act; that this branch of the case was amply supported by evidence, and could not have been withdrawn from the jury; and that the appeal must, therefore, be dismissed.

But, as the maximum sum recoverable under the Act is $1,500, the judgment must be reduced to that sum and costs of the action; and there should be no costs of this appeal.

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MARCH 6TH, 1903.

C.A.

## MUNRO v. TORONTO R. W. CO.

*Partition—Parties—Lease by Infant Tenant in Common—Repudiation—Partition by Deed among Tenants in Common—Position of Lessees.*

Appeal by defendants from order of a Divisional Court (4 O. L. R. 36, 1 O. W. R, 316) reversing the judgment of MEREDITH, C.J., at the trial (1 O. W. R. 25), in an action for possession of land, a partition, and other relief.

Plaintiff, while an infant, joined with an adult brother and sister in a lease of a property to the east of the city of Toronto, known as Munro Park, in which all three were tenants in common, for a period of ten years, to the defendants, who turned the property into a pleasure ground. Plaintiff came of age during the term, and at once repudiated the lease, and effected with his co-tenants a partition of the property, to which defendants were not parties. The Divisional Court held that the partition made could not be declared binding on the defendants, and that plaintiff's brother and sister were not necessary parties to a new partition between plaintiff and defendants, and ordered a partition for the rest of the term, and also allowed plaintiff mesne profits.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

J. Bicknell, K.C., for appellants.

C. Millar, for plaintiff.

MOSS, C.J.O.—The plaintiff has already made partition with his brother and sister, and as against them he needs no order of the Court to perfect his title to the centre parcel which has been conveyed to him in severalty. As respects defendants, his claim to partition rests upon the ground that

they and he are tenants in common of the parcel for the remainder of the term of the lease under which defendants hold.

The plaintiff refused to be bound by the lease, and if, instead of making partition by agreement and conveyance between himself and his brother and sister, to which defendants were not parties, he had come to the Court for partition, making defendants parties, he would have had no difficulty in obtaining a partition in severalty, and confining defendants' lease to the parcels allotted to his brother and sister. The position of the defendants would then have been that in place of being tenants of two undivided shares they would become the tenants of two divided shares. See Mason v. Keays, 78 L. T. R. 33. . . .

But when plaintiff chose to make partition without reference to the defendants, what is the effect as regards their respective interests?

If the partition was binding upon defendants, their tenancy under their lease would be restricted to the parcels allotted and conveyed to plaintiff's brother and sister, and plaintiff would hold his parcel free from the lease. . . .

Unless the effect of the language of the lease is to give to defendants a greater estate than they had before the conveyance by way of partition, they are only entitled to a leasehold interest in an undivided two-thirds of the whole land. And is not this the position in which plaintiff should be entitled to place them, they have declined to be bound by the partition unless on terms of plaintiff recognizing the lease as subsisting over his interest? Ought they to be permitted to claim as against him that the partition is binding on him, and that they are entitled to the benefit of the conveyance so far as it conveys to plaintiff's brother and sister? Or should they not be held obliged either to accept or reject it as a whole? . . . Unless defendants can insist on the conveyance, the plaintiff is entitled to a partition of the whole premises so as to set apart in severalty the two-thirds portion of the whole which the defendants may hold during the remainder of the term of their lease. And in order to accomplish this his brother and sister must be before the Court. . . . In my opinion, they are necessary parties at some stage of the proceedings, and I think that, under the circumstances of this case, they should be made parties before judgment is prounced. If there had been no conveyance between the co-tenants, and the plaintiff sought partition, the brother and sister would be necessary parties, and in the way in which the case is now to be looked at, and indeed in the

way in which the Divisional Court regarded it, the proceedings should be allowed to go on as if the plaintiff's rights were unaffected by the conveyance. And any order that may be necessary to put the matter in train for bringing about this result should be made.

On other grounds also, plaintiffs brother and sister appear to be necessary parties at some stage of the case.

The effect of a partition on a conveyance is to sever the reversion. The plaintiff's brother and sister then have each a reversion in severalty, and each should become entitled to an aliquot part of the rent issuing out of the parcel which he or she holds. And such remedies as they would have against the land under the lease, such, for example, as the right of re-entry for non-payment of rent, would be exercisable in severalty and not otherwise: R. S. O. ch. 170, sec. 9.

The plaintiff's brother and sister are entitled to be present and have a voice in the partition proceedings which will fix the parcels out of which they are to receive their portions of the rent, and will relieve another parcel entirely from all claim by them under the lease. It is certainly most desirable and convenient that they should be parties when these proceedings are taken.

Mason v. Keays (supra), Mildway v. Quicke, L. R. 20 Eq. 537, Foster on Joint Ownership, p. 124, Baring v. Nash, 1 V. & B. 551, referred to.

Appeal allowed and judgment of MEREDITH, C. J., restored.

The defendants are entitled to the costs of the motion to the Divisional Court and of the appeal.

The plaintiff is to have one month within which to add parties and amend in accordance with the judgment of Meredith, C. J.

GARROW, J. A., gave written reasons for coming to the same conclusion.

OSLER and MACLAREN, JJ. A., concurred orally.

MACLENNAN, J. A., dissented, giving reasons in writing.

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MARCH 6TH, 1903.

C. A.

ST. THOMAS GAS CO. v. DONLEY.

*Contract—Supply of Light to Building—Rate of Payment—Expiry of Contract—Continuance of Supply—Letter Stating New Terms —Acquiescence.*

Appeal by plaintiffs from order of MEREDITH, C. J., dismissing plaintiffs' appeal from the report of a local Master.

A. B. Aylesworth, K. C., and J. Farley, K.C., for appellants.

T. W. Crothers, St. Thomas, and A. Grant, St. Thomas for defendant.

The judgment of the Court (Moss, C. J. O., Osler, Maclennan, Garrow, Maclaren, JJ.A.) was delivered by

Osler, J. A.—The Master's finding cannot be said to rest upon the credit he has attached to any particular witness. He did not accept the evidence of defendant as establishing the agreement attempted to be set up by him as the result of his interview with the president of plaintiff company on 31st October or 1st November, nor did he accept the evidence of the latter as contradicting it. The question of liability was, therefore, at large, and rested upon the inferences which ought to have been drawn from the president's letter to defendant of 15th October, 1901, and the subsequent acts and conduct of the parties. Defendant used the electric light supplied by plaintiffs to his hotel, and they are entitled to be paid for it. The Master has held that the amount recoverable was to be ascertained as upon a quantum meruit, and, in the absence of any other evidence than the fact of user, it might not have been unreasonable to measure it by the rate of payment under the two years' contract which expired on the 1st November, 1901, and the Master in fact awarded a trifle more than this. Defendant had, however, neglected or refused to exercise the option of renewing his contract, and plaintiffs had given him notice in writing before he entered upon another year that they would thereafter charge him upon a meter measurement at the rate or 9 cents per thousand. This letter was never withdrawn, and the Master did not accept the defendant's statement of what occurred at the subsequent interview between him and the president. . . . Defendant thereafter continued to use the light supplied by plaintiffs throughout the hotel during the whole month of November. At the end of that month an account was rendered to him by plaintiffs in which he was charged upon the meter measurement and at the rate of 9 cents per thousand. He made no remonstrance, although he cut off the light from the upper part of his hotel . . . but continued to use the light in the rest of the hotel until the middle of December, when . . . he severed the plaintiffs' wires altogether and cut out their meter. It was proved that the rate charged by plaintiffs was a reasonable one, though larger than . . . defendant had been paying. I am . . . unable to see why this ought not to be regarded as the basis of liability. Having had notice before he began to use the light of what plaintiffs

meant to charge therefor, and having used it thereafter, . . . the onus rested upon him to establish clearly that plaintiffs had withdrawn the letter and left the rate open for subsequent arrangement. . . .

The appeal should be allowed with costs and judgment entered for plaintiffs for the amount payable on the footing I have mentioned.

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MARCH 6TH, 1903.

C.A.

## DOHERTY v. MILLERS AND MANUFACTURERS INS. CO.

*Fire Insurance—Mutual Plan—Annual Renewal—Proposal for Increased Premium — Non-acceptance — Condition of Payment in Advance.*

Appeal by plaintiffs from judgment of STREET, J. (4 O. L. R. 303, 1 O. W. R. 457), dismissing with costs an action brought by a firm of manufacturers at Clinton, Ontario, against the company which had insured their property against fire upon the mutual system by two policies for $20,000 and $10,000 respectively. A fire took place on the 16th November, 1901. Street, J., held that, under the events which happened, no contract existed between plaintiffs and defendants for an insurance for the year beginning 31st October, 1901.

G. F. Shepley, K.C., and W. Proudfoot, K.C., for appellants.

J. H. Moss and C. A. Moss for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—The plaintiffs' insurance with the defendants for the year 1900-1901 expired at noon on the 31st October, 1901, and I am of opinion that it was not thereafter renewed or continued.

If there was any renewal contract, when did it arise? Not on the 31st October, for defendants' letter of 28th October was not answered, nor was the renewal undertaking sent, nor the cash premium paid to them by plaintiffs as required by that letter. From 31st October to 6th November plaintiffs were uninsured. How does plaintiffs' letter of 6th November or defendants' reply thereto of 7th November alter the situation? In no respect that I can see. By the former plaintiffs merely proposed some modification of the new rate defendants were proposing to charge, and did not, as required

by their letter of 28th October, remit the new undertaking and cash premium. By defendants' letter of 7th November they were not leading plaintiffs to think they were insured or that they were giving him time for payment. They simply re-stated their position and adhered to it. . . . The plaintiffs, instead of paying the cash premium and sending the undertaking and thus closing a contract, postponed doing so and waited for a reply which they got on 12th November by defendants' letter of the 11th. The defendants were firm, and, in my opinion, both parties were then in exactly the same position they were in on the 1st November. Defendants had done absolutely nothing to lull plaintiffs into the belief or supposition that they were insured without payment of cash and delivery of undertaking. Plaintiffs remained silent until 18th November, when, without saying a word of the fact that a fire had occurred on the 16th November, they sent forward the undertaking and a marked cheque for the cash premium. . . .

If plaintiffs, not liking the new rates, had, on the 11th November, or at any time after the 31st October, made application to another company for insurance, they could truthfully have said, in answer to the usual question, that they were not insured in any other company, so far as these defendants are concerned.

Joyce v. Swann, 17 C. B. N. S. 84, and Ridgeway v. Wharton, 6 H. L. Cas., distinguished.

Appeal dismissed with costs.

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STREET, J. MARCH 6TH, 1903.

CHAMBERS.

## RE FOSTER.

*Will—Construction—Devises of Land—Charge of Debts—Mortgage Debts—Apportionment—Valuation—Costs.*

Motion by George Sparks, executor of will of William Robert Foster, for an order declaring the construction of certain parts of the will. Testator died 25th February, 1899. He was a farmer and left personalty consisting of farm stock and implements, furniture, cash, etc., valued at $1,295. His real estate consisted of the north half of lot 34 in the 2nd concession of Nepean, 100 acres, and the west quarter of lot 35 in the 3rd concession, 50 acres. The north half of 34 was subject to a mortgage for $800 dated 17th September, 1888, and that lot, along with the other, was also subject to a further mortgage dated 3rd April, 1897, for about $2,700. The testator's debts, apart from the mortgage debts, were

not stated, but it was shewn that the executor had paid $699.98 for debts and legal expenses out of the proceeds of the sale of the west quarter of lot 35, which was sold by the executor, with the approval of the official guardian, for $3,-100, and had also paid thereout $2,108.75 upon the $2,700 mortgage, leaving a balance of $291.27. John G. Foster, the the devisee of the north half of 34, gave the executor a bond to repay any part of the sum paid on the mortgage which a Court should declare him liable to pay. W. R. Foster, the devisee of the other lot, died intestate on the 21st March, 1900.

L. A. Smith, Ottawa, for the executor and the administrator of the estates of W. R. Foster and Isabella H. Foster.

J. Lorne McDougall, Ottawa, for John G. Foster.

C. J. R. Bethune, Ottawa, for infants.

N. Sparks, Ottawa, for other adults.

Street, J., held that by the Wills Act the real estate devised to W. R. Foster and J. G. Foster must, in the absence of the expression of a contrary intention in the will, be taken to have been devised subject to the payment of the mortgage debts upon it, each portion according to its value bearing a proportionate part of the whole of such debts; and a general direction that the testator's debts shall be paid out of his personal estate is not to be taken to be the expression of such contrary intention unless mortgage debts are expressly included in such direction. No contrary intention is to be found in this will. The two sons (the devisees) of the testator are directed to work together until all his just debts are paid. This is, in substance, a direction to them to pay his debts, and, coupled with the devise to them of a farm each, it creates a charge upon the farms of his just debts. That language was evidently intended to cover the debts other than the mortgage debts, and the result is, that testator has devised to each son a farm charged not only with its proportion of the mortgage debts, but with its proportion of his ordinary debts. The debts are to be charged upon the two parcels in proportion to their respective values. The price at which the west quarter of 35 was sold will be a guide as to its value, and the parties may be able to agree as to the value of the other lot, and so save the costs of a reference.

Costs of all parties of this application to be borne by the parcels in the same proportion as the debts. Costs of reference (if any) reserved, and any party insisting on a reference will do so at the risk of costs.

MEREDITH, C. J. MARCH 6TH, 1903.

TRIAL.

## WATEROUS ENGINE WORKS CO. v. LIVINGSTON.

*Sale of Goods—Conditional Sale—Property not to Pass till Payment of Price and other Indebtedness—Construction of Contract—Right of Vendors to Re-take Goods.*

Action to recover goods sold by plaintiffs to defendant.

W. S. Brewster, K.C., for plaintiffs.

I. F. Hellmuth, K.C., for defendant.

MEREDITH, C.J.—If the property in such of the goods as are mentioned in the order given by defendant to plaintiffs on 13th September, 1900, was not to pass to defendant until he had paid not only for these goods but any other indebtedness which he might incur to plaintiffs at any time before all the goods which were supplied under that order were paid for, plaintiffs are entitled to succeed as to all the machinery and other articles described in the statement of claim which are mentioned in the order.

According to the provisions of the order, the property in the goods which defendant ordered was not to pass to him "until full payment of the purchase price and interest . . . or any other account incurred during the currency of this agreement."

The effect of this term of the agreement is, I think, to prevent the property in any of the goods which were furnished to defendant in pursuance of the agreement passing to him until he had paid, not only the purchase price of these goods, but also any other indebtedness which he might incur to plaintiffs at any time before delivery of the goods which were ordered had been completed. . . .

In this view it is unnecessary to consider the questions as to the application of payments discussed at the trial. . . .

The other order of 10th November, 1900, being in the same terms, the Trevor lathe and appliances which defendant received must be taken to be subject to the terms of that order, and, as something is due by defendant for the goods supplied to him in pursuance of the terms of it, plaintiffs are entitled to succeed as to the lathe and its appliances and such other of the articles mentioned in the order as were supplied to defendant. If defendant's counsel is of opinion that any of the articles claimed by plaintiffs are, upon the view now expressed, not recoverable by plaintiffs, counsel will be heard and a reference, if necessary, directed. Subject to this, there will be judgment for plaintiffs for the recovery of the goods claimed, with costs.

MEREDITH, C.J. MARCH 6TH, 1903

TRIAL.

## KNY-SCHEERER CO. v. CHANDLER AND MASSEY.

*Sale of Goods —Action for Price — Conversion of Goods — Contract — Breach—False Representations—Counterclaim.*

Plaintiffs were manufacturers and importers and wholesale dealers in surgical instruments. carrying on business in New York, and having an intimate connection of some kind with a company carrying on at Tuttlingen, in Germany, the manufacture of surgical instruments which are designated by the name of "Kny-Scheerer." Defendants were wholesale and retail dealers in surgical instruments carrying on business at Toronto. Plaintiffs' claim was for goods sold and delivered by them to defendants, $4,171.35; for wrongful conversion by defendants of goods, $7,825.40; and for damages for loss of profits by breach of an agreement of 31st January, 1900. Defendants counterclaimed for $20,000 damages. The claim of plaintiffs for goods sold and delivered was admitted at $3,635.98, subject to a question as to the price at which they should have been charged. The principal matter in dispute was the alleged agreement of plaintiffs to establish and maintain at Montreal, and, as afterwards arranged according to the contention of defendants, at Toronto, a well assorted wholesale stock of surgical instruments which should always amount in value to at least $50,000, and from which defendants might obtain such surgical instruments as they wished to buy when and as they required them.

G. F. Shepley, K.C., and W. E. Middleton, for plaintiffs.

A. B. Aylesworth, K.C., and E. B. Ryckman, for defendants.

MEREDITH, C.J., held that some modifications of the terms of the agreement of 31st January, 1900, were agreed upon by the parties, but these were modifications only in matters of detail, and the rights and liabilities of the parties were to be determined on the provisions of that agreement so modified, and on them only, for no other agreement had been proved. It was proved that before the negotiations which resulted in the agreement of 31st January, 1900, were begun, plaintiffs had decided to open a branch of their business at either Montreal or Toronto, where they purposed keeping a stock of Kny-Scheerer surgical instruments for supplying the trade in Canada and for export to the Australian Colonies and to Mexico and certain parts of South

America, and also as a reserve stock for their New York business. This course had been decided on because surgical instruments were admitted into Canada free of duty, but when imported into the United States of America paid a high duty. But it was not a part of the arrangement to which the parties came that plaintiffs should be bound to establish such a branch of their business or that they should keep a stock of their goods in Canada from which defendants might be supplied. Defendants were content to rely upon plaintiffs, in their own interests, carrying out the decision to which they had come, and did not stipulate or intend to stipulate that they should come under any contractual obligation to do so, nor did plaintiffs intend to bind themselves to the taking of any such course. Treating the alleged agreement to establish a stock in Canada as a representation, the defendants could not succeed, because the representation, if made, was only of an intention to do something, and it was a representation which was not untrue, and was one which plaintiffs did not agree to be bound to carry out. Therefore the counterclaim, so far as it related to the claim for damages for breach of the alleged representation, failed.

Defendants' claim to a reduction in the price of the goods sold also failed.

Plaintiffs were entitled to recover $3,869.04 (less certain deductions) for the price of goods taken over by defendants.

Judgment for plaintiffs for $7,122.02 with costs, and counterclaim dismissed with costs.

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